No. S222314

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOLUS INDUSTRIAL INNOVATIONS, LLC; EMERSON POWER TRANSMISSION CORPORATION; and EMERSON ELECTRIC CO.,

Petitioners,

v.

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

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Parties in Interest.

Appeal from a Published Opinion of the Court of Appeal, Fourth Appellate District, Division 3, No. G047661

From the Superior Court, County of Orange
Civil Case No. 30-2012-00581868-CU-MC-CXC
The Honorable Kim G. Dunning, Department CX104

COMBINED RESPONSE TO BRIEFS OF AMICI CURIAE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS AND DIVISION OF OCCUPATIONAL SAFETY AND HEALTH AND CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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I. INTRODUCTION

The California Department of Industrial Relations and the California Division of Occupational Safety and Health Act (collectively, "Cal/OSHA") and the California District Attorneys Association ("CDAA") have submitted separate amicus curiae briefs. Respondents Solus Industrial Innovations, LLC, Emerson Power Transmission Corporation, and Emerson Electric Co. ("Solus") hereby respond to both briefs.

Neither brief provides any reason for the Court to reverse the decision of the Court of Appeal. Indeed, both briefs *confirm* three fundamental points supporting that court's decision:

1. Both briefs confirm that the Orange County District Attorney (as well as other district attorneys) is attempting to use Business and Professions Code sections 17200 and 17500 as a method of enforcing California's worker safety program.
2. Both briefs confirm that enforcement of worker safety standards by original civil actions through either of these provisions is not part of California's state worker safety plan.
3. Both briefs confirm that California's worker safety plan does not provide for enforcement of worker safety standards through original civil actions filed in the superior courts.

Given these three points, the conclusion necessarily follows that the federal Occupational Safety and Health Act (the "OSH Act") preempts Business

and Professions Code sections 17200 and 17500 as they are being used by the Orange County District Attorney in this matter. The Court should therefore affirm the decision of the Court of Appeal.

II. THE FEDERAL OSH ACT PREEMPTS ALL STATE LAWS REGULATING WORKPLACE SAFETY UNLESS THOSE LAWS, INCLUDING THE METHOD OF ENFORCEMENT, HAVE BEEN INCORPORATED IN THE APPROVED STATE PLAN

In considering the arguments made in the amicus briefs at issue, it is helpful to keep in mind the simple analysis that leads to the conclusion that the challenged statutes are preempted to the extent that they are being used to enforce worker safety regulations.

In *Gade v. National Solid Wastes Management Association* (1992) 505 U.S. 88, 102 (*Gade*), the U.S. Supreme Court held that Congress enacted the OSH Act "to promote occupational safety and health while at the same time avoiding duplicative, and possibly counterproductive, regulation." To achieve these goals, the OSH Act "established a system of uniform federal occupational health and safety standards, but gave States the option of pre-empting federal regulations by developing their own occupational safety and health programs." (*Ibid.*)

The OSH Act, however, provides that any state plan for the development and enforcement of workplace safety standards must be submitted for approval by the U.S. Secretary of Labor:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(29 U.S.C. § 667(b).) Accordingly, the U.S. Supreme Court concluded that "the OSH Act precludes any state regulation of an occupational safety or health issue with respect to which a federal standard has been established, unless a state plan has been submitted and approved" by the U.S. Secretary of Labor. (*Gade, supra,* 505 U.S. at p. 102.)

The Supreme Court also noted that the scope of this preemption includes any state law that "'interferes with the methods by which the federal statute was designed to reach th[at] goal.' [Citation.]" (*Gade, supra,* 505 U.S. at p. 103.) Accordingly, "States are not permitted to assume an enforcement role without the Secretary's approval . . . ." (*Id.* at p. 101.)

California submitted its workplace safety plan to the U.S. Secretary of Labor, who approved that plan. (29 C.F.R. § 1952.170 *et seq.* [subpart K].) The California workplace safety plan does not include enforcement by local prosecutors through civil penalties actions brought under either Business and Professions Code section 17200 (the "Unfair Competition Law" or "UCL") or Business and Professions Code section 17500 (the

"False Advertising Law" or "FAL"). (See 29 C.F.R. § 1952.170(a); see generally 29 C.F.R. § 1952, subpart K.) Instead, California's worker safety plan calls for enforcement by Cal/OSHA, with administrative adjudications entrusted to the California Occupational Safety and Health Appeals Board:

> The State's program will be enforced by the Division of Industrial Safety of the Department of Industrial Relations of the California Agriculture and Services Agency. . . . Administrative adjudications will be the responsibility of the California Occupational Safety and Health Appeals Board.

(29 C.F.R. § 1952.170(a).)

Cal/OSHA's own amicus brief makes this very point. In describing its role in Part II of its brief, Cal/OSHA states that its Chief is "the officer responsible for enforcement of California occupational safety and health laws and regulations at workplaces throughout the State." (Cal/OSHA Amicus Curiae Brief ("Cal/OSHA Am. Br.") at pp. 1-2.) This is exactly the role Cal/OSHA has been assigned by statute. No enforcement role was assigned to local prosecutors.

In addition, the California Legislature specifically provided that only Cal/OSHA may seek civil penalties for violation of the regulations at issue: "The division [i.e., Cal/OSHA] may impose a civil penalty against an employer as specified in Chapter 4 (commencing with Section 6423) of this part." (Lab. Code, § 6317.) Nothing in the statutory scheme—or in the state plan— permits local prosecutors to impose such civil penalties.

Nevertheless, the Orange County District Attorney is attempting to use the UCL and FAL to enforce worker safety standards. The complaint alleges as a matter of fact only violations of various sections of the Labor Code and the regulations thereunder. (A14-17.) It contains no factual allegations of any separate act that might constitute unfair competition or false advertising. The District Attorney is simply attempting to enforce the Labor Code sections and regulations through UCL and FAL claims filed as original actions in the superior court.

Indeed, the Occupational Safety and Health Administration ("OSHA") makes it crystal clear on its website that penalties as well as substantive plan provisions are subject to the agency's approval. The OSHA website (<https://www.osha.gov/dcsp/osp/> [as of Aug. 20, 2015]) has a page of Frequently Asked Questions that includes the question "Can State Plans Impose Higher Fines or Stricter Penalties than OSHA?" In response to that question, OSHA states that such higher fines and stricter penalties are permitted but then adds: "All State Plan policies and procedures related to penalties **must be submitted and reviewed by OSHA.**" (Emphasis added.)

In other words, OSHA expects that "policies and procedures related to penalties" must be submitted for its approval. Original civil penalties actions by local prosecutors under the UCL and the FAL are clearly "policies and procedures related to penalties." Indeed, such actions have

the potential to make significant, if not radical, changes to the enforcement scheme in the approved plan. Yet California has concededly not submitted any proposal for adding such civil penalties actions to the state enforcement program.

Because California's worker safety plan does not provide for enforcement through original civil actions brought by the district attorneys, such actions under the UCL and FAL are preempted by the OSH Act.

III. CAL/OSHA'S SELF-CONTRADICTORY BRIEF DOES NOT PROVIDE ANY COGENT REASON FOR REVERSING THE DECISION OF THE COURT OF APPEAL

In its amicus brief, Cal/OSHA argues variously that the federal OSH Act does not preempt the Orange County District Attorney's use of the UCL and FAL in this instance because (a) the UCL[1] is not being used to enforce an occupational health or safety standard; (b) the UCL is a law of general application; (c) the UCL falls under the savings clause of the OSH Act; (d) the District Attorney is using the UCL as part of California's workers' compensation system; (e) the UCL is already part of the California worker safety plan approved by the U.S. Secretary of Labor; and/or (f) the UCL is already part of the California plan and may be enforced pending approval by the Secretary of Labor.

[1] Hereinafter, references to the UCL also refer to the FAL.

To a great extent, these arguments are mutually self-contradictory. If actions by local prosecutors brought under the UCL *are* part of California's worker safety plan (whether approved or not), then arguments (a) through (d) are entirely irrelevant. If such actions are *not* part of California's worker safety plan, then arguments (e) and (f) are meritless.

In fact, civil penalties actions under the UCL are *not* part of California's worker safety plan. But such an action is being used in this case precisely to enforce worker safety standards. It is therefore preempted by the federal OSH Act.

A. As Applied in This Matter, the UCL and FAL Are Not Being Used as Laws of General Applicability

Cal/OSHA first argues that the UCL escapes preemption under the OSH Act as a "law of general applicability." (Cal/OSHA Am. Br. at pp. 8-14.) That argument is without merit. The District Attorney is using the UCL to enforce worker safety standards. This runs afoul of the preemptive effect of the OSH Act.

First, as a matter of fact there can be no doubt that the Orange County District Attorney is seeking to use the UCL as a means of enforcing California's worker safety standards. The complaint in this matter rests entirely on factual allegations about worker safety standards—not about unfair competition or false advertising. (See A14-17.) The very fact that Cal/OSHA has submitted an amicus brief is an acknowledgment of

the obvious—this case is about enforcing workplace safety standards and not about preventing unfair competition or false advertising. (See Cal/OSHA Am. Br. at 2 ["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," italics added].)

And that is necessarily the case, as the UCL does not itself set any standards for conduct. Instead, as this Court has previously explained, the UCL "borrows violations of other laws and treats them as unlawful practices that the [UCL] makes *independently* actionable." (*Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 396 (*Rose*), internal quotation marks and citations omitted.)

Cal/OSHA makes much of this Court's statement in *Rose* that "a UCL action does not 'enforce' the law on which a claim of unlawful business practice is based." (*Rose, supra,* 57 Cal.4th at p. 396.) But in *Rose* the defendant specifically did *not* raise a preemption argument. (*Id.* at p. 395 ["The Bank responds that considerations of preemption are irrelevant, and instead frames the issue as one of congressional intent to disallow private enforcement of [the federal Truth in Savings Act]."].) Accordingly, *Rose* does not support the argument that the UCL permits a plaintiff to avoid federal preemption by simply redesignating an otherwise preempted claim as a UCL claim.

Indeed, the UCL cannot so easily trump the Supremacy Clause of the U.S. Constitution. If the UCL had that power, the doctrine of federal preemption would effectively cease to exist. For example, the federal courts have exclusive jurisdiction over copyright and patent claims. But, on Cal/OSHA's theory, a plaintiff could prosecute a patent or copyright claim in California state court simply by designating it as a claim under the UCL and then arguing that the lawsuit is not "'enforc[in]g' the law on which [the UCL claim] is based." (See *Rose, supra,* 57 Cal.4th at p. 396.) Nothing suggests that the UCL provides such a potent get-out-of-preemption-free card.

The courts routinely hold that a plaintiff cannot circumvent preemption by recasting a preempted claim as a claim under the UCL. Thus, this Court held that the federal Highway Beautification Act preempts the UCL. (*People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co. of Cal.* (1985) 38 Cal.3d 509, 523.) The Court of Appeal held that a federal regulation adopted under the Home Owners' Loan Act preempted a state law claim under the UCL. (*Washington Mutual Bank, FA v. Superior Court* (2002) 95 Cal.App.4th 606, 612, 621.) The Ninth Circuit held that the Copyright Act completely preempts any attempt to use the UCL as a surrogate for a copyright claim. (*Kodadek v. MTV Networks, Inc.* (9th Cir. 1998) 152 F.3d 1209, 1213.) Similarly, a U.S. district court held that federal bankruptcy law preempts a UCL action claiming malicious

prosecution in bankruptcy. (*Rogers v. NationsCredit Financial Services Corp.* (Bankr. N.D.Cal. 1999) 233 B.R. 98, 110.) Another U.S. district court held in *Vega v. JPMorgan Chase Bank, N.A.* (E.D.Cal. 2009) 654 F.Supp.2d 1104, 1117-1118, that a plaintiff could not sue a national bank under the UCL for alleged violations of federal laws such as the Truth in Lending Act. That court explained that a plaintiff may not '"plead around an absolute bar to relief simply by recasting the cause of action as one for unfair competition.'" (*Id.* at p. 1118, quoting *Chabner v. United of Omaha Life Ins. Co.* (9th Cir. 2000) 225 F.3d 1042, 1048.)

Cal/OSHA proclaims that the UCL "is a consumer protection law that neither contains any mention of workplace safety nor is directed at workplace safety." (Cal/OSHA Am. Br. at p. 12.) Similarly, the UCL has no mention of copyrights, patents, national banking or a range of other topics where state claims are preempted because of the effect of a federal statute. But this does not mean that a plaintiff can sue in state court for copyright infringement under the guise of a UCL claim and then argue that the UCL is a "law of general applicability" not subject to preemption (Cal/OSHA Am. Br. at p. 11-12) or "an independent cause of action [and] not an enforcement mechanism" (*id.* at p. 10) for copyright law. The courts have uniformly seen through this smokescreen.

The approach to the UCL taken by the cases cited above adheres to the U.S. Supreme Court's teaching in *Gade* that, in conducting a

preemption analysis, a court must consider the "practical impact" of a state law:

> "[W]hen considering the purpose of a challenged statute, this Court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law."

(*Gade, supra,* 505 U.S. at p. 106, quoting *Hughes v. Oklahoma* (1979) 441 U.S. 322, 336; see also *Gade,* at p. 105 ["In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law."].)

Here, the complaint rests precisely on allegations of violations of California's approved worker safety plan. Permitting local prosecutors to bring UCL or FAL actions against employers where the gravamen of the allegations is the violation of workplace safety regulations would have the "practical impact" of enforcing those regulations. But enforcement in this manner would disrupt the enforcement program established under California's approved state plan. The approved plan calls for enforcement through agency action—not through civil actions in the superior courts. (Compare 29 C.F.R. § 1952.170(a) with Bus. & Prof. Code, § 17206, subd. (a).) The approved plan calls for designated penalties—penalties that UCL actions would far exceed. (Compare Lab. Code, §§ 6319, 6427, 6428,

6429, 6430, subd. (a) [identifying potential penalties through administrative action] with Bus. & Prof. Code, § 17206 [providing for penalties up to $2,500 per day].) The approved plan calls for administrative citations to be issued within six months months—and not merely commenced within the four-year limitations period applicable to UCL claims. (Compare Lab. Code, § 6317 [period for issuing administrative citations] with Bus. & Prof. Code, § 17208 [UCL limitations period].) Indeed, as we have seen (Part II above), OSHA itself states on its official website that "[a]ll State Plan policies and procedures related to penalties **must be submitted**" to that agency for its approval. (Emphasis added.) Yet, as all parties acknowledge, the policy of permitting local prosecutors to bring UCL and FAL actions as an adjunct to Cal/OSHA's enforcement powers has never been submitted to OSHA for incorporation in the state plan, let alone received agency approval.

In short, in this matter the "practical impact" of permitting prosecutors to bring UCL and FAL actions would be to enforce California's worker safety laws in a manner contrary to that set out in its worker safety plan. Accordingly, this application of the UCL and FAL is preempted by the OSH Act.

B. The OSH Act's Savings Clause Has No Effect Here Because the UCL and FAL Are Enforcing Only Worker Safety Standards, Which Must Be Enforced in Accordance with California's Worker Safety Program

Cal/OSHA argues further that the OSH Act does not preempt the UCL or the FAL because those statutes fall within the OSH Act's savings clause, 29 U.S.C. § 653(b)(4). (Cal/OSHA Am. Br. at pp. 14-20.) That argument fails for precisely the same reason that the "law of general applicability" argument fails: when judged by "practical impact," as the law requires, the policy of permitting local prosecutors to bring UCL and FAL actions does not fall within the scope of the savings clause, but instead functions to enforce California's worker safety program in a manner inconsistent with the California plan.

The OSH Act's savings clause provides as follows:

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

(29 U.S.C. § 653(b)(4).)

To begin with, Cal/OSHA's suggestion that UCL and FAL actions are covered by the savings clause is undercut by Cal/OSHA's own characterization of the UCL and FAL in its amicus brief. The savings

clause, by its terms, saves "statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." (29 U.S.C. § 653(b)(4).) But, according to Cal/OSHA, the UCL "is a consumer protection law that neither contains any mention of workplace safety nor is directed at workplace safety." (Cal/OSHA Am. Br. at p. 12.) If that is the case, the UCL is not a statute that says anything about the rights, duties or liabilities of employers and employees regarding workplace injuries, diseases or death. Therefore, if Cal/OSHA means what it says about the UCL, the UCL could not possibly be covered by the savings clause.

Beyond this, it is also clear that the savings clause does not immediately immunize any state law. Instead, the Court must conduct a preemption analysis—and in conducting that analysis, the Court must identify the "practical impact" of that law. (See *Gade, supra,* 505 U.S. at p. 106.) As discussed above, in this case a civil penalties action brought by a local prosecutor under the UCL and the FAL is being used solely to enforce worker safety standards. The complaint identifies *only* violations of worker safety standards and nowhere identifies any other wrongful conduct.

Cal/OSHA argues that criminal prosecutions and private tort actions have historically been seen as covered by the savings clause. (Cal/OSHA

Am. Br. at pp. 14-15.) Of course, the action involved here is neither a criminal prosecution nor a private tort action, so Cal/OSHA's argument is of marginal relevance.

In any case, there is no need for a savings clause analysis regarding criminal actions in California, as the state plan expressly contemplates referral of serious cases by Cal/OSHA's Bureau of Investigations to local prosecutors for criminal prosecution. (Lab. Code, § 6315, subd. (g).)[2] As for private causes of action, whether they are covered by the savings clause is beside the point here, because by definition such cases are brought by private parties as opposed to the state. All Solus is saying here is that actions brought by arms of the state to enforce workplace safety violations can be pursued only to the extent contemplated and approved by the state plan. Civil penalties actions brought by local prosecutors are not part of the state plan. To say that the savings clause can "save" an enforcement mechanism for workplace safety violations from the rigors of the OSHA approval process would be to gut the carefully-considered scheme under which states must seek plan approval—for penalty procedures as well as for substantive provisions— and then limit their enforcement activities to those reflected in the approved plan.

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[2] In the other writ proceeding arising from the case below—*People v. Superior Court* (2014) 224 Cal.App.4th 33, 44-45 (*Solus I*), review denied—the Court of Appeal held that Labor Code section 6315, subdivision (g) was not a grant of standing to district attorneys to bring civil actions, as opposed to criminal prosecutions.

Cal/OSHA next refers to the Court of Appeal's statement that the District Attorney's UCL claim here is "'expressly intended to *penalize* a party for past misconduct.'" (Cal/OSHA Am. Br. at p. 17, quoting *Solus Industrial Innovations, LLC v. Superior Court* (2014) 229 Cal.App.4th 1291, 1308, review granted.) From this, Cal/OSHA goes on to argue that, as a penalty statute, the UCL is akin to criminal sanctions and punitive damages in tort actions and is therefore covered by the savings clause. (Cal/OSHA Am. Br. at pp. 17-20.)

But branding a statute "penal" in nature does not save the statute from preemption. Whether the statute is considered penal or not, if it is used by a state instrumentality or agency to pursue workplace safety violations, that use has to be approved by OSHA and incorporated into the state plan.

Cal/OSHA also raises the specter that, if the Court of Appeal's ruling is upheld, then California would have to seek a plan change from the Secretary of Labor "for every state law, including UCL, that may touch on workplace safety and health." (Cal/OSHA Am. Br. at p. 26; see also *id.* at p. 2 [the Court of Appeal's decision 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"].)

This alarm is completely warrantless. The issue here is a narrow one: whether local prosecutors can bring UCL and FAL actions to supplement Cal/OSHA's enforcement efforts for workplace safety violations where such actions are not part of the approved plan. The Secretary of Labor does not have to "approve" the UCL or any other statute that may incidentally touch on occupational safety and health. The only approval required is of the policy of permitting local prosecutors to bring UCL or FAL actions as part of the official workplace safety enforcement effort. As long as there is no involvement by the district attorneys as part of the official workplace safety enforcement program, no other statute, regulation or common law theory will in any way be affected by the ruling Solus is asking for here.

C. The Prosecutor's Use of the UCL and FAL Has Nothing to Do with the State's Workers Compensation System

Cal/OSHA has also offered the peculiar argument that the UCL and the FAL escape preemption because they are being applied as part of the state's workers' compensation program. (Cal/OSHA Am. Br. at pp. 20-26.) The argument is peculiar because, as Cal/OSHA effectively admits, even the Orange County District Attorney has not argued that this case has anything to do with California's workers' compensation program. (Cal/OSHA Am. Br. at p. 20, fn. 29.) Of course, the complaint in this matter alleges only violations of statutes and regulations that are part of

California's worker safety program. Given that the District Attorney has asserted only violations of the worker safety program, and not separate violations of the workers' compensation laws, there can be no merit to Cal/OSHA's argument in this regard.

The Court should also reject that argument because Cal/OSHA is attempting to raise an argument that has been foreclosed. Specifically, Cal/OSHA attempts to rely on Labor Code section 6315, subdivision (g) as authority for the district attorneys to bring civil actions to enforce the state's worker safety program. (Cal/OSHA Am. Br. at pp. 22-25.) But that argument is foreclosed by the Court of Appeal's *other* opinion relating to this matter. (See *Solus I, supra,* 224 Cal.App.4th 33.) In *Solus I,* the Court of Appeal held that the California Legislature did not authorize the district attorneys to file civil actions under Labor Code sections 6428 and 6429. (*Id.* at p. 43.) The court relied on prior decisions of this Court holding that '"a district attorney has no authority to prosecute civil actions absent *specific* legislative authorization."' (*Id.* at p. 41, quoting *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 753 & fn. 12.)

As *Solus I* makes clear, only the California Legislature can authorize a district attorney to file an original civil action. (See *Solus I, supra,* 224 Cal.App.4th at p. 41.) And *Solus I* also establishes that the California Legislature did not authorize the district attorneys to bring civil actions to enforce the worker safety standards at issue in this case. (*Id.* at pp. 40-45.)

This ruling is now the law of the case. (See *People v. Stanley* (1995) 10 Cal.4th 764, 786-787.) Accordingly, it is now beyond dispute that the California Legislature did *not* authorize the district attorneys to bring civil actions to enforce worker safety standards.

In short, Cal/OSHA's arguments regarding the "workers' compensation laws" have no connection with the actual complaint in this matter and are further foreclosed by the decision in *Solus I.* If there is anything else left of Cal/OSHA's argument on this point (and there does not appear to be), it is further foreclosed by the considerations set out above—that is, the fact that the District Attorney is attempting to use the UCL and the FAL to enforce worker safety standards in a manner not approved by the Secretary of Labor and not at all part of California's worker safety plan.

D. The California State Plan Does Not Provide for Enforcing California's Worker Safety Standards Through UCL Actions

As noted above, Cal/OSHA offers the self-contradictory arguments (a) that the UCL *is* part of the California worker safety plan and (b) that it *is not* part of the plan.

The UCL is in fact not part of California's worker safety plan, whether approved or otherwise. The UCL does not itself set forth any worker safety standards. And Cal/OSHA fails to cite a single statute or regulation providing for enforcement of California's actually existing

worker safety standards through UCL actions. Finally, as noted above, *Solus I* confirms that the California Legislature did not authorize the district attorneys to bring civil actions to enforce the worker safety standards at issue in this case. (*Solus I, supra,* 224 Cal.App.4th at pp. 40-45.)

Rather than relying on actual statutes or regulations, Cal/OSHA argues that the UCL is part of the approved California plan because the U.S. Secretary of Labor has known since 1982 that Cal/OSHA is using the UCL to enforce worker safety standards. (Cal/OSHA Am. Br. at pp. 26-28.)[3] But Cal/OSHA fails to explain how the Secretary of Labor can bestow on the district attorneys the authority to bring civil actions when the California Legislature has not done so. (*See Solus I, supra,* 224 Cal.App.4th at pp. 40-45.) Nor has Cal/OSHA suggested that there is any law supporting the notion that a state plan can be implicitly amended by the Secretary of Labor's alleged acquiescence in an enforcement practice that is not part of the plan.

Moreover, the Secretary of Labor has apparently never reached the conclusion for which Cal/OSHA argues. The applicable federal regulation still confirms that California's plan will be enforced by Cal/OSHA through agency actions, not civil actions:

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[3] The materials of which Cal/OSHA requests judicial notice fall far short of showing that the Secretary was in fact on notice of the fact that local prosecutors in California occasionally bring UCL and FAL actions in workplace safety cases. (Opp'n to Request for Judicial Notice of Amici Curiae Cal/OSHA at pp. 9-10.)

> The State's program will be enforced by the Division of Industrial Safety of the Department of Industrial Relations of the California Agriculture and Services Agency. . . . Administrative adjudications will be the responsibility of the California Occupational Safety and Health Appeals Board.

(29 C.F.R.§ 1952.170(a).)

And Cal/OSHA has not explained how to square its claim with the fact that the applicable federal regulation does *not* identify civil actions under the UCL as an approved enforcement tool. Presumably, had the Secretary of Labor in fact approved this approach, he or she would have amended the regulation at some time during the past three decades.

Further, contrary to Cal/OSHA's suggestion, the practice of filing UCL or FAL actions by local prosecutors is not part of California's enforcement plan pending approval by the Secretary of Labor. (See Cal/OSHA Am. Br. at pp. 28-30.) Cal/OSHA has not cited any statute, regulation, or other source of law showing that the State of California has ever submitted an enforcement plan containing these elements to the Secretary of Labor for approval. Nor has Cal/OSHA cited any statute, regulation, or other source of law showing that, before this date, the California Legislature or any other California state entity has ever considered actions by district attorneys under the UCL or the FAL to be part of the state's worker safety plan, whether approved or pending approval.

This is just an *ad hoc* argument advanced by Cal/OSHA to try to cover the plain fact that Cal/OSHA has never sought to amend the state plan by including a provision that would permit local prosecutors to bring UCL and FAL actions.

E. Cal/OSHA Has Asked the Court to Take Judicial Notice of a Document That Confirms Solus's Position in This Matter

Cal/OSHA's arguments are particularly startling given that Cal/OSHA has asked the Court to take judicial notice of a report from Cal/OSHA's BOI (the Cal/OSHA arm that investigates prospective criminal cases) that explicitly acknowledges the fact that Cal/OSHA stoutly denies in its amicus brief— that Cal/OSHA uses UCL actions brought by prosecutors to enforce worker safety standards. (See Request for Judicial Notice of Amici Curiae California Department of Industrial Relations and Division of Occupational Safety and Health filed herein July 23, 2015 ("RJN") and Ex. A thereto.) The core of Exhibit A is a BOI report dated September 2, 1982, about BOI's activities in the previous year. An entire section of this report is devoted to explaining why BOI decided to use UCL actions brought by district attorneys as an adjunct to Cal/OSHA's enforcement efforts. (See RJN, Ex. A at pp. 7-9.) That section expressly confirms that Cal/OSHA uses UCL actions filed by local prosecutors as a means of providing a more effective enforcement program. (RJN, Ex. A at p. 7 [heading].) Of course, it would be crystal clear even without these

admissions that the District Attorney's UCL action against Solus was brought to enforce California's workplace safety laws.

In its brief, Cal/OSHA takes pains to argue that the UCL is not an "enforcement mechanism" for the workplace safety regulations at issue here. (Cal/OSHA Am. Br. at pp. 9-11.) Cal/OSHA makes this argument in tacit acknowledgment that, if the UCL is an enforcement mechanism for those regulations, the use of the UCL by local prosecutors in workplace safety cases would require approval at the federal level. The BOI report which Cal/OSHA asks the Court to take judicial notice of confirms the fact that Cal/OSHA does indeed refer cases to local prosecutors for the filing of UCL actions as part of Cal/OSHA's enforcement program—even though such actions are not part of the California plan approved by the Secretary of Labor.

IV. THE AMICUS BRIEF OF THE CALIFORNIA DISTRICT ATTORNEYS' ASSOCIATION DOES NOT RAISE ANY ADDITIONAL ARGUMENTS

In its amicus brief, the CDAA raises essentially the same arguments offered by the Orange County District Attorney and Cal/OSHA. None of the CDAA's arguments has any merit.

A. The OSH Act Is Not a "Law of General Applicability"

The CDAA argues first that the UCL is a "law of general applicability" and thus not subject to preemption under the OSH Act. (Application for Request to File Amicus Curiae Brief and Amicus Curiae

Brief in Support of Real Parties in Interest the People of the State of California ("CDAA Am. Br.") at pp. 14-20.)

That argument fails for the same reasons that Cal/OSHA's argument on the same point fails. As shown in Part III.A above, a plaintiff cannot invoke a general statute like the UCL or the FAL, call it a "law of general applicability," and then argue that he can bring a preempted claim—whether arising out of copyright law, patent law or some other federal statutory framework that serves to preempt state claims—under the guise of the state statute. The Supremacy Clause bars this result. As also shown above, under *Gade,* a court must consider the "practical impact" of the state statute in making the preemption analysis. Here, the District Attorney's complaint under the UCL and the FAL is based exclusively on alleged breaches of the workplace safety regulations that Cal/OSHA has the authority to enforce. The "practical impact" of UCL and FAL civil penalties actions brought by district attorneys is clearly in aid of enforcement of the state worker safety program.

In this regard, the CDAA, like the District Attorney and Cal/OSHA, continually fails to grapple with the Supreme Court's explanation that the OSH Act preempts a state law if that law "'interferes with the *methods* by which the federal statute was designed to reach th[at] goal.' [Citation.]" (*Gade, supra,* 505 U.S. at p. 103, italics added; see also *id.* at p. 101 ["States are not permitted to assume an enforcement role without the

Secretary's approval . . . ."].) Here, the State, acting through the Orange County District Attorney, is using a state law that "interferes with the methods by which the federal statute was designed to reach [its] goal"—that is, the method of administrative enforcement through agency action.

B. The OSH Act's Savings Clause Does Not Apply

The CDAA reiterates much of Cal/OSHA's argument regarding the OSH Act's savings clause. (CDAA Am. Br. at pp. 20-21.) That argument fails for the same reasons that Cal/OSHA's argument failed.

First, like Cal/OSHA, the CDAA undercuts any argument about the applicability of the savings clause by the way it characterizes the UCL. As regards statutes, the savings clause applies only to statutory rights, duties and liabilities of employers and employees under any law with respect to injuries, diseases or death of the employee arising out of employment. (29 U.S.C. § 653(b)(4).) But the CDAA says in its brief that the UCL "is not an 'occupational safety and health' law at all." (CDAA Am. Br. at p. 14.) We are further told that the UCL claim in this case "is not an occupational health and safety standard or an attempt to enforce one." (CDAA Am. Br. at p. 19.) So if the UCL has nothing to do with workplace safety, how can it be "saved" by a clause limited to statutes that have a workplace safety nexus?

Beyond this, the "practical impact" of licensing local prosecutors to file UCL and FAL actions in workplace safety cases would be to enforce

California's worker safety plan. But permission to establish or implement such a program has never been sought from, or obtained by, the U.S. Secretary of Labor. Nor has the California Legislature weighed in on this approach. This is simply an *ad hoc* rationalization for an informal means of enforcement. If the State of California wants to use this means of enforcing its workplace safety regulations, then it should formally enact the statutes and adopt the regulations necessary to do so—and it should seek the Secretary of Labor's approval of this approach, just as it did in regard to Proposition 65. (See *California Lab. Federation v. Cal/OSHA* (1990) 221 Cal.App.3d 1547, 1558-1559; 62 Fed.Reg. 31159 (June 6, 1997) [Secretary of Labor's actions in reviewing and in approving in part Proposition 65].)

C. The OSH Act Preempts Local Prosecutors' Use of the UCL and the FAL Because They Are Enforcing Worker Safety Standards in a Manner Inconsistent with the Act

The CDAA also makes a somewhat unclear argument that the UCL is not preempted by the OSH Act "because the Secretary of Labor does not have the authority to promulgate unfair competition or consumer protection laws." (CDAA Am. Br. at p. 22.) But the complaint at issue contains no allegations of unfair competition or consumer protection. Thus, as explained above, the "practical impact" of permitting local prosecutors to bring UCL and FAL actions is necessarily to enforce worker safety standards.

The CDAA may also be claiming that no federal standards track the underlying state worker safety standards involved in this case and therefore there is no federal standard that can preempt the state standards involved here. (See CDAA Am. Br. at p. 22.) The Orange County District Attorney has never raised that argument. In any event, the argument is meritless. "[W]hen 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." (*Industrial Truck Assn. v Henry* (9th Cir. 1997) 125 F.3d 1305, 1311.) Here, numerous federal regulations relate to the issues addressed by the state standards. (See, e.g., 29 C.F.R. § 1910.147 [control of hazardous energy, including steam energy]; 29 C.F.R. § 1910, subpart H, Hazardous Materials, and subpart M, Compressed Gas and Compressed Air Equipment [water heater as a pressure vessel].)

More important, the CDAA ignores the central issue: that the Orange County District Attorney is using a means of enforcing the California worker safety plan that is not part of that plan and has never been submitted to or approved by the Secretary of Labor.

D. Recognition of Federal Preemption in This Instance Would Have No Effect on State Laws That Truly Are "Generally Applicable"

The CDAA closes its argument by asserting that recognition of preemption in this case will "result in the preemption of common law and

statutory torts, as well as criminal laws, even if they are generally applicable laws, unless they are included in an approved state plan." (CDAA Am. Br. at p. 23.) Indeed, according to the CDAA, if the Court of Appeal's ruling is upheld, "Workplaces will become the Wild West, unless each and every state law [touching on workplace safety] is included in the state plan and approved by the Secretary." (*Ibid.*)

This fear is unfounded. As previously shown (Part III.B above), Solus' only concern is the use by local prosecutors of the UCL and the FAL to supplement Cal/OSHA's enforcement efforts where such use has never been approved at the federal level. No one is contending that a range of other laws that may touch on workplace safety need to be part of the plan. Indeed, unless district attorneys plan on invoking some other statute to enforce alleged workplace safety violations (and there is no indication that the district attorneys have any such plan), the Court of Appeal's ruling will not affect a single other statute—or, for that matter, any common law theory of recovery.

In this same section, the CDAA—like the District Attorney and Cal/OSHA—effectively admits that application of the UCL and the FAL in this context enforces worker safety standards. Specifically, the CDAA argues that "the deterrent effect of UCL penalties is entirely consistent with the OSH Act's goal of protecting employees. . . . [B]y providing punitive

penalties, the UCL fills a much needed gap in the state and federal regulations." (CDAA Am. Br. at pp. 26-27.)

CDAA's argument helps confirm the point made by Solus throughout this litigation: the Orange County District Attorney is using the UCL and FAL to enforce worker safety standards. This point would be obvious anyway, since it is abundantly clear that the underlying action, based exclusively on an alleged violation of worker safety standards and seeking penalties for those alleged violations, is workplace safety enforcement plain and simple. But enforcement actions by local prosecutors under the UCL and the FAL are not part of California's worker safety program, and that program does not provide for enforcement by local prosecutors through original civil actions filed in the superior courts.

The District Attorney, the CDAA, and Cal/OSHA may be right that enforcement of the state's worker safety standards through UCL actions would promote some of Congress' interests in enacting the OSH Act. But it is not enough that the UCL and the FAL might promote some of the same goals of the federal law:

> We cannot accept petitioner's argument that the OSH Act does not pre-empt nonconflicting state laws because those laws, like the Act, are designed to promote worker safety. In determining whether state law "stands as an obstacle" to the full implementation of a federal law [citation], "it is not enough to say that the ultimate goal of both federal and state law" is the same [citation]. "A state law also is pre-

> empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal." [Citations.] The OSH Act does not foreclose a State from enacting its own laws to advance the goal of worker safety, but it does restrict the ways in which it can do so.

(*Gade, supra,* 505 U.S. at p. 103.)

Thus, it is irrelevant that the District Attorney's use of the UCL might help achieve some of the goals of the OSH Act. Even if that is true, the District Attorney's approach "interferes with the methods by which the federal statute was designed to reach th[at] goal." (*Gade, supra,* 505 U.S. at p. 103.) It does so by providing for enforcement in a way that is not part of the state plan and that was not approved by the Secretary of Labor.

Further, this use of the UCL and FAL would result in duplicative regulation of workplaces, thus contradicting part of Congress' purpose in enacting the statute: "The OSH Act as a whole evidences Congress' intent *to avoid subjecting workers and employers to duplicative regulation . . . .*" (*Gade, supra,* 505 U.S. at p. 100, italics added.)

Because this application of the UCL and the FAL would subject both workers and employers to duplicative regulation, it is preempted by the OSH Act.

V. CONCLUSION

Neither Cal/OSHA nor the CDAA provides any reason to reverse the considered opinion of the Court of Appeal. The "practical impact" (*Gade, supra,* 505 U.S. at p. 106) of the District Attorney's use of the UCL and the FAL is to provide for a second round of enforcement of worker safety standards in a way that was not approved by the U.S. Secretary of Labor. The Court should therefore conclude that the use by local prosecutors of the UCL and the FAL as an enforcement mechanism for workplace safety laws is preempted.

Dated: August 24, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies, pursuant to Rule 8.504(d) of the California Rules of Court, that the foregoing brief was produced using 13-point type, including footnotes, and contains 7,194 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 24, 2015

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On August 24, 2015, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s): **COMBINED RESPONSE TO BRIEFS OF AMICI CURIAE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS AND DIVISION OF OCCUPATIONAL SAFETY AND HEALTH AND CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION**, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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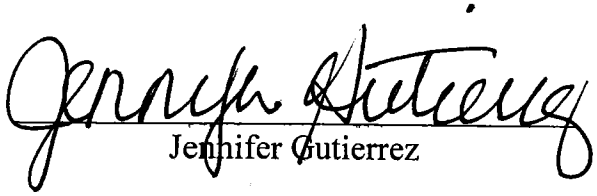

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