NO. S222314
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

SOLUS INDUSTRIAL INNOVATIONS, LLC, et al.,
Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF ORANGE,
Respondent;

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

Petition for Review of a Decision of the Court of Appeal,
Fourth Appellate District, Division 3, No. Case No. 0047661

SUPERIOR COURT OF THE COUNTY OF ORANGE
Civil Case No. 30-2012-00581868-CU-MC-CXC
THE HONORABLE KIM G. DUNNING

DIRECTOR OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, CHRISTINE BAKER, AND THE CHIEF OF THE DIVISION OF OCCUPATIONAL SAFETY AND HEALTH, JULIANN SUM

***AMICUS CURIAE* BRIEF**

Filed in support of Appellant/Real Party in Interest
District of Attorney (Orange County)

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(Service on Attorney General required by Rules of Court 8.29(c)(2)(B))
Filing Fee Exempt – Govt. Code § 6103

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I. ISSUE PRESENTED

Did the court of appeal[1] err in deciding that the federal Occupational Safety and Health Act of 1970 ("OSH Act") preempts a district attorney's attempt to recover civil penalties under California's unfair competition law ("UCL"),[2] a generally applicable consumer protection law, based on an employer's violation of state workplace safety standards that resulted in the deaths of two employees?

II. INTEREST OF *AMICUS CURIAE* AND APPLICATION TO FILE *AMICUS CURIAE* BRIEF

The Director of the California Department of Industrial Relations, Christine Baker ("DIR"), and the Chief of the Division of Occupational Safety and Health, Juliann Sum ("DOSH"), acting in their official capacities, respectfully request permission to file an *amicus curiae* brief in this matter (Cal. Ct. Rule 8.200(c).)[3] The Director of DIR is the administrator of the California state occupational safety and health plan ("the state plan") approved by the Secretary of Labor ("Secretary") for the purposes of OSH Act. (Cal. Lab. Code, § 50.7.) The Chief of DOSH is the

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[1] All references to the decision in this case are to *Solus Indus. Innovations, LLC v. Superior Court*, 229 Cal.App.4th 1291 (2014), *as modified on denial of reh'g (Oct. 16, 2014), review granted and opinion superseded sub nom. Solus Indus. Innovations v. S.C. (People)*, 340 P.3d 379 (Cal. 2015) ("*Solus*").

[2] The district attorney also alleges violations of California's False Advertising Law, Cal. Bus. & Prof. Code § 17508, based on the same violations of California's workplace safety and health laws. These allegations are subject to the same preemption analysis as the UCL claim.

[3] Hereafter, the Director of DIR and the Chief of DOSH are jointly referred to as "DIR" or "Director".

officer responsible for enforcement of California occupational safety and health laws and regulations at workplaces throughout the State. (Cal. Lab. Code, § 6307.)

The question of whether and how the OSH Act preempts California laws used in the enforcement of occupational safety and health standards is of great and direct importance to both DIR and the people of the State of California. DIR has a specific and immediate interest in the outcome of this litigation. If not reversed, the court of appeal's decision that any component of the state plan not expressly approved by the Secretary of Labor is preempted is so broad and far-reaching it would require California to obtain an affirmative approval in the form of a state plan change from the Secretary of Labor for every state law that may touch on occupational safety and health. Such a result unduly burdens the administrative resources of DIR and impairs effective enforcement of workplace safety laws. It is also contrary to the current framework used by the Secretary of Labor to monitor and exert federal authority over the approved state plan.

DIR alone authored this application and *amicus* brief. No party or party's counsel authored any portion of the brief and no person or entity outside of DIR contributed money to fund the preparation or submission of this brief.

DIR respectfully requests that the Court grant leave to file the following *amicus* brief submitted in support of the appellant, the District Attorney of Orange County.

III. SUMMARY OF ARGUMENT

The OSH Act is standard-setting legislation that embodies Congress's commitment to joint federal and state governance of the workplace. Section 18(a) provides that where no federal standard is in

place, states may freely regulate over any given occupational health or safety issue. (29 U.S.C.A. § 667(a).) Even where federal standards exist, states are still not precluded from regulating since section 18(b) allows states to "assume responsibility for development and enforcement []of occupational safety and health standards relating to any occupational safety or health issue" by submitting a state plan to the Secretary of Labor. (29 U.S.C.A. § 667(b).) Once approved and certified, state standards supplant federal law. California's state plan was approved by the Secretary of Labor on April 24, 1973 and was certified on August 12, 1977. (29 C.F.R. § 1952.174.)

The OSH Act applies only to workplace safety issues and only to the conduct of employees and their employers in the workplace. Under section 18, only state "occupational safety and health standards" are subject to OSH Act preemption. (*See* 29 U.S.C.A. § 667(b).) UCL is neither an enforcement mechanism for such standards nor an independent "occupational safety and health standard." Instead, it is an independent cause of action for unlawful business practices. As a consumer protection law, UCL regulates unlawful or unfair and fraudulent business practices to protect competing California businesses and consumers. The purpose of UCL is to deter unfair competition predicated on business practices that violate other laws, including occupational safety and health requirements. But the UCL looks to other state laws only to define what is unlawful – the law contains no mention of workplace safety nor is it directed at workplace safety.

Equally important to the preemption analysis, the OSH Act contains a saving clause that explicitly protects from preemption state worker's compensation law and other state laws of general applicability providing

remedies for workplace injuries and/or diseases. (29 U.S.C.A. § 653(b)(4) [also known as "section 4(b)(4)"].) UCL also fits squarely within the section 4(b)(4) savings clause and is saved from preemption because it is both a valid exercise of the state's inherent police powers (to impose additional criminal or civil liability for serious worker injuries, illnesses, or death on culpable employers who violate state workplace safety laws) and because it addresses workplace safety as a component of the state workers' compensation system.

The decision of the court below is so broad and far-reaching it would require California to seek a state plan change from the Secretary of Labor for every state law that may touch on occupational safety and health. Such a result is contrary to the framework used by the Secretary of Labor to monitor and exert federal authority over the approved state plan.

IV. ARGUMENT

A. PREEMPTION PRINCIPLES

Preemption can occur in one of three ways. First, Congress can preempt state law by stating in express terms that any state law within a given field shall be superseded by federal law. (*See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 203, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983).) Second, federal law can occupy a field of law so completely that preemption may be inferred. (*English v. General Elec. Co.,* 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990).) Third, federal law can actually conflict with state law, thereby pre-empting it. (*Ibid.*) Thus, preemption is found where state regulation makes compliance with federal law impossible or otherwise frustrates the objectives of Congress. (*Id.*)

In all three situations, congressional intent is the "ultimate touchstone" for deciding whether a specific state law is preempted by federal law. (*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700 (1996).) There is always a presumption the states' historic police powers are not to be superseded by the federal law unless that was "the clear and manifest purpose of Congress." (*Ibid.* [when Congress passes legislation in a field traditionally reserved to states, presumption is against preemption]; *Wyeth v. Levine,* 555 U.S. 555, 565-66, 129 S.Ct. 1187, 1194-95, 173 L.Ed. 2d 51 (2009) [same].)[4] This presumption against preemption "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." (*Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977) (citation and quotation omitted).) The Supreme Court is particularly "reluctant to infer preemption" in implied preemption cases. (*See Bldg. & Constr. Trades Council v. Associated Builders and Contrs.,* 507 U.S. 218, 224 (1993) (internal citations omitted).)

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[4] In its Interpretation Letter dated October 18, 2011, the federal Occupational Safety and Health Administration ("OSHA") confirms that the presumption against preemption applies when interpreting the OSH Act and states:

> Analysis begins with the presumption that Congress did not intend to displace state and local law, especially when a statute operates in an area within the states' traditional powers. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470,485 (1996). [...] Thus, preemption will be found only where that is the clear and manifest purpose of Congress. *Medtronic, Inc.*, 518 U.S. at 485.

(https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27746 (accessed July 7, 2015).)

This case should be analyzed under implied preemption principles[5] as a case concerning a matter which has been "primarily, and historically" a matter of local concern.[6] As set forth below, it cannot be said that it was the "clear and manifest" purpose of Congress to preempt the application of state consumer protection laws for the culpable conduct of the employer simply because the same conduct is also governed by the OSH Act.

B. THE OSH ACT IS A MODEL OF COOPERATIVE PREEMPTION.

The OSH Act, a standard-setting law, embodies the congressional commitment to joint federal and state governance of the workplace. (*See, e.g.*, Eileen Silverstein, *Against Preemption in Labor Law*, 24 Conn. L. Rev. 1, 39-41 (1991); Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 Fordham L. Rev. 469, 553 (1993) ["OHSA's preemption provisions establish a system of cooperative federalism."].)

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[5] In *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98-99, 102, 112 S.Ct. 2374, 2383, 120 L.Ed.2d 73 (1992) ("*Gade*"), the Supreme Court held that where there is not an approved state plan, a state occupational safety and health standard relating to an issue for which a federal standard is in effect is impliedly pre-empted because it is in conflict with the purposes and objectives of the OSH Act. Inexplicably, although its opinion heavily cites *Gade,* the court of appeal treated this case as an express preemption case, stating: "state regulation of workplace safety standards is explicitly preempted by federal law under the OSH Act." *Solus, supra,* 178 Cal.Rptr.3d at 134.

[6] States are vested with the police powers to protect the health, safety and welfare of their citizens. (*Medtronic, Inc. v. Lohr, supra,* 518 U.S. at 475, 484-85; *see also Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 756 (1985).) Thus, regulation of health and safety has been considered "primarily, and historically" a matter of local concern. (*Hillsborough County v. Automated Medical Laboratories, Inc.* (1985), 471 U.S. 707, 719, 105 S.Ct. 2371, 2378.)

Section 18 of the OSH Act sets forth the division of federal and state responsibility. (29 U.S.C.A. § 667.) Section 18(a) states "[n]othing 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 [OSH Act] standard is in effect." (29 U.S.C.A. § 667(a).) Therefore, where no federal standard is in place, states may freely regulate over any given occupational health or safety issue.

Even where federal standards exist, states are still not precluded from regulating. Section 18(b) provides that if OSHA has promulgated a federal standard, that standard controls any issue of occupational health and safety, unless a State chooses to "assume responsibility for development and enforcement []of occupational safety and health standards relating to any occupational safety or health issue" by submitting a state plan to the Secretary. (29 U.S.C.A. § 667(b).) The Secretary is directed to approve any state plan that contains standards "at least as effective" as its federal counterpart, provided the state will devote the necessary resources to administer and enforce the standard. (29 U.S.C.A. § 667(c).) The Secretary has no statutory authority to reject state standards as too strict. (*See Ibid.*) States may and do adopt more stringent standards, penalties, and enforcement schemes than OSHA's. (*Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535, 539 (1987).) Thus, the OSH Act standards are a floor and not a ceiling. (*See United Airlines, Inc. v. Occupational Safety & Health Appeals Board* (1982) 32 Cal.3d 762, 772, 654 P.2d 157, 187 Cal.Rptr. 387.) Moreover, once approved, state standards preempt federal law. California's state plan, the California Occupational Safety and Health Act of 1973 (Cal. Lab. Code, § 6300), was approved by the

Secretary on April 24, 1973, and certified as having satisfied the requirements of an approved state plan on August 12, 1977. (29 C.F.R. § 1952.174.)

Equally important to the preemption analysis, the OSH Act also includes a saving clause, section 4(b)(4), that protects from preemption state worker's compensation law and other state laws of general applicability providing remedies for workplace injuries and/or diseases. (29 U.S.C.A. § 653(b)(4).) As explained below at pp. 14-20, *infra,* UCL also fits squarely within the section 4(b)(4) savings clause and is saved from preemption.

C. UNDER SECTION 18(B), UCL IS NEITHER AN ENFORCEMENT MECHANISM FOR CALIFORNIA "OCCUPATIONAL HEALTH AND SAFETY STANDARDS" NOR AN "OCCUPATIONAL HEALTH AND SAFETY STANDARD."

Only state "occupational safety and health standards"[7] are subject to the OSH Act pre-emption under section 18(b). (*See* 29 U.S.C.A. § 667(b); *Gade, supra,* 505 U.S. at 104-05.) There can be no dispute that the state standards underlying the district attorney's UCL claim are included in California's approved state plan and that that these standards preempt federal standards.[8] (*See* discussion of section 18(b) at p. 7, *supra.*)

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[7] "Occupational safety and health standards" are also referred to as "workplace safety standards" or "standards" throughout the brief.

[8] The court of appeal confirmed that the district attorney's UCL claim is "based on the same worker health and safety standards placed at issue in the [DOSH] administrative proceedings." (*See Solus, supra,* 178 Cal.Rptr.3d 126.) These standards concern proper safety valves on water heater (Cal. Code Regs., tit. 8, § 467(a)), safe operation and proper maintenance of

Nonetheless, the court of appeal concluded that the district attorney's UCL action based on the approved state standards is preempted by the OSH Act. (*See Solus, supra,* 178 Cal.Rptr.3d at 134-35.) This conclusion rests on the flawed characterization of UCL as either an enforcement mechanism for the state standards[9] or an independent workplace safety standard.[10] It is neither.

1. California's UCL is an Independent Cause of Action for Unlawful Business Practices, Not an Enforcement Mechanism for the State's Workplace Safety Standards.

UCL defines unfair competition to "mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Cal. Bus. & Prof. Code, § 17200.) Its "scope is broad" and its coverage "sweeping." (*People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 783, *cert. denied sub nom. PAC Anchor Transp., Inc. v. California ex rel. Harris*, 135 S.Ct. 1400, 191 L.Ed.2d 360 (2015) (citation omitted).) Its purpose is to protect consumers and law-abiding competitors from business practices that confer

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the water heater (*Id.* at § 3328(a)-(b)), engineering practices concerning selection and use of residential water heater in extrusion operations, (*Id.* at § 3328(f)), and use of qualified and trained personnel to operate and maintain the water heater. (*Id.* at § 3328(h).)

[9] *See, e.g., Solus, supra,* 178 Cal.Rptr.3d at 132 ("... standard for assessing whether reliance on the UCL as a tool of enforcing workplace safety laws is preempted ..."); Petitioners' Answer Brief on the Merits at p. 2 (framing the issue as whether "federal OSHA preempt[s] the UCL [] as *enforcement* mechanisms for workplace safety standards. . .") (emphasis in original.)

[10] *See, e.g., Solus, supra,* 178 Cal.Rptr.3d at 132 ("... the OSH Act *does not* allow states to *independently establish* workplace safety laws...") (emphases in original); Petitioners' Answer Brief on the Merits at p. 14 ("... state laws are preempted if they are being used to regulate workplace safety without the U.S. Secretary of Labor's approval ...")

unlawful and unfair advantages in the marketplace. (*Rose v. Bank of Am., N.A.* (2013) 57 Cal.4th 390, 397, *cert. denied,* 134 S.Ct. 2870, 189 L.Ed.2d 832 (2014).) UCL is an independent cause of action, not an enforcement mechanism for the law on which a claim of unlawful business practice is based.[11] In *Rose v. Bank of Am., N.A.,* this Court explained:

> ...a UCL action does not "enforce" the law on which a claim of unlawful business practice is based. "By proscribing 'any unlawful' business practice, [Business and Professions Code] 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the [UCL] makes *independently* actionable. [Citations.]" In *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570, 71 Cal.Rptr.2d 731, 950 P.2d 1086 (*Stop Youth Addiction*), we explained the independent nature of a UCL action. There the UCL claim was based on alleged violations of Penal Code section 308, which bans the sale of cigarettes to minors. The defendant contended the suit was barred because Penal Code section 308 [...] "embodie[d] the Legislature's intent to create a comprehensive, exclusive scheme for combating the sale of tobacco to minors."

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[11] Petitioners rely on *Industrial Truck Ass'n v. Henry,* (9th Cir. 1997) 125 F.3d 1305, to argue "...just as Proposition 65 could not be used to enforce workplace safety standards... the UCL [] cannot be used to enforce workplace safety standards without the U.S. Secretary of Labor's approval." (Petitioners' Answering Brief, at pp. 14-15.) This reliance is misplaced because in *Industrial Truck Ass'n v. Henry,* the challenged law was undisputedly found to be an "occupational safety and health standard." As that court stated:

> There are ample reasons to conclude that the Hazard Communication Standard and the OEHHA Regs. relate to the same issue or subject matter. First, it is undisputed that the occupational warning requirements of Proposition 65 and the OEHHA Regs. are, like the Hazard Communication Standard, occupational safety and health standards within the meaning of the Occupational Safety and Health Act. [...]

(125 F.3d at 1314 (citations omitted.).)

> (citation.) We rejected this argument, and emphasized that the plaintiff was enforcing the UCL, not the statutes underlying their claim of unlawful business practice.

(*Rose v. Bank of Am., N.A.*, supra, 57 Cal.4th at 396 (citations omitted).)[12]

It is the UCL itself and not the predicate statutes underlying the UCL claim that confers "specific power" to prosecute UCL claims. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 562) (citation omitted).) UCL employs "other laws only to define what is 'unlawful.'" (*Rose v. Bank of Am., N.A., supra,* 57 Cal.4th at 396 (citation omitted).) Thus, UCL cannot be the enforcement mechanism for the workplace safety regulations (concerning operation and maintenance of water heaters and their safety features) underlying the district attorney's UCL action against Solus Industrial Innovations.

2. UCL is a Consumer Protection Law of General Applicability and not a State Workplace Safety Standard.

The express language of the OSH Act's section 18(b) extends only to the development and enforcement of state "occupational safety and health standards."[13] It does not extend to the development and enforcement

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[12] *Solus* dismisses the *Rose* Supreme Court's analysis because *Rose* concerned a private UCL cause of action. Here, the UCL action is brought by the district attorney and is "expressly intended to *penalize* a party for past misconduct." *Solus, supra,* 178 Cal.Rptr.3d at 134 (emphasis in original). As discussed at p. 15, *infra*, this distinction is of little relevance because section 4(b)(4)'s savings clause (which the *Solus* court wholly ignores) exempts criminal prosecutions, also brought by prosecutors and intended to penalize a party for past misconduct, from the OSH Act preemption.

[13] "Occupational safety and health standard" is defined by the OSH Act as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary to provide safe or healthful employment and places of

of generally applicable state laws. UCL is not an "occupational safety and health standard" under section 18(b) because it does not "directly, substantially, and specifically regulate[] occupational safety and health." (*See Gade, supra,* 505 U.S. at 107 [defining "occupational safety and health standard" for preemption analysis].)[14] Instead, UCL is a consumer protection law that neither contains any mention of workplace safety nor is directed at workplace safety. UCL regulates unlawful or unfair and fraudulent business practices in order to protect competing California businesses and consumers.

Further, even where a UCL action might have a "'direct and substantial' effect on worker safety," it is nonetheless protected from preemption because it is a law of general applicability. OSH Act is limited in scope and only applies to workplace safety issues and only to the conduct of workers and their employers in the workplace. (*See Lindsey v. Caterpillar,* 480 F.3d 202, 208 (3d Cir. 2007) [OSH Act is "limited in scope, however, as jurisdiction under the Act extends only to the employee-employer relationship within the workplace."].) It does not preempt laws of general applicability, even when such laws have a substantial impact on worker safety. The *Gade* Supreme Court explicitly saved generally applicable state laws from OSH Act preemption, explaining:

> [S]tate laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA

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employment." (29 U.S.C.A. § 652(8).)

[14] The *Gade* Supreme Court's implied preemption test is based on this definition. Non-approved state law is preempted by the OSH Act if it "constitutes, in a direct, clear and substantial way, regulation of worker health and safety" with respect to any issue for which a federal standard has been established. (*Gade, supra,* 505 U.S. at 102.)

> standards[15] and that regulate the conduct of workers and nonworkers alike would generally not be pre-empted. Although some laws of general applicability may have a "direct and substantial" effect on worker safety, they cannot fairly be characterized as "occupational" standards, because they regulate workers simply as members of the general public.

(505 U.S. at 107.)

The salience of this explanation is further clarified by the *Gade* court's reference to fire safety and traffic safety regulations. While such regulations are for the protection of the general public, as a practical matter, such regulations often regulate workers as workers, and have a direct and substantial impact on the safety of such workers. Thus, although UCL may have a "direct and substantial" effect on worker safety, it "cannot be fairly characterized as an 'occupational' standard[]," because it regulates employers and workers "simply as members of the general public." (*See id.*) Further, consumer protection laws, like the UCL, are within the states' historic powers and apply throughout the state. They are not limited to workplaces. They protect everyone and even if they regulate some workplace safety issues, are laws of general applicability. (*See also, In re Farm Raised Salmon Cases,* (2008) 42 Cal.4th 1077, 1088, 175 P.3d 1170,

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[15] There can be no conflict between UCL and an OSH Act standard because there is no federal standard on unlawful or unfair competition while doing business in violation of state workplace safety laws. In contrast, in *Gade,* the challenged Illinois law constitutes workplace safety standards since it concerns licensing statutes governing hazardous equipment operators and workers and their purpose was "to promote job safety." (505 U.S. at 91.) The Illinois licensing scheme conflicted with the OSH Act standards because they imposed more rigorous training requirements than the OSH Act training standards. (505 U.S. at 93-94.) Further, unlike California, Illinois does not have an approved state plan and so the OSH Act standards control any issue of occupational health and safety under section 18(b). (505 U.S. at 97.)

1176 [consumer protection laws like UCL are within states' historic police powers].) Nothing in the OSH Act indicates a Congressional intent to preempt enforcement in the workplace of rights and remedies traditionally afforded by state laws of general application. Indeed, as discussed at pp. 14-15, *infra,* the opposite is true.[16]

D. UCL IS PROTECTED FROM PREEMPTION BY THE SECTION 4(B)(4) SAVINGS CLAUSE.

Federal regulation of workplace safety was "not intended to be all encompassing."[17] (*Gade, supra,* 505 U.S. at 96.) Rather than occupying the entire field of workplace safety regulation, Congress expressly provided:

> 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 both, of employees arising out of, or in the course of, employment.

(29 U.S.C.A. § 653(b)(4).)

The plain language of section (4)(b)(4) savings clause allows all manner of common law and statutory actions, including those based on generally

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[16] Moreover, the purposes of the UCL and the OSH Act are different. The purpose of the UCL is to deter unlawful business competition. The purpose of the OSH Act is to protect workers from unsafe and unhealthful conditions by defining "standards" the employer must meet in providing a safe and healthful place of employment.

[17] That Congress invited states to administer their own occupational health and safety plans in section 18(a) also shows that it did not intend to preclude state regulation in the field of workplace safety.

applicable criminal and tort laws.[18] Courts have consistently and uniformly held that OSH Act's broad savings clause protects workers compensation laws, criminal laws, and tort laws from preemption.[19] Thus, as explained below, section 4(b)(4) saving clause is yet another reason that UCL is protected from OSH Act preemption.[20]

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[18] Section 4(b)(4) savings clause was not implicated in *Gade* because the licensing statutes set occupational standards. (*See* discussion at fn. 15, *supra.*) In contrast, here, UCL is neither an enforcement mechanism for state workplace health and safety standards nor an independent occupational standard. (*See* discussion at pp. 9-14, *supra.*)

[19] *See, e.g., Nat'l Solid Wastes Mgmt. Ass'n v. Killian*, 918 F.2d 671, 680 n. 9 (7th Cir. 1990) *aff'd sub nom. Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (collecting cases); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir.1987) (California's approved state plan did not preempt wrongful discharge claim), *cert. denied*, 486 U.S. 1054, 108 S.Ct. 2819, 100 L.Ed.2d 921 (1988); *People v. Hegedus* (1989) 432 Mich. 598, 616-617 (manslaughter criminal statute was "any law" under section 4(b)(4)); *People v. Chicago Magnet Wire Corp.* (1989) 534 N.E.2d 962, 968 (section 4(b)(4) exempts criminal actions from preemption because "[t]here is little if any difference in the regulatory effect of punitive damages in tort and criminal penalties under the criminal law"); *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents,* 101 Harv.L.Rev. 535, 543 (1987) (section 4(b)(4) saves from preemption criminal law, workers' compensation and tort law); *see also Pedraza v. Shell Oil,* 942 F.2d 48 (1st Cir. 1991) and *Lindsey v. Caterpillar, Inc., supra,* 480 F.3d 202 (applying savings clause to state law actions brought by workers against third parties for workplace exposures); *see also* OSHA Interpretation Letters dated February 3, 2010 and October 18, 2011 [confirming savings clause exempts tort actions and other state law remedies from OSH Act preemption].)

[20] The court of appeal disregarded the section 4(b)(4) savings clause. There is no reference to it other than a truncated quote from the *Gade* opinion that the OSH Act "does not 'supersede or in any manner affect any workmen's compensation law'... '" (*Solus, supra,* 178 Cal.Rptr.3d at 127-28 quoting *Gade, supra,* 505 U.S. at 96–97, 112 S.Ct. 2374.) Notably, the *Solus* opinion omitted the remainder of the savings clause language quoted

1. Broad Language of Section 4(b)(4) Savings Clause Supports Narrow Interpretation of Preemption.

The very existence of the section 4(b)(4) savings clause supports a narrow interpretation of OSH Act preemption. A savings clause is a directive from Congress to interpret the preemption language of the statute narrowly. (*See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 868 (2000) [savings clause assumes significant number of liability actions to save].) This is especially true since section 4(b)(4) savings clause explicitly states Congressional intent to protect common law and "statutory rights, duties, or liabilities of employers and employees under any law" from OSH Act preemption.[21] Section 4(b)(4) declares that OSH Act would not "enlarge or diminish or affect in any other manner" the statutory rights, duties, or liabilities of employers and employees under any law." (29 U.S.C.A. § 653(b)(4).)[22] This clear statement of congressional intent,

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by the *Gade* Supreme Court:

> or ... [the OSH Act does not] 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.A. § 653(b)(4).)

[21] As one court noted, "no other enactment contains a savings clause more broad." (*In re Welding Fume Products Liab. Litig.*, 364 F.Supp. 2d 669, 687 (N.D. Ohio 2005).)

[22] OSHA notes that "it is significant that Congress did not include in the Act any private right of action or other remedy for workplaces injuries, disease, or death. [citations]." The lack of any private right of action and other remedy under the OSH Act "strongly suggests Congress believed that 'widely available state rights of action provided appropriate relief' for workplace injuries. [citation]." (OSHA Interpretation Letter dated February 3, 2010, at fn. 1.)

when coupled with the presumption against preemption (*see* discussion at p. 5, *supra*) supports the conclusion the Court should define the scope of any implied preemption as narrowly as possible and find that UCL is far outside of that scope.[23]

2. *Solus* Court's Characterization of UCL as a Penalty Statute Supports Exemption From Preemption.

Solus court of appeal dismisses this Court's express finding in *Rose v. Bank of Am., N.A., supra,* 57 Cal.4th at 396, that UCL is an independent cause of action and not an enforcement mechanism for the law on which a claim of unlawful business practice is based. It does so by distinguishing the private UCL cause of action in *Rose* from the district attorney's UCL claim here, which the *Solus* court of appeal contends is "expressly intended to *penalize* a party for past misconduct." (*Solus, supra,* 178 Cal.Rptr.3d at

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[23] Little legislative history exists for section 4(b)(4). (*Ries v. Nat'l R.R. Passenger Corp.*, 960 F.2d 1156, 1160-62 (3d Cir. 1992). It consists of two items: (1) the Senate report analyzing this section which basically restates the provision, and (2) a letter from the Solicitor of Labor to the Chairman of the House Subcommittee on Labor that confirmed that section 4(b)(4) would "in no way affect the present status of the law with regard to workmen's compensation legislation or private tort actions." (*Ibid.* (citations omitted).) The Solicitor's letter "dealt solely with workers' compensation [and private tort actions] because that was the only concern which was raised at the time of OSHA's passage." (*Id.* at 1162.) It was unlikely that Congress even considered the effect of the OSH Act on other general state laws - criminal, consumer protection, or otherwise, which were rarely used at that time in the context of workplace accidents. (*See Pratico v. Portland Terminal Co.*, 783 F.2d 255, 266 (1st Cir. 1985) [review of legislative history "suggests that it is highly unlikely that Congress considered the interaction of OSHA regulations with other common law and statutory schemes other than worker's compensation."].) Nonetheless, had Congress intended only to preclude workers' compensation or private tort actions, it "would not have drafted [section 4(b)(4) savings clause] in such sweeping terms." (*Ries v. Nat'l R.R. Passenger Corp.*, 960 F.2d 1156, 1162 (3rd Cir. 1992).)

134 (emphasis in original) (also, prosecutor cannot rely on UCL "to provide an additional means of penalizing an employer" for violating workplace safety standards].)[24] Characterized this way, UCL is analogous to criminal sanctions and punitive damages in tort actions, both of which are categorically saved from the OSH Act preemption.[25] (*See* discussion at p. 15, *supra*, and fn. 19.) Applying the same rationale that exempts these generally applicable penalty statutes (state criminal laws or punitive damages in tort actions)[26] from the OSH Act preemption, UCL is also exempt from preemption.[27]

First, the express language of section 18(b) extends only to the development and enforcement of state standards, not to enforcement of generally applicable penalty statutes. (*See* 29 U.S.C.A. § 667(b).) Second, under the OSH Act, "standards" are "ex ante, prophylactic measures

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[24] Notably, once the state plan is approved and certified, state penalty provisions preempt the OSH Act penalty provisions. (29 U.S.C.A. § 667(e) [upon certification of the state plan, the OSH Act penalty provisions of 29 U.S.C.A. § 666 shall not apply.].)

[25] Like criminal prosecution, the UCL action here was brought by a "representative of the state." (*Solus, supra,* 178 Cal.Rptr.3d at 134.) Like punitive damages in tort actions, the UCL provides a civil remedy. Like both, the UCL action here was arguably intended to penalize Petitioners for past misconduct.

[26] The right to punitive damages award in California is strictly statutory. (*See* Cal. Civ. Code, § 3294.)

[27] The plain language of the OSH Act supports this result. Once a state plan is approved and certified, the penalty and enforcement provisions of the OSH Act "shall not apply with respect to any occupational safety or health issues covered under the plan." (29 U.S.C.A. § 667(e).) California's plan has long been approved and certified. Thus, even assuming *arguendo* that UCL is an enforcement mechanism, OSH Act's enforcement and penalty provisions cannot preempt UCL as these provisions "shall not apply" to any issues covered under California's state plan.

prescribing or proscribing specific practices." (*Getting away with murder: Federal OSHA preemption of state criminal prosecutions for industrial accidents,* 101 Harv.L.R. 535, 543 (1987); *People v. Hegedus*, 432 Mich. 598, 610-11, 443 N.W.2d 127, 132-33 (1989).) Penalty statutes, on the other hand, are "ex post, reactive measures, focusing on conduct after an injury has occurred." (*Ibid.*) They not only attempt to deter prohibited conduct, they serve to punish as a matter of retributive justice. Thus, if UCL is a penalty statute, as the *Solus* court of appeal contends, then it cannot be a "standard" within the meaning of the OSH Act. UCL does not prescribe or proscribe specific practices.

Moreover, even though additional sanctions imposed through a criminal prosecution, tort action, or UCL "may incidentally serve as a regulation for workplace safety," there is "nothing in [OSH Act] or its legislative history to indicate that Congress intended to preempt the enforcement of these general state laws simply because of [their] incidental regulatory effect." (*People v. Chicago Magnet Wire Corp.*, 534 N.E. 2d 962, 967 (Ill. Sup. Ct. 1989).) In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S.Ct. 615, 625 (1983), a case involving the federal Atomic Energy Act of 1954, the Supreme Court explained that although a "tension" existed between exclusive federal regulation and the regulatory consequences of punitive damages (which like a criminal sanction enforce implicit standards), there was no evidence of congressional intent to preempt such implicit regulation. Thus, state courts are not preempted from assessing punitive damages against companies that cause injuries by radiation exposure even though the federal government occupies the field of nuclear safety regulation. (*Ibid.*) In the context of the OSH Act, section 4(b)(4) explicitly saves from preemption common law and statutory forms

of liability (workers' compensation, criminal and tort laws) that may regulate workplace conduct and set implicit standards.[28]

E. THE PROSECUTOR'S USE OF UCL TO ADDRESS WORKPLACE SAFETY ARISES OUT OF THE STATE'S COMPREHENSIVE WORKERS' COMPENSATION SYSTEM

California laws that protect workers from safety and health hazards in the workplace are a component of California's system of workers' compensation within the meaning of article XIV, section 4, of the California Constitution.[29] (*Bautista v. State of California* (2011) 201 Cal.App.4th 716, 726 [provision for 'securing safety in places of employment' is part of constitutionally defined system of workers' compensation].) Article XIV, section 4, of the California Constitution provides, in relevant part:

> The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to

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[28] As the *amicus* brief of the California Association of District Attorneys points out at p. 9, the court of appeal's analysis would "preempt state tort laws if an injury occurs in the workplace, as well as criminal laws if the crime occurs in the workplace." Such a result is contrary to the findings of other courts who have uniformly held that state tort and criminal laws are not preempted by the OSH Act. (*See* discussion at pp. 14-15 and fn. 19, *supra*.)

[29] No party to the case has discussed the history of California safety and health laws and their relationship to the California workers' compensation system. The Court, nonetheless, has discretion to consider this information, especially when the disputed issue has a broader impact on state laws and regulations. (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496 [court has discretion to consider new issues raised by amicus when issue is purely a question of law and involves important public policy questions]; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644 [parties may advance new theories on appeal when issue is a question of law and involves important public policy questions].)

> create, and enforce a complete system of workers' compensation, by appropriate legislation....A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers...; also full provision for securing safety in places of employment;...

California's Constitution thus defines a complete system of workers' compensation, to include a "full provision for securing safety in places of employment[.]" (Art. XIV, § 4.) Article XIV, section 4, of the California Constitution also specifically authorizes the Legislature to pass laws that secure safety in places of employment. From this constitutional grant of authority, the California Legislature has enacted occupational health and safety laws.[30] (*See* Cal. Lab. Code, § 6300, *et seq.*; *Bautista v. State, supra,* 201 Cal.App.4th at 725; *see also Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719, [discussing history of constitutional amendments and legislation confirming Legislature's plenary power to enact a system of laws securing safety in places of employment as an integral part of the workers' compensation system].)[31]

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[30] The Legislature has consistently used this constitutional grant of plenary power to enact various laws governing workplace safety and health, even before the passage of the California Occupational Safety and Health Act of 1973. One such example is the legislation creating the Division of Industrial Safety within DIR to regulate occupational safety and health standards. All powers, duties, purposes, responsibilities and jurisdiction of the Division of Industrial Safety later were later transferred to DOSH. (Cal. Lab. Code, § 60(b).)

[31] This constitutional grant of authority to make laws protecting worker safety and health was affirmed in 1988, when California voters approved Proposition 97. Proposition 97 restored the California state plan after the then-Governor took action to withdraw the state plan and to reduce DOSH's funding in 1987. (*See California Lab. Fed'n v. Occupational Safety & Health Stds. Bd.* (1990) 221 Cal.App.3d 1547, 1552-53, 271

Section 4(b)(4) savings clause expressly states the OSH Act does not "supersede or in any manner affect any workmen's compensation law..." (29 U.S.C.A. § 653(b)(4).) When viewed in the proper historical context of the California Legislature's exercise of its plenary power under Article XIV, section 4, and as explained below, it is clear both that the Legislature's enactment of Labor Code section 6315(g) (the law pursuant to which DIR referred the results of its investigation of the underlying workplace fatalities to the Orange County District Attorney for "appropriate action") and the district attorney's UCL action against the employer (for violating California's workplace safety laws) fall within the mandate to create workplace safety laws as an integral part of the "complete system" of workers' compensation under Article XIV, section 4 of the California Constitution.

In Labor Code section 6315, the Legislature created a specific unit in the approved state plan enforcement program called the Bureau of Investigations ("BOI").[32] The BOI has the express statutory mandate to direct accident investigations involving a workplace fatality. In any case

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Cal.Rptr. 310 [discussing Prop. 97].) The preamble to Proposition 97 states, in relevant part:

> It is the purpose of this Act to restore California control over private sector safety and health, which the state has provided for since 1913, and has administered since 1973 through Cal/OSHA. Pursuant to Article XIV, Section 4, of the California Constitution, state jurisdiction over worker safety and health should not be limited, eliminated or otherwise restricted, unless absolutely required by the Federal Constitution. (*Ibid.* quoting Prop. 97, § 1, subd. (10).)

[32] There is no federal OSH Act counterpart to BOI.

where the Bureau is required to conduct an investigation and there is a serious injury or death,

> ...the results of investigation shall be referred in a timely manner by the bureau to the appropriate prosecuting authority having jurisdiction for appropriate action, unless the bureau determines that there is legally insufficient evidence of a violation of law. (Cal. Lab. Code, § 6315(g).)

This section required BOI to refer the results of its investigation of the workplace deaths to the Orange County District Attorney for "appropriate action." Section 6315 is part of the original implementing legislation, the California Occupational Safety and Health Act of 1973, which was approved and certified by the Secretary of Labor as part of the state plan. (29 C.F.R. § 1952.174(p).)

Labor Code section 6315(g) is also an exercise of the state's plenary authority under the California Constitution to adopt "full provision for securing safety in employment" as part of the "...complete system of workers' compensation." The UCL action brought by the district attorney in this case seeking additional civil penalties against the employer is an "appropriate action" contemplated by section 6315(g). Indeed, that the Legislature contemplated the use of UCL to penalize unfair competition arising out of violations of workplace safety laws prior to the enactment of section 6315 is supported by UCL's legislative history.[33] This Court

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[33] On June 18, 2014, this Court remanded the case to the *Solus* court of appeal to reconsider its ruling "...in light of Statutes 1972, chapter 1084, pp. 2020-2021 [statute in effect when California's plan was approved, providing for the imposition of similar penalties based on acts of unfair competition]." (*Solus Indus. Innovations v. S.C.*, 326 P.3d 267 (Cal. 2014).) On remand, the *Solus* court of appeal again concluded that there "is no basis to infer that reliance on the UCL, in its current form, could have been contemplated by the Secretary as part of the initial decision approving California's plan." (*Solus, supra,* 178 Cal.Rptr.3d at 130.) The *Solus* Court

summarized the relevant history in *Barquis v. Merchants Collection Association of Oakland, Inc.* (1972) 7 Cal. 3d 94, 112-13:

> As originally enacted in 1933, section 3369 defined "unfair competition" only in terms of "unfair or fraudulent business practice[s]"; most of the reported cases, dealing in deceptive conduct, arose under the statute as so worded. In 1963, however, the Legislature amended section 3369 to add the word "unlawful" to the types of wrongful business conduct that could be enjoined. Although the legislative history of this amendment is not particularly instructive, nevertheless, as one commentator has noted "it is difficult to see any other purpose than to extend the meaning of unfair competition to anything that can properly be called a business practice and that at the same time is forbidden by law." (Note, *Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition* (1968) 19 Hastings L.J. 398, 408-409.)[34]

Moreover, contrary to Petitioners' insistence that BOI's referrals to the district attorney "must necessarily be for criminal prosecution," (Petitioners' Answering Brief at p. 21), Labor Code section 6315(g) does not mention "criminal prosecution." Notably, although the word "criminal" appears three times in section 6315, (*see* Cal. Lab. Code, §§ 6315(a), (d),

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of Appeal's inquiry differs from the one presented here, which is whether California's Legislature, when it enacted Labor Code section 6315, could have contemplated the UCL action as an "appropriate action" once BOI made its mandatory referral to the district attorney.

[34] In interpreting the meaning of "unfair competition," even before the passage of Labor Code section 6315, courts have viewed the legislative intent to be "inclusive rather than restrictive" and requiring a broad interpretation of the types of conduct that constitute unfair competition. (*See, e.g., People ex rel. Mosk v. Nat'l Research Co. of Cal.* (1962) 201 Cal. App.2d 765, 771, 20 Cal. Rptr. 516 ("The very breadth of the terms used by the Legislature [in defining unfair competition] indicate, in our judgment, an intent to be inclusive rather than restrictive in the practices to be enjoined."].)

and (i)), it does not appear anywhere in subsection (g). Instead, section 6315(g) mandates that the referral be made for "appropriate action." Had the Legislature so intended to limit the authority of the "appropriate prosecuting authority" to "criminal action," rather than "appropriate action," it certainly could have done so. (*See, e.g., People v. Robinson* (2010) 47 Cal.4th 1104, 1138, 104 Cal.Rptr.3d 727, 224 P.3d 55 [courts must look to the statute's words and give them their usual and ordinary meaning, and plain language of statute controls]; *People v. Loeun* (1997) 17 Cal.4th 1, 9, 69 Cal.Rptr.2d 776, 947 P.2d 1313 ["In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law"] (citation omitted).")[35]

Thus, "appropriate action" includes a UCL action under Business and Professions Code section 17206, subdivision (a), which the court of appeal noted may only be brought by public prosecutors. (*See Solus, supra,* 178 Cal.Rptr.3d at 134; *see also* Cal. Bus. & Prof. Code § 17206(a) [civil penalties "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, by any district attorney, by any county counsel ... or ... by a city prosecutor"].) The UCL action in this case is, then, both a valid exercise of the state's inherent police powers (to impose additional criminal or civil liability for serious worker injuries, illnesses, or death on culpable employers who violate state workplace safety laws) and plenary authority under the

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[35] Indeed, the wording "appropriate action" is a "general choice of wording, suggesting that interpretation should favor inclusion rather than exclusion in the close case." (*Cf. Williams v. MacFrugal's Bargains - Close Outs, Inc.* (1998) 67 Cal.App.4th 479, 482, 79 Cal. Rptr. 2d 98, 100 (discussing the word "related") (citation omitted).)

California constitution "to enact a complete system of workers' compensation."

Under section 4(b)(4) savings clause, the OSH Act cannot "supersede or in any manner affect any workmen's compensation law." Since DIR's referral of the BOI investigation to the district attorney for "appropriate action" was mandated by Labor Code section 6315(g), which in turn was enacted by the California Legislature under the constitutional mandate to create a "complete system" of workers compensation, the "appropriate action" taken by the prosecutor pursuant to section 6315(g) cannot be preempted by the OSH Act.

F. THE DECISION BELOW IS CONTRARY TO THE EXISTING FRAMEWORK USED BY THE SECRETARY OF LABOR TO EVALUATE AND MONITOR THE APPROVED STATE PLAN.

The court of appeal's decision is so far-reaching and broad that it would require California to obtain an affirmative approval, in the form of a state plan change, from the Secretary of Labor for every state law, including UCL, that may touch on workplace safety and health. This absurd result is contrary to the framework which has been used by the Secretary of Labor to monitor, audit, and fund the enforcement activities (including BOI investigation and referral work resulting in the UCL filings of state prosecutors) of California's approved state plan for nearly forty years.

1. The Secretary of Labor has Long Been Monitoring, Auditing, and Funding BOI's Investigation and Referral Practices That Result in UCL Filings by State Prosecutors.

As an approved state plan within the meaning of section 18(c) of the OSH Act, California's state plan is continually evaluated and monitored by

the Assistant Secretary of Labor (29 U.S.C.A. § 667(f).). The state plan must submit written quarterly and annual reports about its operation to the Assistant Secretary through the Regional OSHA office. (29 C.F.R. § 1954.10.) These reports specifically include data concerning the outcome of BOI referrals made to state prosecutors pursuant to section 6315(g). (29 C.F.R. § 1902.44(a).) In addition, a representative of the Assistant Secretary must personally visit DIR at least every six months and perform periodic audits, including enforcement case file reviews. (29 C.F.R. § 1954.11.) This federal framework for monitoring the approved California state plan has been operating for forty years.

Further, as an approved state plan, California is required to re-apply annually for federal OSHA grant funds that support the enforcement program in the state. California's applications for this funding must account for the investigation and referral work performed by BOI. These grant applications have been approved by the Secretary through the annual grant application process without exception since the state plan became operational in 1973.

2. A Prosecutor's Filing of a UCL Action Against the Employer Cannot Constitute a "Plan Change" of the Approved State Plan.

As discussed on p. 23, *supra,* California's approved state plan includes Labor Code section 6315(g)'s mandate for BOI to refer the results of its investigation to the district attorney for "appropriate action." Since BOI began referring cases to state prosecutors under section 6315(g), the Secretary of Labor has received information concerning UCL civil suits resulting from BOI referrals. (*See, e.g.*, Exhibits A, B, and C to the Request for Judicial Notice filed concurrently with this brief.)

Thus, it is clear that the Secretary of Labor has known of UCL civil actions filed by state prosecutors and of the judgments rendered by California courts against such employers. In the face of this long-standing knowledge, the Secretary of Labor has never disapproved, objected, threatened to withdraw approval of the state plan or otherwise taken any adverse action on the state plan for state prosecutors' filing of UCL actions against employers. Such an activity cannot, therefore, constitute a "plan change."

3. Even Assuming *Arguendo* That District Attorney's UCL Civil Action Constitutes a "Plan Change," California Properly Exercised its Authority to Initiate UCL Actions.

Even if a district attorney's filing of a UCL action against an employer could constitute a "plan change," the OSH Act and its implementing regulations would not require a written approval for such a change from the Secretary of Labor. Current OSHA regulation states that no prior approval of standards or plan changes is required for an approved state plan. It states:[36]

> (a) Effectiveness of State plan changes under State law. 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*

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[36] These regulations adopted the holding of *Florida Citrus Packers v. State of Cal., Dep't of Indus. Relations, Div. of Occupational Safety & Health*, 545 F.Supp. 216, 219 (N.D. Cal.) *supplemented sub nom. Florida Citrus Packers v. State of Cal.*, 549 F.Supp. 213 (N.D. Cal. 1982):

> [P]reenforcement federal approval of state modification to an approved plan is *not* required by the Act. (emphasis in original).

> *contained in its plan, and may implement such requirements under State law, without prior approval of the plan 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 then be excluded from the State's Federally-approved plan.

(29 C.F.R. § 1953.3.) (emphasis added.)

The OSH Act regulations further require the state to provide the OSHA representative with written notice when the state "makes a change to its legislation, regulations, standards, or major changes to policies or procedures, which affect the operation of the State plan."[37] (29 C.F.R. § 1953.3(b).) The state is also required to submit a formal plan supplement when the plan change "differs from a corresponding federal program component." (*Ibid.*) Here, Labor Code section 6315(g)'s mandate that the BOI refer cases to prosecutors for "appropriate action" has been a component of the California state plan since it was implemented forty years ago.[38] As well, there is no corresponding federal program component or standard for Labor Code section 6315(g).

Section 1953.3(a) of Title 29, Code of Federal Regulations, quoted at p. 29, *supra*, states that the OSH Act and regulations expressly authorize the Secretary of Labor to take action when necessary to stop a state plan from continuing to implement a state standard, a program or a change that

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[37] California provides OSHA with written notice of statutory changes that may be related to the state plan as part of the annual state reporting requirements in the form of a summary of recently enacted legislation.

[38] As originally enacted, Labor Code section 6315(e) provided: "In any case where the bureau is required to conduct an investigation, and in which there is a serious injury or death, the results of the investigation *shall be referred* by the bureau to the city attorney or district attorney having jurisdiction *for appropriate action.*" (Stats. 1973, Ch. 993, § 70) (emphases added.)

fails to meet the minimums established by the OSH Act, program, standards or otherwise interferes with the effectiveness of the approved state plan. The Secretary of Labor has taken no action to disapprove of any activities related to the state prosecutors' filing of UCL actions against employers.

V. CONCLUSION

For the foregoing reasons, the Court is urged to reverse the Court of Appeal's ruling and find that the federal Occupational Safety and Health Act does not preempt the effort by a district attorney to recover civil penalties under California's Unfair Competition Law based on an employer's violation of state workplace safety regulations which resulted in deaths of two employees.

Respectfully submitted,

By: _____

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VI. CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(3) of the California Rules of Court, I hereby certify that, according to the word count executed by MS Word, the program used to write this AMICUS CURIAE BRIEF, the brief consists of 9053 words in length.

Respectfully submitted,

By: _____

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VII. REQUEST TO APPEAR AND ARGUE

Pursuant to Rule 8.524 of the California Rules of Court, DIR also requests permission to appear at the argument of this cause and be allotted 10 minutes of time for argument. If this request is granted, and Respondent concurs, DIR will file its request to divide oral argument among multiple counsel within 10 days after the date of the order setting the case for argument.

Respectfully submitted,

By: 

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Attorneys for *Amicus Curiae*,
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VIII. PROOF OF SERVICE

I, the undersigned, declare the following:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action. My place of employment and business address is 1515 Clay Street, Suite 701, Oakland, CA 94612. On July 17, 2015, I caused service of the attached:

1. **STATE OSHA PLAN ADMINISTRATOR'S *AMICUS CURIAE* BRIEF; AND**

2. **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF THEIR AMICUS BRIEF; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF SUZANNE P. MARRIA; PROPOSED ORDER**

SERVICE LIST ATTACHED

on the interested party or parties in said action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

(X) **BY COURIER SERVICE: (A)** By giving the document listed to a courier service for hand delivery to the Clerk of the Supreme Court ***only***)

(X) **BY MAIL: (B)** By placing on this above date a true copy of the document(s) listed above as addressed above for collection and mailing, in the course of ordinary business practice, with other correspondence of DOSH Legal Unit and the Department of Industrial Relations located at 1515 Clay Street, Oakland, California enclosed in a sealed envelope, with the postage fully prepaid. I am familiar with the practice of the Office of the Director – Legal Unit and the Department of Industrial Relations for collection, processing, and depositing mail with the United States Postal

Service. It is the practice that correspondence is deposited with the United States Postal Service in Oakland, California, the same day it is submitted for mailing.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on July 17, 2015 at Oakland, California.

REGINA SCHNEIDER

SERVICE LIST

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