No. 17-1713

In The
Supreme Court of the United States

EMERSON ELECTRIC CO., ET AL.,

Petitioners,

v.

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

Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The Chamber's membership includes businesses engaged in commerce in each of the 50 states, many of which have a nationwide reach. Because its members are subject in varying degrees to a wide range of federal regulatory schemes that expressly preempt state and local laws, the Chamber has a keen interest in ensuring that those members operate in a transparent regulatory environment with clearly and consistently defined rules and equally well-delineated consequences for failure to adhere to them.

The California Supreme Court decision imperils that interest. Congress authorized states to replace federal worker safety standards only through obtaining federal approval of the rules delineated

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[1] Counsel of record for all parties received timely advance notice of the intent to file this brief and consented to the filing of the brief. S. Ct. R. 37(2)(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

within a state plan—expressly including both substantive standards and enforcement mechanisms. Yet California's highest court has instead issued an open-ended invitation to states to add additional layers of rules and escalating enforcement mechanisms without any federal oversight. In doing so, the California Supreme Court not only diverges from Ninth Circuit precedent involving precisely the same issue, but also invites other states to follow suit, putting at risk the Occupational Safety and Health Act's ("OSH Act") promise of a unitary, federally approved worker safety regime in any given state.

INTRODUCTION AND SUMMARY OF ARGUMENT

In holding that approval of a state plan by the Secretary of Labor under the OSH Act does not limit how local prosecutors can wield other state law provisions (preexisting or otherwise) to bootstrap additional penalties on top of those set forth in the approved plan, the California Supreme Court created a square conflict with the Ninth Circuit, which on its face leads to an untenable situation in the Nation's largest economy.

The result reached is indefensible. Only those provisions that are set forth in a state plan and approved by the Secretary of Labor serve to displace federal standards and avoid federal preemption. It simply does not follow, as the California Supreme Court would have it, that once a federally approved state plan exists, local prosecutors (or creative plaintiffs) can pile on any, and every, potential additional enforcement mechanism under state law

and remain clear of the preemptive scope of the OSH Act.

And resolving the conflict is critically important to the Nation's businesses, even though—or perhaps because—"enforcement," rather than "substance," is at stake. Congress placed substantive standards and enforcement on an equal footing in the OSH Act with respect to state authority and federal preemption. With good reason. From the perspective of regulated businesses, "substance" and "enforcement" are not two distinct, hermetically sealed bodies of law, but rather parts of a single regulatory continuum. The sort of unpredictable and unforeseen regulatory changes invited by the decision below, adopted outside of any transparent administrative process and without federal oversight, are equally disruptive regardless of how they are labeled.

Even if the impact of the conflict between the Ninth Circuit and the California Supreme Court could be cabined to worker safety regulation within California alone, this Court's review is warranted. A holding eviscerating federal oversight of worker safety rules, and permitting unbounded state regulation, within the Nation's largest economy—in direct conflict with the Ninth Circuit—is consequential enough. *See* Pet. 31-32. But the effects of the decision, if allowed to stand, will be felt beyond worker safety issues and California's borders.

This case thus provides the Court with an excellent opportunity to resolve a conflict in one of the Nation's most important economies; address the preemptive force of the OSH Act when there is a state-

approved plan governing private employers (as there is not only in California, but also in 21 other states); and, ultimately, restore Congress's mandate that worker safety regulations *and* their enforcement mechanisms be approved by the Secretary of Labor so as to avoid undue burdening of interstate commerce.

ARGUMENT

I. Resolving The Conflict Regarding OSH Act Preemption Of Unapproved State Enforcement Is Critically Important.

The California Supreme Court's holding effectively erased the federal part of the federal-state balance envisioned by Congress when it based the OSH Act on a "cooperative federalism" model. Also cast aside by the decision below is the Act's foundational premise that employers would be subject to only one delineated and self-contained worker safety regime in any given state—whether provided by federal or state regulations (through the federally approved state plan). Thus, although the California Supreme Court deemed the subject of this case to be "mere" enforcement measures, Pet. App. 38a n.6, the importance of the conflict it created with the Ninth Circuit far exceeds the magnitude of the particular penalties sought here.

A. The Conflict Goes to the Heart of the Act's Cooperative Federalism.

As Petitioners explain (Pet. 7-8) approval by the federal Secretary of Labor ("Secretary") is the necessary gateway to state enforcement of worker safety standards when a federal standard has been promulgated. 29 U.S.C. § 667(b). In the absence of

federal approval, "the OSH Act pre-empts all state law" regulating worker safety, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992) (plurality). Before now, the common—and commonsense—understanding was that federal preemption was lifted only for state laws that actually passed through the federal-approval gateway. *See Indus. Truck Ass'n v. Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997). But the California Supreme Court upended that understanding—and created a square conflict with the Ninth Circuit—by holding that after the gate has been opened once, it disappears forever. Under the logic of the ruling below, a local authority may revise worker safety measures at will through add-on enforcement actions, free of federal oversight and administrative process.

Because this holding authorizes local prosecutors to amend California's worker safety regime and its carefully graduated penalties (*see* Pet. 10-11), without even attempting the administrative process to integrate changes into the state plan (much less submitting the changes for federal approval), it effectively writes cooperative federalism out of the statute. As the Ninth Circuit observed when reaching the opposite conclusion on the same issue, "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." *Indus. Truck Ass'n*, 125 F.3d at 1311; *accord Gade*, 505 U.S. at 100-101 (If "a State could supplement federal regulations without undergoing the § 18(b) approval process, then the protections that § 18(c) offers to interstate commerce would easily be undercut.").

The ruling below also transforms the unitary regime promised by the OSH Act—supplied by either the federal regulations or the federally approved regulations contained within the state plan—into a fractured hodgepodge of whatever claims creative prosecutors can dream up in the moment, entirely outside the state plan. *See Gade*, 505 U.S. at 99 ("Congress intended to subject employers and employees to only one set of regulations be it federal or state, and … the only way a State may regulate … is pursuant to an approved state plan that displaces the federal standards."). This ad-hoc accumulation of worker safety rules is all the worse because it short-circuits the administrative process mandated by the OSH Act and its associated opportunity for public comment. *See* 5 U.S.C. § 553; 29 C.F.R. § 1902.11(d) (describing opportunity for public comment on approval of state plans); *id.* § 1953.6(c) (same for state-plan amendments).

B. Congress Made Federal Approval Equally Essential for Enforcement as for Substantive Standards.

Resolving the conflict between the Ninth Circuit and the California Supreme Court is no less important whether dealing with substantive safety standards or the consequences for failure to comply.[2] However one characterizes the subject matter, the conflict cuts to the heart of the OSH Act's federal-state balance. The Act is replete with indications that Congress intended

[2] And, as Petitioners point out, the California Supreme Court made clear that its reasoning applied with equal force to substantive standards. Pet. 25.

an equally robust federal role for the development and implementation of enforcement measures as for substantive standards. And the Secretary's administrative practice confirms it.

First, Congress expressly required states to seek approval of *both* substantive standards and enforcement measures. "Any State which, at any time, desires to assume responsibility for development and *enforcement* therein of occupational safety and health standards relating to [a federal standard] shall submit a State plan for the development of such standards and their *enforcement*." 29 U.S.C. § 667(b) (emphasis added).

Second, Congress specifically required the Secretary to review aspects of proposed state plans that address enforcement measures. To approve a plan, the Secretary must ensure that the plan specifies the "agency or agencies" responsible for administering the state plan, and provides "satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for *the enforcement* of [the] standards." 29 U.S.C. § 667(c)(1), (4) (emphasis added).

The Secretary also must determine that the "standards (*and the enforcement of which standards*) are or will be at least as effective in providing safe and healthful employment and places of employment as the [federal standards], and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce." *Id.* § 667(c)(2) (emphasis added). Under

this provision, both substantive standards and enforcement measures are subject to federal review to ensure that federal interests (encompassing both protecting worker safety and avoiding undue burdens on interstate commerce) are safeguarded. *See, e.g.*, Supplement to California State Plan, 62 Fed. Reg. 31,159, 31,178-179 (June 6, 1997) (reviewing the impact of enforcement measures on interstate commerce, although declining to issue formal interpretation that the test applies to enforcement measures, 62 Fed. Reg. at 31,162).

Finally, administrative practice confirms the robust federal role in scrutinizing and approving enforcement measures, whether presented as part of the initial plan, or as later amendments (neither of which, of course, happened here). *See* 29 C.F.R. § 1953.3(b) (requiring submission of state plan amendments to the Occupational Safety and Health Administration ("OSHA"); *id.* § 1953.6 (OSHA review of plan amendments). And OSHA has reviewed and addressed public comments regarding state plan amendments to alter enforcement mechanisms. *See, e.g.*, 62 Fed. Reg. at 31,178 (noting the "most extensive comments" regarding state-plan amendments addressed enforcement measures). But where, as here, no amendment to the state plan was ever submitted, there is no mechanism for this public input and federal review to take place.

For all of these reasons—as the Ninth Circuit has recognized, in conflict with the decision below—a state law that does not fall within the savings clause (which is inapplicable here, *see* Pet. 7), must be included within an approved state plan to avoid preemption

under the OSH Act, regardless of whether it is deemed a "substantive" or "enforcement" measure. *See Kelly v. USS-POSCO Indus.*, 101 F. App'x 182 (9th Cir. 2003).

C. Letting the Conflict Stand Would Impair Important Interests Protected by Federal Review.

Congress's decision to treat substantive standards and enforcement mechanisms alike in the approval process for state plans was sound. Both worker safety rules and the penalties for non-compliance warrant public participation and federal approval before lifting the otherwise preemptive force of the comprehensive set of federal standards under the OSH Act. Those federal standards not only detail a multitude of worker safety regulations, *see* Pet. 6, but also provide differentiated penalties for types of violations, and distinguish between "serious" and "willful" or "repeated" violations, 29 C.F.R. § 1903.15(d). California's approved state plan similarly offers a comprehensive and reticulated framework of rules and their consequences, where the penalty imposed reflects the nature of the violation and is constrained by factors set out by statute. *See, e.g.*, Cal. Lab. Code §§ 6427-6431 (setting distinct maximum penalties for serious, non-serious, repeated or willful, failure-to-correct, or recordkeeping violations); *id.* § 6319(c)-(d) (factors for determining penalty amounts). And this entire package of rules and penalties reflects the balance reached by workplace safety regulators and affected parties as part of a transparent approval process. *See* 29 C.F.R. §§ 1902.11(d), 1953.6(c).

The bootstrapping of civil penalties for unfair competition and false advertising onto violation of a worker safety regulation, on the other hand, is none of these things—it is neither graduated, part of a comprehensive planning process, nor transparent. Rather, it involves potentially "massive" penalties, Pet. App. 67a, imposable based on strict liability and regardless of the severity of an employer's violation or its good faith efforts. Employers need to know the scope and force of the regulatory universe they operate in. And—until now—they reasonably expected, based on clear statutory text, that the relevant universe was contained within the state plan.

Reliance interests are formed not only in substantive rules, but also in enforcement mechanisms. Transparency in both sides of the regulatory coin allows employers not only to ensure compliance but also to protect against risks. As the Court has recognized in other contexts, the "*extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored," and unpredictable changes can be unfair. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 283-284 (1994) (addressing retroactivity).

For a business attempting to comply with myriad regulatory requirements, unforeseeable and unpredictable changes in enforcement mechanisms can be just as disruptive as changes to substantive obligations, particularly when those changes represent such a major departure from the approved state plan. Clarity and predictability are thus critical for all rules governing worker safety, whether deemed substantive or enforcement.

Preserving the federal role in reviewing and approving state plan amendments is particularly important for enforcement measures. As an initial matter, it is the federal agency's function to ensure that additional enforcement—like the massive potential additional penalties at issue here, that are in theory imposable with no finding of a "willful" or "serious" violation—does not create an undue burden on interstate commerce. *See* 29 U.S.C. § 667(c)(2). States are necessarily going to be less attuned to the exigencies of interstate commerce.

Moreover, the federal agency is best positioned to address whether the possibility of cumulative financial penalties for every violation, independent of its severity, could distort state enforcement efforts. A careful articulation of graduated penalties based on the severity of violations, as exists in California's actual state plan, *see* Cal. Lab. Code §§ 6427-6431, is very different from a wholly discretionary penalty system where the enforcers may keep up to half of the penalties they recover. The former system prioritizes enforcement to where it is needed most; the latter potentially incentivizes enforcement based on other considerations, like an employer's financial resources.

Finally, the necessity of obtaining federal approval ensures there is a process for public input, which is critical to airing some of the concerns described above that the federal agency is best-positioned to address. *See* 29 C.F.R. § 1953.6. The federal administrative process preserves clarity by limiting the contours of state regulatory authority, because only the approved rules and penalties are saved from federal preemption. In negating the

requirement of federal approval, and not even requiring a *state* process to amend the state plan, the decision below eliminates the predictability and clarity that the OSH Act was designed to institute with respect to the rules governing worker safety.[3]

Resolving the intra-state conflict on this issue through certiorari review is essential. At a minimum, the Court should seek the views of the United States, given the Department of Labor's expertise in administering the process for federal approval of state plans.

II. The Negative Consequences Of The California Supreme Court's Decision Extend Far Beyond Worker Safety Regulation In California.

A. The Decision Imperils Other Cooperative Federalism Programs in California.

California's resistance to federal preemption did not start with the OSH Act. *See, e.g.*, *DirecTV, Inc. v.*

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[3] With respect to the violations alleged in this case, the civil penalties allowed under California's federally approved plan are already substantial. *See* Pet. 10-11. And they are not the only consequences Petitioners face for the tragedy that occurred. Some employees faced criminal charges, as contemplated by the worker safety statute's referral mechanism, Pet. 11, and the OSH Act's savings clause, 29 U.S.C. § 653(b)(4), allows for the possibility of separate tort actions to compensate the victims, Pet. 7 n.1. What the OSH Act does not allow, however, is for local prosecutors to bootstrap additional civil liability for the same violations, by use of a statute of general applicability that was never presented as part of the state plan approval process.

Imburgia, 136 S. Ct. 463, 467 (2015) (describing California Court of Appeal decision "conced[ing] that this Court … had held that the Federal Arbitration Act invalidated California's rule" but nonetheless concluding that this preemption "did not change the result" regarding the unenforceability of class action waivers). This case is thus just one in a string of cases in which California courts have demonstrated hostility to federal preemption. *See, e.g.*, *Quesada v. Herb Thyme Farms, Inc.*, 361 P.3d 868 (Cal. 2015) (holding California unfair competition and false advertising law claims for allegedly false "organic" label not preempted by the Organic Food Production Act); *compare Marentette v. Abbott Labs.*, 886 F.3d 112 (2d Cir. 2018) (holding similar California and New York claims preempted by the Act).

This decision is thus likely to encourage similar rulings and have spillover effects disrupting other federal regulatory regimes. Many federal programs embody "cooperative federalism" mechanisms like the OSH Act, "offer[ing] 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). For example, under provisions of the Clean Air Act, states develop their own permitting programs that are subject to federal approval. *E.g.*, 42 U.S.C. §§ 7410(a), (k); 7475(d); 7661a. Federal regulations apply where EPA has not approved a state's program. *Id.* Similarly, states may obtain permitting authority under the Clean Water Act in lieu of federal permitting agencies. 33 U.S.C. § 1342(b). As under the OSH Act, the state programs must be as effective as the federal program, satisfy

other federal considerations, and undergo public comment. *Compare* 29 U.S.C. § 667(c) (specifying state plan under OSH Act must be at least as "effective" as federal standards, while avoiding undue burden on interstate commerce), *with* 42 U.S.C. §§ 7410(a), (k); 7475(d); 7661a; *and* 33 U.S.C. § 1342. And, once the state plan is approved, the standards within that plan become the applicable law under the relevant federal act. *Compare* 29 U.S.C. § 667(b), *with* 42 U.S.C. § 7413 (describing federal enforcement of state plans with respect to emissions regulated by the Clean Air Act).

Given the narrow approach taken by the California Supreme Court to federal preemption, the federal-state balance in these other areas of cooperative federalism is at risk of disruption, too, if the reasoning of the California Supreme Court's decision goes unchecked. This Court has before seen fit to intervene to resolve federal preemption questions from California even where there was no split. *See* Pet. 32 (collecting cases). Here, the need for review is more pressing. Not only will failure to act tempt the California Supreme Court to disregard the preemptive force of federal law in other areas, but the stark disagreement between federal and state courts within California on how to answer the precise preemption question involved will likely yield a host of costly ancillary litigation.

B. The Decision Invites Similar Claims under Other States' Broad Unfair Competition Statutes.

Beyond California, the decision invites a proliferation of add-on rules, wholly outside of the deliberate process for federally approved state plans, in the other states with approved state plans governing private employers. Nearly half of states have such plans (22 states, including California). *See* U.S. Dep't of Labor, Occupational Safety & Health Admin., *State Plans*.[4]

Several other states with state plans have statutes that, like California's unfair competition law, Cal. Bus. & Prof. Code § 17200, can be enforced by public officials and impose large civil penalties for broadly worded prohibitions on "unfair" business practices or competition, without limitation to consumer deception. *See, e.g.*, Or. Rev. Stat. § 646.608(1)(u) (prohibiting "any other unfair or deceptive conduct in trade or commerce"); *id.* § 646.642 (penalty); Tenn. Code Ann. § 47-18-104(b)(27) (prohibiting "any other act or practice which is deceptive to the consumer or to any other person" and vesting enforcement of catch-all in public officials); *id.* § 47-18-108(c) (penalty). And it is becoming increasingly common for state prosecutors to use such statutes to seek additional penalties for conduct that is already regulated under federal statutes. *See* Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging*

[4] *Available at* https://www.osha.gov/dcsp/osp/index.html.

Concerns and Solutions, 65 U. KAN. L. REV. 209, 224-240 (2016) (describing unfair-practice cases brought by prosecutors regarding conduct regulated by the Food and Drug Administration, the Centers for Medicare and Medicaid Services, and other federal agencies).

In at least a few instances, such broadly-worded statutes have already formed the basis of claims arising out the employment relationship. *See, e.g., Gurrobat v. HTH Corp.*, 323 P.3d 792, 812-14 (Haw. 2014) (holding that employee could state an unfair competition claim based on an employer not distributing "service charge" receipts in full to its employees); *cf. Darcangelo v. Verizon Comm., Inc.*, 292 F.3d 181 (4th Cir. 2010) (addressing ERISA preemption of employee's claim under Maryland unfair and deceptive trade practices statute based on employer's alleged improper use of employee's medical records). It is no stretch to suppose that the California Supreme Court's decision will prompt claims in other States as well, seeking penalties for occupational safety claims that diverge from what is outlined in the federally approved state plan, without any of the safeguards attendant to state-plan approval.

Allowing the conflict of authority to persist in California is bad enough, given California's role in the national economy and the millions of workers employed within the state. *See supra*; Pet. 31-32. And further percolation will only make the situation worse. Creative lawsuits that should be preempted will be filed in state court, and costly unnecessary litigation will ensue to prove as much. The OSH Act was designed to eliminate this sort of piecemeal, ad hoc

specification and enforcement of occupational safety rules. The Act sets forth a simple rule that balances state and federal authority: "a State may not enforce its own occupational safety and health standards without obtaining the Secretary's approval," *Gade*, 505 U.S. at 99 (plurality); *id.* at 112 (Kennedy, J., concurring in judgment). Absent this Court's review, the decision below will eviscerate that bright-line rule and the clarity that should come with it, with far-reaching negative consequences for the Nation's employers.

CONCLUSION

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

Respectfully submitted.

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