No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, authorizes the Secretary of Labor to set mandatory federal occupational safety and health standards, and the Act generally preempts any state law or regulation on which a federal safety standard has been established. *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992). Congress gave the states the option to "assume responsibility for development and enforcement" of occupational safety standards once the state has submitted, and the Secretary has approved, "a State plan for the development of such standards and their enforcement." 29 U.S.C. § 667(b). "[I]n the absence of the approval of the Secretary, the OSH Act pre-empts all state law" regulating worker safety issues covered by federal standards. *Gade*, 505 U.S. at 107. Although the Secretary has approved California's state plan, it is undisputed that the use of the state's general unfair competition laws as supplemental enforcement mechanisms for workplace safety standards "was not mentioned in the plan's enforcement provisions." App., *infra*, 14a.

The question presented is:

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* 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.

PARTIES TO THE PROCEEDINGS

1. Petitioners Emerson Electric Co., Emerson Power Transmission Corporation, and Solus Industrial Innovations, LLC were defendants in the trial court and petitioners below.

2. The Superior Court of California for Orange County, respondent on review, was the respondent below.

3. The People of the State of California, respondent on review, was the plaintiff in the trial court and the real party in interest below.

RULE 29.6 DISCLOSURE STATEMENT

1. Emerson Electric Co. (NYSE: EMR) is a publicly held corporation that has no parent corporation, and no publicly held company owns 10% or more of its stock.

2. On January 30, 2015, Emerson Electric Co. divested its Power Transmission Solutions business to Regal Beloit Corporation (NYSE: RBC). Pursuant to the divesture agreement, Emerson Electric Co. retained the liability of the Solus litigation. Prior to the divesture, Emerson Power Transmission Corporation and Solus Industrial Innovations, LLC were both indirect, wholly owned subsidiaries of Emerson Electric Co.

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PETITION FOR A WRIT OF CERTIORARI

Emerson Electric Co., Emerson Power Transmission Corporation, and Solus Industrial Innovations, LLC respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of California.

OPINIONS BELOW

The Supreme Court of California's opinion, App., *infra*, 1a-45a, is reported at 410 P.3d 32. The California Court of Appeal's decision granting petitioners' petition for a writ of mandate, App., *infra*, 46a-69a, is reported at 178 Cal. Rptr. 3d 122. The Orange County Superior Court's order certifying the preemption issue for early review, App., *infra*, 70a-71a, and its minute order overruling petitioners' demurrer in part, App., *infra*, 72a-73a, are unreported.

JURISDICTION

The judgment of the Supreme Court of California was entered on February 8, 2018. On April 30, 2018, Justice Kennedy extended the time in which to file a petition for a writ of certiorari to and including June 25, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are set forth in the appendix to this petition. App., *infra*, 74a-101a.

INTRODUCTION

The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("OSH Act" or "Act"), establishes a comprehensive regulatory scheme for workplace safety and health. The Act authorizes the Secretary of Labor to promulgate federal occupational safety and health standards, see 29 U.S.C. § 655, which are enforced by the Occupational Safety and Health Administration ("OSHA"). The Act "unquestionably pre-empts" state laws and regulations addressing occupational safety and health issues for which there is an applicable federal standard. *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 97 (1992) (plurality opinion; internal quotation marks omitted) (applying implied preemption analysis); *id.* at 112-113 (Kennedy, J., concurring in part and concurring in the judgment) (same; express preemption).

Congress balanced federal and state authority in this important regulatory area by establishing a system of ongoing federal-state cooperation. Congress gave the states the option to "assume responsibility for development and enforcement * * * of occupational safety and health standards," 29 U.S.C. § 667(b), and in states that elect to do so, state standards "pre-empt[] federal regulation entirely" within their boundaries. *Gade*, 505 U.S. at 97 (plurality opinion); *id.* at 112 (Kennedy, J., concurring in part and concurring in the judgment). But for state workplace safety and health regulations to have preemptive effect, the state must submit, and the Secretary must approve, "a State plan for the development of such standards and their enforcement," 29 U.S.C. § 667(b), including any later modifi-

cations, 29 U.S.C. § 667(c). "[I]n the absence of the approval of the Secretary, the OSH Act pre-empts all state law" regulating worker safety, *Gade*, 505 U.S. at 107, and "any nonapproved state law regulating the same safety and health issue" is preempted, *id.* at 104 n.2 (plurality opinion). The Secretary of Labor has approved California's "plan for the development of [occupational safety and health] standards and their enforcement." 29 U.S.C. § 667(b). The approved plan includes robust administrative and criminal enforcement mechanisms. App., *infra*, 10a-13a.

In its ruling in this case, the California Supreme Court upended Congress' careful balance. The court held that state authorities pursuing civil penalties against petitioner Solus Industrial Innovations, LLC ("Solus") in the wake of an accident at its manufacturing facility were not limited to the enforcement mechanisms set forth in the state's approved "plan for the development of [occupational safety and health] standards and their enforcement." 29 U.S.C. § 667(b). Rather, the court held that in addition to the actions state labor authorities had pursued using approved enforcement mechanisms, the Orange County district attorney was entitled to bring a separate civil lawsuit against Solus and its parent companies, seeking to "impos[e] truly massive" (App., *infra*, 67a)—and cumulative—civil penalties under California's general unfair competition and false advertising laws, neither of which were among the mechanisms set forth in the plan's enforcement provisions, *id.* at 14a.

The California Supreme Court held that because California has an approved state plan, the state has

nearly unfettered power to impose additional penalties or enforcement mechanisms, regardless of whether it ever bothers to incorporate them into its state plan and submits them for federal approval. In doing so, the California Supreme Court broke with the federal court of appeals for the state, which has squarely held that the OSH Act preempts state laws "until the[y] * * * [a]re included in the existing state OSHA standards and approved by the Secretary of Labor," App., *infra*, 38a n.6; see *Indus. Truck Ass'n* v. *Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997), and indeed has *specifically held* that unfair competition claims "related to occupational health and safety"—the very kind of claims at issue here—are "preempted by OSHA" because they are "not part of California's approved occupational health and safety plan." *Kelly* v. *USS-POSCO Indus.*, 101 Fed. Appx. 182, 184 (9th Cir. 2003) (Reinhardt, Hawkins, Siler, JJ.), *aff'g* No. 98-cv-04457, 2000 WL 36732730, at *4 (N.D. Cal. Jan. 12, 2000) (Breyer, J.).

The decision below cannot be reconciled with either the statutory language or this Court's decision in *Gade* and dramatically alters the federal-state balance in the critical field of workplace safety regulation. It also subjects employers in California—by far the Nation's most populous state, and the state with the largest economy—to an "an extraordinary jump in the potential civil penalty an employer * * * might incur for workplace safety violations" at the hands of local prosecutors who choose to "deviat[e] from the [state's] approved plan," App., *infra*, 68a, 36a.

This Court's review is urgently warranted. At a minimum, the Court should seek the views of the United States because of the Secretary of Labor's role in administering the OSH Act.

STATEMENT

A. Preemption And Cooperative Federalism Under The OSH Act

1. The OSH Act "culminat[ed] nearly a century of endeavors by the states and the federal government to mitigate the vulnerabilities of employees exposed to hazards of the industrial age." U.S. Dep't of Labor, Occupational Safety & Health Admin., *Reflections on OSHA's History* 3-4 (Jan. 2009), https://bit.ly/2r4OlDL. The Act "establishes a comprehensive regulatory scheme" for occupational safety and health, *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 147 (1991), which carefully delineates the division of federal and state authority within the field. Under it, Congress "offer[s] States the choice of regulating * * * according to federal standards or having state law pre-empted by federal regulation." *New York* v. *United States*, 505 U.S. 144, 167 (1992). This Court has accordingly described the OSH Act as an archetypical "program of cooperative federalism." *Id.* at 167-168 (internal quotation marks omitted).

2. a. The federal government has a central role in this comprehensive scheme. The Secretary of Labor ("Secretary") is authorized to "promulgate, modify, or revoke any occupational safety or health standard" through a statutorily defined rulemaking process. 29 U.S.C. § 655(b). "OSHA is the administrative

agency within the Department of Labor that is responsible for promulgating and enforcing standards under the Act." *Indus. Union Dep't* v. *Am. Petroleum Inst.*, 448 U.S. 607, 613 n.2 (1980); cf. *Chao* v. *Mallard Bay Drilling, Inc.*, 534 U.S. 235, 238, 241 n.6 (2002). Today, federal standards govern a wide range of workplace safety issues, from ladders and stairways to power tools and welding. See generally 29 C.F.R. pt. 1910.

The OSH Act's preemptive sweep is broad. As this Court explained in *Gade* v. *National Solid Wastes Management Association*, "the OSH Act pre-empts all state 'occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated.'" 505 U.S. 88, 105 (1992) (quoting 29 U.S.C. § 667(b)); accord *id.* at 111 (Kennedy, J., concurring in part and concurring in the judgment) (same). Preemption is not confined to state laws that *conflict* with federal standards: even state laws that "'supplement' * * * federal regulations with ostensibly nonconflicting standards" are also preempted. *Id.* at 103 (plurality opinion); accord *id.* at 113 (Kennedy, J., concurring in part and concurring in the judgment) ("Congress intended to pre-empt supplementary state regulation of an occupational safety and health issue with respect to which a federal standard exists"). Nor must a state law's purpose be limited to workplace safety in order to be subject to preemption; the Act likewise preempts so-called "dual impact" laws that serve "non-occupational purpose[s]" in addition to workplace safety, so long as those laws "directly,

substantially, and specifically regulat[e] occupational safety and health." *Id.* at 106-107 (citation omitted).

b. Although the federal government dominates occupational safety regulation under the OSH Act, "[f]ederal regulation of the workplace" is not "all encompassing." *Gade*, 505 U.S. at 96 (plurality opinion). Under § 18(b) of the Act, 29 U.S.C. § 667(b), a state that "desires to assume responsibility for development and enforcement * * * of occupational safety and health standards" may "submit a State plan for the development of such standards and their enforcement" to the Secretary for review and approval. *Ibid.* If the Secretary approves it, the state plan governs instead. *Ibid.*; see also *Gade*, 505 U.S. at 97 (plurality opinion).[1]

In order to secure plan approval, a state's submission must meet a number of requirements. Among

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[1] The OSH Act also contains two "saving provisions," *Gade*, 505 U.S. at 109, neither of which is implicated here. The first, § 4(b)(4) of the Act, clarifies that the Act does not affect "workmen's compensation law[s]" or "common law or statutory rights, duties, or liabilities * * * under any law with respect to injuries, diseases, or death of employees arising out of * * * employment." 29 U.S.C. § 653(b)(4). This is generally understood to save from preemption "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); see also *id.* at 1035; 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). The second, § 18(a) of the Act, clarifies that States may assert jurisdiction over occupational safety or health issues "with respect to which no [federal] standard is in effect." 29 U.S.C. § 667(a).

other things, it must designate "a State agency or agencies * * * responsible for administering the plan throughout the State." 29 U.S.C. § 667(c)(1). And it must provide for the "development and enforcement" of standards that are "at least as effective" as the corresponding federal standards, but which "when applicable to products * * * distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce." 29 U.S.C. § 667(c)(2).

"Twenty-six states, Puerto Rico, and the Virgin Islands have OSHA-approved State Plans. Twenty-two State Plans * * * cover both private and state and local government workplaces," with the rest covering only government workers. U.S. Dep't of Labor, Occupational Safety & Health Admin., *State Plans*, https://bit.ly/1zRWyHG (last visited June 19, 2018) (OSHA, *State Plans*); see also 29 C.F.R. pt. 1952.

c. The federal government's involvement does not end after the Secretary approves a state plan. First, states must submit any plan modifications to the Secretary. 29 U.S.C. § 667(c) (establishing approval mechanism); 29 C.F.R. § 1953.4(d) (requiring submission of "State-initiated change [plan] supplement[s]"). Second, the Secretary is required to "make a continuing evaluation of the manner in which each State having" an approved plan "is carrying out such plan," and "shall" withdraw approval "[w]henever [he or she] finds * * * a failure to comply substantially with any provision of the State plan." 29 U.S.C. § 667(f).

B. Cal/OSHA And California's State Plan

1. OSHA initially approved California's state plan in 1973, 38 Fed. Reg. 10,717 (May 1, 1973), and the agency has approved various modifications in the decades since. See 62 Fed. Reg. 31,159 (June 6, 1997); 48 Fed. Reg. 8,610 (Mar. 1, 1983); see generally U.S. Dep't of Labor, Occupational Safety & Health Admin., *California State Plan*, https://bit.ly/2Httk0q (last visited June 19, 2018) (OSHA, *California State Plan*) (describing current California plan). California's plan covers both private-sector employees and state and local government workers. See OSHA, *California State Plan*; 29 C.F.R. § 1952.7(c).[2] California's Department of Industrial Relations ("DIR") is the state agency designated to administer the state plan. Cal. Lab. Code § 50.7(a); cf. 29 U.S.C. § 667(c)(1) (requiring designation of responsible state agency).

2. a. Within the DIR, the Division of Occupational Safety and Health ("Cal/OSHA") plays a critical role in administering the state plan. Cal/OSHA proposes occupational health standards, Cal. Lab. Code § 147.1(a), (c), and also "implements the California State Plan's enforcement." OSHA, *California State Plan*; see Cal. Lab. Code §§ 142, 6307. "Compliance officers inspect workplaces * * * and issue citations

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[2] In 2015, OSHA removed "the detailed descriptions of State plan coverage" that previously appeared in the Code of Federal Regulations. 80 Fed. Reg. 49,897, 49,897 (Aug. 18, 2015); see App., *infra*, 13a-14a. The current section of the Code of Federal Regulations that describes California's plan refers readers to the website cited above for "additional details about the plan." 29 C.F.R. § 1952.7(c).

and orders where violations are identified." OSHA, *California State Plan*. California's approved plan and the California Labor Code contemplate that DIR will enter into formal inter-agency agreements with other government entities to assist in carrying out the plan. But the California Labor Code provides that "[t]he authority of any agency, department, division, bureau or any other political subdivision" other than Cal/OSHA to "assist in the administration or enforcement of any occupational safety or health standard" must be "contained in a written agreement." Cal. Lab. Code § 144(a); see App., *infra*, 56a-57a.

b. Under California's plan, if Cal/OSHA believes an employer has violated state standards, it issues a citation or notice and calls for abatement within a specified time. Cal. Lab. Code § 6317. It may also impose civil penalties. *Ibid*. The penalty amount depends on the seriousness of the violation. See *id.* § 6427 (setting maximum penalty for minor violations at $12,471, adjusted yearly for inflation); *id.* § 6428 (setting maximum penalty for serious violations at $25,000); *id.* § 6429(a) (setting penalty range of $8,908 to $124,709 for willful violations, adjusted yearly for inflation).

Some violations constitute crimes punishable by imprisonment and fines. For example, serious, knowing violations are misdemeanors punishable by imprisonment for up to six months and a fine of up to $5,000. Cal. Lab. Code § 6423(a)(1), (b). Willful violations causing death or bodily impairment are punishable by imprisonment for up to three years. *Id.* § 6425(a). Corporate defendants may be fined up

to $1,500,000, *ibid.*, or up to $3,500,000 for certain repeat violations, *id.* § 6425(c).

Cal/OSHA's Bureau of Investigations "is responsible for directing accident investigations involving violations" of state occupational safety standards "in which there is a serious injury to five or more employees, death, or request for prosecution by a [Cal/OSHA] representative." Cal. Lab. Code § 6315(a). "The bureau is responsible for preparing cases for the purpose of prosecution * * *." *Ibid.* Where the Bureau investigates an incident involving a serious injury or death, it refers the results of the investigation "to the appropriate prosecuting authority having jurisdiction for appropriate action." *Id.* § 6315(g).

C. Procedural Background

1. This case arose out of a workplace accident in which a water heater exploded at Solus's plastics manufacturing facility in Rancho Santa Margarita, California, killing two employees. App., *infra*, 2a. After investigating, Cal/OSHA charged Solus with civil violations of state occupational safety and health regulations. *Id.* at 3a. Cal/OSHA also forwarded the investigation results to the Orange County District Attorney, who filed criminal charges against Solus's plant manager and maintenance supervisor for felony violations of California's Labor Code. *Ibid.*

2. a. The district attorney separately filed a civil action against Solus, as well as Emerson Power Transmission Corporation and the indirect parent of both companies, Emerson Electric Co. (collectively, "Emerson"). The district attorney's civil complaint

"alleged four causes of action, all based on the same worker health and safety standards placed at issue in the administrative proceedings." App., *infra*, 3a-4a (internal quotation marks omitted).

The first two causes of action sought recovery under California Labor Code sections 6428 and 6429, which provide civil penalties for violations of occupational safety or health standards. App., *infra*, 4a n.2; 122a-124a; cf. Cal. Lab. Code §§ 6248, 6429. Those causes of action alleged violations of the very same occupational standards Solus was charged with violating in the administrative proceedings. App., *infra*, 122a-124a.

The district attorney's third cause of action alleged "that Solus's failure to comply with workplace safety standards" constituted "an unlawful, unfair and fraudulent business practice under Business and Professions Code section 17200," California's Unfair Competition Law ("UCL"). App., *infra*, 4a. Under the UCL, "unfair competition" includes "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "By proscribing 'any unlawful' business act or practice, the UCL 'borrows' rules set out in other laws and makes violations of those rules independently actionable." *Zhang* v. *Superior Ct.*, 304 P.3d 163, 167 (Cal. 2013) (citation and internal quotation marks omitted). The UCL thus has exceptionally broad application, because its "sweeping language" covers "anything that can properly be called a business practice and that at the same time is forbidden by law." *Bank of the West* v. *Superior Ct.*, 833 P.2d 545, 553 (Cal. 1992) (quoting

Barquis v. *Merchs. Collection Ass'n*, 496 P.2d 817, 830 (Cal. 1972)).

The UCL cause of action alleged the same violation of safety standards Solus was charged with in the administrative proceeding. App., *infra*, 124a-125a. The district attorney sought civil penalties, which under the UCL are "cumulative * * * to the remedies or penalties available under all other laws of [the] state," Cal. Bus. & Prof. Code § 17205, and are payable to the country treasurer. See *id.* § 17206(a) (civil penalties available in UCL actions brought by government authorities); see also *id.* § 17206(c) (civil penalties payable to county treasurer in cases brought by district attorneys); see generally James L. Bernard et al., *2018 Annual Overview of California's Unfair Competition Law and Consumers Legal Remedies Act* 49, 56-57 (Mar. 2018), https://bit.ly/2JBR9DL (Bernard et al., *UCL Overview*).

The district attorney's fourth cause of action alleged that Solus and Emerson violated Business and Professions Code section 17500—California's False Advertising Law ("FAL")—by falsely representing that they were committed to workplace safety and complied with applicable workplace safety standards. App., *infra*, 4a, 125a-127a; see Cal. Bus. & Prof. Code § 17500. And once again, the district attorney sought civil penalties. App., *infra*, 4a.

b. Petitioners demurred, arguing that (1) the district attorney had no statutory authority to seek penalties under the California Labor Code, and (2) the OSH Act preempted all four causes of action. The trial court agreed on the first point, holding that dis-

trict attorneys lack authority to pursue civil penalties under the occupational safety or health standards themselves.[3] App., *infra*, 4a n.2. But it disagreed that the district attorney's UCL and FAL causes of action were preempted. *Id.* at 5a.

3. Solus and Emerson sought a writ of mandate from the court of appeal, arguing that the trial court erred on the preemption issue. App., *infra*, 5a. The court of appeal agreed with petitioners, holding that the OSH Act preempts the UCL and FAL causes of action. *Id.* at 46a-69a.[4]

Reviewing the text and structure of the OSH Act, this Court's *Gade* decision, and other precedents, the court of appeal reasoned that "[b]ecause the OSH Act allows a state to avoid federal preemption only if it obtains federal approval of its own plan, it necessarily follows that a state has no authority to enact and

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[3] The district attorney sought review of this holding in a separate writ petition to the court of appeal. The court affirmed, App., *infra*, 4a n.2; *People* v. *Superior Ct.*, 168 Cal. Rptr. 3d 286, 287 (Cal. Ct. App. 2014), and the California Supreme Court denied review. Those two causes of action are no longer at issue.

[4] The court of appeal initially denied the petition, but the California Supreme Court granted review and transferred the case back to the court of appeal for consideration. The court of appeal then ruled in favor of petitioners for substantially the reasons set forth in the court of appeal's final decision described in the text. The California Supreme Court then granted review and transferred the matter back to the court of appeal for reconsideration in light of former California Civil Code § 3370.1, a since-repealed provision that provided penalties for unfair competition, similar to the later-enacted UCL. App., *infra*, 47a-48a. Those procedural detours are not relevant to the legal issue presented here.

enforce laws governing workplace safety which fall outside of that approved plan." App., *infra*, 65a. While § 18 of the Act allows states to avoid federal preemption, "a state seeking to exempt itself from the federal preemption over workplace safety regulation must specifically inform the Secretary of its proposed plan, detailing both the '*standards [to be employed] and their enforcement*.'" *Id.* at 61a-62a (quoting 29 U.S.C. § 667(b)). The court of appeal concluded that both OSHA's regulation approving California's plan and the California Labor Code itself contemplate that DIR will enforce state labor standards, and other government entities will assist only under formal inter-agency agreements. *Id.* at 56a-57a.

The court of appeal noted that the district attorney did not dispute that this case involves an issue governed by a federal safety standard, and did not "claim[] that reliance on UCL [and FAL] penalties as an additional remedy for wrongs associated with workplace safety violations was ever specifically included in California's approved plan." App., *infra*, 62a-63a. The court emphasized that this case is not "a private * * * cause of action, brought by a litigant who has suffered injury in fact," *id.* at 67a, but "an action, available only to a representative of the state, which is expressly intended *to penalize* a party for past misconduct" with "truly massive" potential penalties. *Id.* at 67a-68a. The court of appeal therefore concluded that before the UCL and FAL could be invoked to cause "such an extraordinary jump in the potential civil penalty an employer * * * might incur for workplace safety violations," *id.* at 68a, the Secretary of Labor would have to approve

district attorneys' use of those statutes as enforcement tools. *Ibid.*

4. The California Supreme Court granted review and reversed. App., *infra*, 1a-45a. The court acknowledged that the "OSH Act is concerned not only with a state's substantive standards, but also with its enforcement." *Id.* at 34a (citing 29 U.S.C. § 667(b)). The court likewise acknowledged that UCL and FAL actions "supplement enforcement of state [OSH] standards," *id.* at 31a, by "discourag[ing]" their violation, *id.* at 32a, and that when "claims are premised on violations of a state's plan, the UCL and FAL arguably come within" this Court's "description of an occupational safety and health standard in the context of the * * * OSH Act: 'a state law requirement that directly, substantially, and specifically regulates occupational safety and health.'" *Id.* at 34a (quoting *Gade*, 505 U.S. at 107). And the court conceded that there was "no dispute * * * that use of UCL and FAL claims by local prosecutors pursuing civil actions was not mentioned in the [state] plan's enforcement provisions." *Id.* at 14a.

The court nevertheless concluded that the federal OSH Act does not preempt the district attorney's use of UCL and FAL actions to impose penalties for violation of occupational safety standards. The court emphasized that, in its view, "the preempted field is narrow," App., *infra*, 27a, because "the purpose of the [OSH Act] was to supply a nationwide *floor* of protection for workers," *id.* at 6a, and "nothing in the federal act suggests a concern with enforcement that exceeds federal requirements," even if the Secretary of Labor never reviewed or approved those "supple-

ment[al] enforcement" mechanisms, *id.* at 31a. The court concluded that, at least as a facial matter, "the UCL and FAL are laws of general application," *id.* at 33a, because they were not specifically intended as "means of enforcing the law claimed to be violated," but rather "provide a remedy for economic damage suffered as a result of violations of a wide array of * * * laws." *Id.* at 31a. And the court concluded, "[l]aws of general application are not ordinarily preempted by" the OSH Act. *Ibid.* (citing *Gade*, 505 U.S. at 107). Moreover, according to the court, "Congress has not specified * * * that any amendments to the state plan—even as to substantive standards—must be submitted to the Secretary of Labor for approval *before they are implemented*." *Id.* at 36a.

The California Supreme Court acknowledged that the federal court of appeals with jurisdiction over the state had, unlike it, read *Gade*'s "preemption analysis relatively broadly," and had "concluded that [California's] regulations promulgated to implement California's Safe Drinking Water and Toxic Enforcement Act," popularly known as Proposition 65, "were preempted by the federal OSH Act * * * until the regulations were included in the existing state OSHA standards and approved by the Secretary of Labor." App., *infra*, 38a n.6 (citing *Indus. Truck Ass'n* v. *Henry*, 125 F.3d 1305 (9th Cir. 1997)). The court wrote that "the Ninth Circuit should have given deference to the federal Department of Labor's decision approving California's incorporation of provisions from Proposition 65 into a standard under the state plan," and in any event, the "challenged

regulations" the Ninth Circuit addressed "themselves constituted occupational safety and health standards," and "did not present a situation implicating mere additional enforcement measures for existing, approved standards." *Ibid.*

REASONS FOR GRANTING THE PETITION

In upholding the district attorney's use of California's UCL and FAL as "supplement[al] enforcement" mechanisms for workplace safety regulations, App., *infra*, 31a—mechanisms whose use the Secretary of Labor concededly never approved—the California Supreme Court adopted a "narrower reading of the federal OSH Act's preemptive effect" that it acknowledged conflicts with the "relatively broad[]" view of OSH Act preemption taken by that state's regional federal court of appeals. *Id.* at 38a-39a n.6; see also *id*. at 29a. In so doing, it created a sharp split of authority with the Ninth Circuit, which has both held that the OSH Act preempts state laws "until the[y] * * * [a]re included in the existing state OSHA standards and approved by the Secretary of Labor," *id.* at 38a n.6; see *Indus. Truck Ass'n* v. *Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997), and, indeed, *specifically held* that UCL claims "related to occupational health and safety" are "preempted by OSHA" because "§17200 is not part of California's approved occupational health and safety plan." *Kelly* v. *USS-POSCO Indus.*, 101 Fed. Appx. 182, 184 (9th Cir. 2003). The decision of the California Supreme Court conflicts with the rationale of this Court's decision in *Gade* v. *National Solid Wastes Management Association*, 505 U.S. 88 (1992), and

upends the OSH Act's careful balancing of federal and state authority over workplace safety.

The decision is tremendously important given that more than half of all states have adopted OSHA-approved state plans. See OSHA, *State Plans*, https://bit.ly/1zRWyHG. The decision creates extraordinary uncertainty for employers—especially California employers—who can no longer be sure that they will be regulated through predictable administrative processes supervised and approved by the federal Department of Labor. Instead, such employers are now at the mercy of local prosecutors, who can invoke purported "supplemental enforcement" mechanisms beyond those set forth in the state's approved plan, App., *infra*, 35a, to "impos[e] truly massive penalties," causing "an extraordinary jump in the potential civil penalty an employer * * * might incur for workplace safety violations," *id.* at 67a-68a. This Court's review is urgently warranted. At a minimum, the Court should seek the views of the United States because of the Secretary of Labor's central role in administering the OSH Act.

A. The Decision Below Conflicts With Ninth Circuit Precedent On The Scope Of OSH Act Preemption

The decision below adopted an exceedingly narrow understanding of OSH Act preemption in jurisdictions with approved state plans. Indeed, it essentially held that OSH Act preemption does not apply at all where a state has an approved plan, opening the way for use of non-approved supplemental enforcement mechanisms—and apparently even non-approved

substantive workplace safety standards. *Id.* at 36a-37a; accord *id.* at 29a.

But the Ninth Circuit has flatly rejected that approach, and that court's (correct) understanding of the OSH Act would require dismissing the district attorney's UCL and FAL claims here. This fundamental disagreement on the scope of OSH Act preemption is of "particular concern" and "a substantial reason for granting certiorari," because it represents a "conflict * * * between two courts whose jurisdiction includes" the same State—and in particular, "California, the State with the largest population" and biggest economy in the Nation. *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992); cf. *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (noting certiorari granted to resolve conflict between Eleventh Circuit and Florida Supreme Court).

The disagreement between the California Supreme Court and the Ninth Circuit is especially important given the subject matter. State and federal courts are now divided on the proper balance of federal and state authority under a major program of cooperative federalism—with the California Supreme Court (perhaps unsurprisingly) adopting a "narrower reading of the federal OSH Act's preemptive effect" than the regional federal circuit. App., *infra*, 39a n.6.

1. The Ninth Circuit Holds That The OSH Act Preempts All State Laws Not Incorporated Into A State Plan

In *Industrial Truck Association, Inc.* v. *Henry*, the Ninth Circuit squarely adopted the logic endorsed by

the court of appeal here, cf. App., *infra*, 65a, holding that "when OSHA promulgates a federal standard, that standard totally occupies the field within the 'issue' of that regulation and preempts all state occupational safety and health laws relating to that issue, conflicting or not, unless they are included in the state plan." 125 F.3d at 1311.

Industrial Truck addressed California regulations implementing Proposition 65, a state law requiring persons doing business in California to provide warnings before exposing individuals to carcinogens or reproductive toxins. At the time, California had "two sets of regulations dealing with Proposition 65 warnings." 125 F.3d at 1308. First, the California Office of Environmental Health Hazard Assessment "promulgated regulations that provide[d] the specific warning methods required by Proposition 65," including warnings for exposures in the workplace. *Id.* at 1307. Second, California's Occupational Safety and Health Standards Board had "issued regulations seeking to incorporate Proposition 65" into California's state plan under the OSH Act. *Id.* at 1308. The regulations issued by the Standards Board were submitted to OSHA and approved. *Ibid.*

After analyzing the structure of the OSH Act and *Gade*, the Ninth Circuit held that regulations that were not specifically incorporated into California's state plan and approved by the Secretary were preempted. *Indus. Truck*, 125 F.3d at 1306. The Ninth Circuit rejected any notion that once a state has *any* approved plan, OSH Act preemption ceases to apply. It concluded that "a state may not submit some regulations on a worker safety issue to OSHA

as part of its state plan and omit other regulations relating to the same issue * * * . The omitted regulations, even if complementary to the [OSH] Act's scheme, are subject to the 'background pre-emption' of" federal law. *Id.* at 1311 (quoting *Gade*, 505 U.S. at 100 (plurality opinion)). That outcome followed from the structure of the OSH Act: "It would make the state plan approval requirement superfluous if a state could pick and choose which occupational health and safety regulations to submit to OSHA." *Ibid.*

The Ninth Circuit applied its rule to the precise question presented here in *Kelly* v. *USS-POSCO Industries*, 101 Fed. Appx. 182 (9th Cir. 2003) (Reinhardt, Hawkins, Siler, JJ.). There, a private citizen had brought a claim against USS-POSCO under California's UCL, predicated on allegations of workplace safety violations. *Id.* at 184. The district court granted the defendant's motion to "dismiss her claim for unfair business practices as preempted by OSHA" because the UCL was not in the state's approved plan. *Ibid.* The court reasoned, "Section 17200 is not California's occupational safety and health plan, nor has the Secretary approved the use of 17200 to regulate the conduct of which plaintiff complains. Therefore, plaintiff advocates the use of 17200 in a nonapproved way that is preempted * * * ." *Kelly* v. *USS-POSCO Indus.*, No. 98-cv-04457, 2000 WL 36732730, at *4 (N.D. Cal. Jan. 12, 2000) (Breyer, J.). The Ninth Circuit unanimously affirmed, explaining that the plaintiff's "unfair business practices claim" was "preempted by OSHA" because it "related to occupational health and safety" and "California Business and Professions Code § 17200

* * * is not part of California's approved occupational health and safety plan." *Kelly*, 101 Fed. Appx. at 184.[5]

2. The California Supreme Court Holds That OSH Act Preemption No Longer Applies Where A State Has An Approved Plan

In stark contrast to the Ninth Circuit's decisions, the California Supreme Court held that the OSH Act does not "restrict state authority to the exact terms of the state's approved state plan," App., *infra*, 42a; instead, "once a state plan is approved, it is *federal*, not state, law that must give way," *id.* at 29a. According to the California Supreme Court, therefore, it was simply irrelevant that California's approved state plan does not provide for enforcement of workplace safety standards through UCL and FAL actions: "[e]ven if the availability of greater penalties should be incorporated into the state plan and submitted to the Secretary of Labor for review," the California Supreme Court held, "it does not follow that any change that has not yet been incorporated and approved is preempted." *Id.* at 41a. That conclusion is impossible to square with the Ninth Circuit's diametrically opposed holding that "*any* state regulations not submitted to OSHA as part of a

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[5] Although *Kelly* is unpublished and subject to limitations on its precedential effect within the Ninth Circuit, see 9th Cir. R. 36-3, the unanimous decision shows *Industrial Truck*'s application to "supplemental enforcement" measures not included in the state's approved plan and exposes the California Supreme Court's unconvincing effort to downplay the gulf between itself and the Ninth Circuit on the scope of OSH Act preemption. See pp. 25-26, *infra*.

state plan run afoul of the [OSH] Act because OSHA has no opportunity to review them." *Indus. Truck*, 125 F.3d at 1310. Indeed, the California Supreme Court candidly acknowledged its disagreement, contrasting *Industrial Truck*'s "relatively broad[]" reading of *Gade*, and arguing that the Ninth Circuit should have adopted "a narrower reading of the federal OSH Act's preemptive effect," App., *infra*, 38a-39a n.6, like its own.

The California Supreme Court sought to minimize the split of authority it had created by attempting to distinguish *Industrial Truck* on its facts. It asserted that in *Industrial Truck*, "unlike here, it was undisputed that the challenged regulations themselves constituted occupational safety and health standards, and that there were inconsistent federal standards on the same issues; that case did not present a situation implicating mere additional enforcement measures for existing, approved standards." App., *infra*, 38a n.6.

Those proposed distinctions are illusory. First, the California Supreme Court's analysis was *expressly* premised on the understanding that "there is a federal standard relevant to the claims," acknowledging that "the case has been litigated based on th[at]" understanding. App., *infra*, 8a n.3. Second, it was not "undisputed" in *Industrial Truck* that the relevant federal standards were "inconsistent" with the challenged state regulations. *Id.* at 38 n.6. The state argued in *Industrial Truck* "that its regulations d[id] not conflict with the [federal] Hazard Communication Standard and actually further[ed] Congress' goal of conveying

accurate warnings to employees." 125 F.3d at 1313. And the Ninth Circuit made it clear that whether the regulations conflicted was *irrelevant* under *Gade*: "[a]ll supplementary regulations are preempted, whether they conflict or not." *Ibid.*; accord *id.* at 1311 ("The omitted regulations, even if complementary to the [OSH] Act's scheme, are subject to the 'background pre-emption' of the federal standard." (quoting *Gade*, 505 U.S. at 100 (plurality opinion))).

Finally, the fact that this case involves "mere" enforcement mechanisms, rather than substantive occupational safety requirements, does not diminish the split. The California Supreme Court itself "recognize[d] that the federal OSH Act is concerned not only with a state's substantive standards, but also with its enforcement." App., *infra*, 34a. And its decision did not ultimately turn on the challenged UCL and FAL actions' status as enforcement mechanisms; rather, the California Supreme Court concluded that "even as to substantive standards," "[t]here is no indication" that "state deviation[s] from the formally approved plan" are "without effect until * * * brought to the Secretary's notice and formally approved." *Id.* at 36a-37a; accord *id.* at 29a.

Nor is there any indication the Ninth Circuit would draw a distinction between substantive standards and enforcement mechanisms, given that § 18 of the OSH Act—on which the Ninth Circuit relied for its holding in *Industrial Truck*—plainly addresses both enforcement and substantive requirements. See 29 U.S.C. § 667(b), (c). To the contrary, the Ninth Circuit has squarely held that even "mere" supplemental enforcement mechanisms—including

the very mechanism at issue here, UCL lawsuits—are preempted. See *Kelly*, 101 Fed. Appx. at 184. Tellingly, the California Supreme Court did not even *mention* the Ninth Circuit's decision in *Kelly*, although it was a central authority discussed in the briefs of petitioners, the district attorney, and an *amicus curiae*, see Pet. Cal. S. Ct. Br. 10-11; Resp. Cal. S. Ct. Reply Br. 4-5; *Amicus* Nat'l Ass'n of Mfrs. Cal. S. Ct. Br. 8, 11 n.4. The court's failure to address that squarely conflicting decision is tacit recognition it cannot be distinguished.

B. The California Supreme Court's Decision Conflicts With *Gade* And The OSH Act

In addition to creating a split of authority, the decision below cannot be reconciled with this Court's decision in *Gade*. And it undermines the OSH Act's structural features that led this Court to hold that state workplace safety laws are preempted even when they are merely "supplementary" and do not conflict with corresponding federal requirements.

1. In *Gade*, this Court addressed whether the OSH Act preempted Illinois licensing laws for hazardous waste equipment operators, which were stricter than (but not in conflict with) corresponding OSHA requirements. 505 U.S. at 92-93. Illinois argued both that the OSH Act "does not pre-empt nonconflicting state regulations at all," *id.* at 96 (plurality opinion), and that OSH Act preemption does not extend to "dual impact" state laws that address "public safety as well as occupational safety concerns," *id.* at 104-105. While a plurality of the Court based its conclusion on *implied* preemption analysis and Justice Kennedy relied on *express*

preemption, a majority agreed that "nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect" is "pre-empted." *Id.* at 98-99 (plurality opinion); *id.* at 111-113 (Kennedy, J., concurring in part and in the judgment); see also *id.* at 104 n.2 (plurality opinion) (noting Justice Kennedy's agreement with the plurality "on the pre-emptive scope of the OSH Act").

The decision below conflicts with this Court's analysis. Although the California Supreme Court acknowledged that *Gade* offered "helpful interpretive guidance," it considered the case to be of limited relevance because "there was no approved state plan" in *Gade* and "the extent to which an approved state plan displaces federal authority was not at issue." App., *infra*, 17a-18a. The court also thought it significant that the non-approved laws here were merely "supplemental enforcement" measures. *Id.* at 35a. Lastly, the court placed great weight on the fact that the UCL and FAL provisions are "laws of general application." *Id.* at 33a. None of those proposed distinctions affects the outcome of this case. The same structural analysis of § 18 that supported preemption in *Gade* dictates the same result here.

2. The OSH Act and its provisions for state plan submission and review are plainly concerned with both substantive workplace safety standards and their enforcement. Section 18(b) specifically refers to submission of plans for "development *and enforcement* of State" occupational safety and health standards. 29 U.S.C. § 667(b) (emphasis added). The statutory conditions for OSHA approval of state plans likewise concern both the content of state standards

and their enforcement. See 29 U.S.C. § 667(c)(2)-(5). OSHA's implementation of the Act confirms this point.[6] And *Gade*'s test for determining when a state law may be subject to OSH Act preemption—whether it "directly, substantially, and specifically regulates occupational safety and health," 505 U.S. at 107—also draws no distinction between substantive standards and enforcement measures.

Courts accordingly have held supplemental enforcement mechanisms or programs preempted even when substantive safety requirements are not at issue. See *Kelly*, 101 Fed. Appx. at 184 (holding UCL action preempted because "intrinsically related to occupational health and safety"); *Skilled Craftsmen of Tex., Inc.* v. *Tex. Workers' Comp. Comm'n*, 158 S.W.3d 89, 94-96 (Tex. App.—Austin 2005, pet. dismissed) (concluding that a Texas program for publicly designating "hazardous private employers" was preempted under the OSH Act "because it implicitly regulates workplace safety issues"); *Ben Robinson Co.* v. *Tex. Workers' Comp. Comm'n*, 934 S.W.2d 149, 156-158 (Tex. App.—Austin 1996, writ denied) (similar).

3. *Industrial Truck* explains that having an approved state plan does not alter the preemption

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[6] See, *e.g.*, 29 C.F.R. § 1902.3(d) (specifically requiring state plans to "provide a program for * * * enforcement"); 29 C.F.R. § 1902.4(c)(2)(xi) (aspects of state plan subject to evaluation include "sanctions against employers who violate State standards"); U.S. Dep't of Labor, Occupational Safety & Health Admin., *State Plans: Frequently Asked Questions*, https://bit.ly/2Hx0AE8 (last visited June 19, 2018) (noting that "[a]ll State Plan policies and procedures related to penalties must be submitted and reviewed by OSHA").

analysis. In *Gade*, this Court concluded that § 18(b)'s requirement that states submit a plan foreclosed efforts to supplement federal regulation without submitting a state plan. As *Industrial Truck* explained, if states *with* approved plans could "pick and choose which occupational health and safety regulations to submit to OSHA," it "would make the state plan approval requirement superfluous." 125 F.3d at 1311. That is especially true given that the OSH Act requires submission and review of modifications to existing plans. 29 U.S.C. § 667(c); see also 29 C.F.R. §§ 1953.3(b), 1953.4(d).

4. Nor does it change the outcome that the UCL and FAL are facially laws of general application. This Court's decisions "leave no doubt" that a state law "cannot avoid OSH Act pre-emption simply because [it] serves several objectives rather than one" or serves "a purpose other than (or in addition to) workplace health and safety." *Gade*, 505 U.S. at 105-106. Congress' intent to require submission and approval of state plans would be "defeat[ed] * * * if a state could enact measures stricter than OSHA's * * * simply by asserting a non-occupational purpose for the legislation." *Id.* at 106 (internal quotation marks omitted). Even the California Supreme Court acknowledged that "when UCL and FAL claims are premised on violations of a state's plan, the UCL and FAL arguably come within" this Court's "description of an occupational safety and health standard * * * : 'a state law requirement that directly, substantially, and specifically regulates occupational safety and health.'" App., *infra*, 34a (quoting *Gade*, 505 U.S. at 107).

It simply is not plausible that the OSH Act establishes a detailed scheme for review and approval of carefully graduated penalties to be imposed administratively, but has no effect on a state official's ability to "impos[e] truly massive penalties" under other laws "based specifically upon * * * alleged violation of workplace safety laws." App., *infra*, 67a; accord *Kelly*, 2000 WL 36732730, at *4 (rejecting argument that UCL action based on workplace safety was not preempted because UCL is facially a law of general applicability, and explaining that "[t]he Court cannot ignore the substance of plaintiff's claim as to why defendant's conduct constitutes an unfair business practice by focusing on what the statute says on its face").

5. Finally, the California Supreme Court placed weight on its understanding that OSHA interprets the OSH Act to allow state plan modifications to go into effect before being submitted to OSHA or approved. App., *infra,* 36a-38a. Even if that understanding of the statute were correct, however, the court did not explain why it is relevant. It conceded there was "no dispute" that "UCL and FAL claims by local prosecutors" are not part of California's approved plan, *id.* at 14a, and the state has neither submitted a plan supplement nor given any indication that it ever intends to do so. Taken to its logical conclusion, the California Supreme Court's apparent stance—that a "state deviation from the formally approved plan" is not preempted regardless of whether the state ever seeks OSHA approval (*id.* at 36a)—would imply that OSH Act preemption *never* applies in jurisdictions with approved plans. As the

Ninth Circuit explained in *Industrial Truck*, that would upend the structure of § 18 and "make the state plan approval requirement superfluous." 125 F.3d at 1311.

C. This Case Is An Attractive Vehicle To Resolve An Important Issue

1. The scope of preemption under the OSH Act is an important issue warranting this Court's review. See, *e.g.*, *Gade*, 505 U.S. at 95; *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 240 (2002). The interaction of federal and state workplace safety standards is particularly important, because over half of the states operate under OSHA-approved state plans, twenty-one of which cover both private businesses and government workplaces. See OSHA, *State Plans*, https://bit.ly/1zRWyHG. The decision below virtually writes *Gade* out of existence, and explicitly clears the way for states with approved plans to adopt *de facto* changes to those plans without *ever* submitting them for federal review and approval. Thus, the decision below not only represents a grave threat to employers; it also will have a severe impact on the balance of state and federal authority over occupational safety and health.

Even the narrowest issue raised by this case—whether California public authorities may use the UCL and FAL to dramatically increase penalties for workplace safety violations—has substantial national significance. California is the most populous state in the Nation, and its economy accounts for nearly 15% of the United States' gross domestic product. Press Release, Bureau of Econ. Analysis, Gross Domestic Product by State: Third Quarter 2017, Table 3 (Jan.

24, 2018), https://bit.ly/2JwxZvb (for 2016, California GDP was 14.2% of national total). This Court has not hesitated to grant certiorari in cases presenting important preemption questions concerning California law, even where (unlike here) there was no clear split of authority. See *Am. Trucking Ass'ns, Inc.* v. *City of Los Angeles*, 569 U.S. 641, 648 (2013) (finding Port of Los Angeles concession agreements preempted, in case involving no clear split of authority); *Nat'l Meat Ass'n* v. *Harris*, 565 U.S. 452, 458-459 (2012) (finding California statute preempted, in case implicating no clear split).

Unless the decision below is reversed, any business employing workers in California now faces "truly massive penalties" for workplace safety violations, as the availability of UCL and FAL actions creates "an extraordinary jump in the potential civil penalty an employer * * * might incur for workplace safety violations." App., *infra*, 67a-68a. Here, "the district attorney seeks to recover penalties * * * in excess of $1 million *per employee*, for *each* cause of action." *Id.* at 68a. (emphasis added). And although "California has provided adequate enforcement provisions through its plan," *id.* at 34a, UCL and FAL penalties would be imposed *in addition to* Cal/OSHA plan penalties.

Worse still, exposure to this potential liability depends on the discretionary decisions of local prosecutors—who are seeking fines payable to the county treasury, see Cal. Bus. & Prof. Code § 17206(c), completely circumventing the orderly, centralized, Cal/OSHA processes of carefully graduated penalties normally applicable under California's approved state

plan. As the court of appeal concluded, district attorneys are not statutorily authorized to seek civil penalties directly under California's Labor Code, see note 3 and accompanying text, *supra*. But if the decision below stands, district attorneys will easily circumvent that limitation under the guise of preventing "unfair competition" and "false advertising" in the form of violations of the *very same* provisions. The district attorney's complaint in this case illustrates the trivial ease of bringing such actions. With regard to the UCL cause of action, the complaint merely recited the underlying facts of the accident, alleged that petitioners violated various state occupational safety regulations, and then alleged that "[d]efendants' failure to follow worker safety laws amounts to an unlawful, unfair and fraudulent business practice under California Business and Professions Code Section 17200." App., *infra*, 124a-125a. The FAL cause of action involved only slightly more creative pleading, adding broad-stroke allegations that petitioners retained employees and customers based in part on general statements about their commitment to workplace safety. *Id.* at 125a-127a. As a practical matter, the threat of liability under "copycat" UCL and FAL actions premised on workplace safety violations now hangs over every California employer.[7]

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[7] California's UCL has been criticized for its remarkable breadth. See, *e.g.*, Joshua D. Taylor, Note, *Why the Increasing Role of Public Policy in California's Unfair Competition Law Is a Slippery Step in the Wrong Direction*, 52 Hastings L.J. 1131, 1133-1135 (2001). Of particular relevance here, the UCL is a reliable weapon of choice for creative plaintiffs seeking to bring

2. This case presents an ideal vehicle to resolve the disagreement between the California Supreme Court and the Ninth Circuit and to provide broader guidance to governments and businesses on the scope of OSH Act preemption in states that have federally approved plans.

Not only was the preemption question pressed and passed upon below, it was the *only* question at issue. It was exhaustively briefed with substantial *amicus* participation. Both the court of appeal and the California Supreme Court fully resolved the preemption question and issued opinions thoroughly explaining their analysis, without any other legal issues or factual disputes complicating their respective opinions.[8] This case thus presents an ideal

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claims that would otherwise be barred, and the UCL "end run" is by now a familiar phenomenon. See Bernard et al., *UCL Overview* 39-40; cf. *Stop Youth Addiction, Inc.* v. *Lucky Stores, Inc.*, 950 P.2d 1086, 1114 (Cal. 1998) (Brown, J., dissenting) (describing use of UCL as an end-run around bar on private enforcement of criminal laws as "so exquisitely ridiculous, it would confound Kafka").

[8] The fact that the decision below did not completely end litigation in the trial court does not affect this Court's jurisdiction. The decision below finally resolved petitioners' separate petition for a writ of mandate challenging the district attorney's authority to commence this action, which was initiated in the court of appeal. The remaining litigation will determine the amount of petitioners' liability, and there is no risk that the dispute would become moot. This Court has routinely exercised jurisdiction under 28 U.S.C. § 1257(a) in similar circumstances. See *Bristol-Myers Squibb Co.* v. *Superior Ct.*, 137 S. Ct. 1773, 1778-1779 (2017); *Franchise Tax Bd.* v. *Hyatt*, 538 U.S. 488, 490-494 (2003); *Fisher* v. *Dist. Ct.*, 424 U.S. 382, 385 n.7 (1976) (per curiam); Stephen M. Shapiro et al., *Supreme Court Practice* § 3.8, at 171-172 (10th ed. 2013).

opportunity to resolve a split of authority on an important and recurring question about the scope of OSH Act preemption in states with approved plans and provide much-needed guidance on a question of unmistakable national importance. It also provides this Court a valuable opportunity to clarify the application of *Gade* to the many states that, like California, have adopted "a State plan for the development of [occupational safety and health] standards and their enforcement." 29 U.S.C. § 667(b). Compare App., *infra*, 17a-18a (suggesting *Gade* of limited relevance because "there was no approved state plan" there).

Indeed, it has done so recently. *E.g.*, *Cyan, Inc.* v. *Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1068-1069 (2018) (deciding case in similar posture arising out of California).

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the Court should seek the views of the United States because of the Secretary of Labor's role in administering the OSH Act.

Respectfully submitted.

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JUNE 2018