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.

From an Opinion of the Court of Appeal,
Fourth Appellate District, Division 3, No. G047661

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

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court should deny the District Attorney's petition for review. After considering briefing on remand concerning former Civil Code section 3370.1, the Court of Appeal affirmed its prior decision that the District Attorney's claims under California's Unfair Competition Law ("UCL") and False Advertising Law ("FAL") for alleged workplace safety violations are preempted by federal law, because those laws are not included in any California workplace safety plan approved by the U.S. Secretary of Labor. (*Solus Industrial Innovations, LLC v. Superior Court* (2014) 229 Cal.App.4th 1291, 1306-07 (*Solus II*).) Indeed, the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. ("the OSH Act"), preempts any state law used to enforce workplace safety standards that has not been approved by the U.S. Secretary of Labor as part of a state workplace safety plan. (29 U.S.C. § 667, subd. (b) [requiring submission of state worker safety plans for approval]; *Gade v. National Solid Wastes Management Assn.* (1992) 505 U.S. 88, 102-104 (*Gade*); see also *Loskouski v. State Personnel Bd.* (1992) 4 Cal.App.4th 453, 456 (*Loskouski*) [holding that the OSH Act "permits a state to enforce its own OSHA regulations in areas subject to federal standards only after the state plan has been approved by Fed/OSHA"].)

Before the UCL was codified as Business and Professions Code section 17200 in 1977, former Civil Code section 3370.1 (as enacted by

Stats. 1972, ch. 1084, § 2, pp. 2020-2021) authorized civil penalties for unfair competition. The Court of Appeal followed this Court's "directions to reconsider the matter in light of Statutes 1972, chapter 1084, pp. 2020-2021." After receiving supplemental briefs from the parties, the Court of Appeal invited the parties to submit further letter briefs to address specific questions about the legislative history and application of former Civil Code section 3370.1 and whether it had ever even been brought to the attention of the U.S. Secretary of Labor in connection with California's proposed workplace safety plan. The letter briefs revealed that no legislative history or judicial application of the UCL supports the District Attorney's position in this action, and no evidence exists that the U.S. Secretary of Labor was made aware of the UCL in connection with the approval of California's workplace safety plan.

The District Attorney wrongly asserts in the Petition for Review that the Court of Appeal's "Opinion is still premised on a false statement that the UCL was enacted in 1977 *after* the California worker safety plan was initially approved . . . ." (Petn. at p. 2.) The Court of Appeal actually noted that the UCL "in its current form" was codified under Business and Professions Code section 17200 in 1977, and the Court of Appeal then discussed former Civil Code section 3370.1 as the predecessor statute to Section 17200. (See *Solus II*, *supra*, 229 Cal.App.4th at pp. 1297, 1303–1305.)

Accordingly, the Court of Appeal's decision is now clear that the UCL was not first enacted in 1977. But the fact remains that neither the UCL nor the FAL were included in the California state plan submitted to the U.S. Secretary of Labor for approval in 1973. (See 29 C.F.R. § 1952.170 *et seq.* (subpart K); *Kelly v. USS-POSCO* (9th Cir. 2003) 101 Fed.Appx. 182, 184). Nor were the UCL and FAL included in any approved change to the California state plan. (See 29 C.F.R. § 1952.175.) Indeed, the People admit this factual point in paragraph 11 of their Return to the Petition for Writ of Mandate, filed on June 10, 2013.

Throughout the long history of this case, the District Attorney has failed to cite a single case contrary to the well-reasoned decision of the Court of Appeal. As explained below, the statutes, the regulations, and settled case law contradict each of the District Attorney's arguments.

1. The District Attorney argues that, once the Secretary of Labor has approved a state plan, the state may then vary from that plan, enforcing worker safety standards that have not been approved. That is not the case. The OSH Act requires the state to submit modifications to its plan to the Secretary of Labor for approval. (29 U.S.C. § 667, subd. (c).) This provision confirms that, in fact, a state may *not* change its approved plan at its own discretion. Case law also confirms that a state must submit modifications of its plan to the Secretary of Labor. (See, e.g., *Industrial Truck Assn., Inc. v. Henry* (9th Cir. 1997) 125 F.3d 1305 (*Industrial Truck*);

California Lab. Federation v. Cal/OSHA (1990) 221 Cal.App.3d 1547, 1558-1559 (*Cal. Lab. Fed.*) [requiring Cal/OSHA to submit Proposition 65 to the U.S. Secretary of Labor to avoid federal preemption].) Business and Professions Code sections 17200 and 17500 were not, and never have been, part of the California worker safety plan.

2. The District Attorney argues that a state may enforce workplace safety standards in any manner it chooses, even if the Secretary of Labor has not approved the enforcement method and even if that enforcement method is not part of the state's worker safety plan. That argument, too, is without merit, because 29 U.S.C. § 667 sets out the *only* method by which a state may enforce its own worker safety standards. That statute requires the state plan to identify an agency or agencies to be responsible for enforcing the plan. (29 U.S.C. § 667, subd. (c)(1).) California's approved plan calls for enforcement by the state Division of Occupational Safety and Health ("Cal/OSHA")—not by the district attorneys of California's 58 counties. (29 C.F.R. § 1952.170(a).) The District Attorney's argument runs squarely afoul of the federal statute—and of the Supreme Court's explanation that "States are not permitted to assume an enforcement role without the Secretary's approval." (*Gade, supra,* 505 U.S. at p. 101.)

3. The District Attorney argues that the state plan calls for enforcement by the district attorneys through original actions in superior courts. That is not the case. The federal regulation on point directly

contradicts this assertion. (See 29 C.F.R. § 1952.170(a).) And the California statutes themselves make it abundantly clear that civil penalties are to be imposed by the relevant agency—Cal/OSHA—and not by the district attorneys. (See Lab. Code § 6317 [providing for civil penalties to be enforced by Cal/OSHA].)

In short, the Court of Appeal reached the correct result. California's approved worker safety plan does not include Business and Professions Code sections 17200 or 17500. Its approved worker safety plan also does not include enforcement through civil actions brought by the district attorneys in the superior courts. Accordingly, federal law preempts both the statutes on which the District Attorney relies and his attempt to bring an action in the Superior Court.

The Court of Appeal's opinion is consistent with federal and state statutes and regulations and all the relevant case law. And in the 40 years since the U.S. Secretary of Labor first approved California's workplace safety plan, not a single reported decision exists in which a party was able to bring UCL claims for workplace safety violations. Accordingly, the Court need not review this matter "to secure uniformity of decision or to settle an important question of law." (See Cal. Rules of Court, rule 8.500(b)(1).) Petitioners therefore respectfully request that this Court deny the Petition for Review.

II. COUNTER-STATEMENT OF ISSUE

Where California's workplace safety plan, as approved by the U.S. Secretary of Labor, does not include the UCL or the FAL and does not provide for enforcement through civil actions filed by district attorneys in the superior courts, are the District Attorney's UCL and FAL claims based on alleged workplace safety violations preempted by federal law?

III. STATEMENT OF THE CASE

A. Parties

The District Attorney filed this lawsuit on July 6, 2012, alleging four causes of action for violation of worker health and safety standards promulgated by Cal/OSHA. The District Attorney's claims arise out of an incident in March 2009 at a facility owned by defendant Solus Industrial Innovations, LLC ("Solus") [A1–39.][1]

In 2007, defendant Solus installed an electric water heater for use in its plastics manufacturing operations. (A2 [Compl. ¶ 3].) In December 2008, defendants Emerson Power Transmission Corp. and Emerson Electric Co. (collectively, "Emerson") acquired a Solus affiliate in Italy. (A4–5 [Compl. ¶ 13].) On March 19, 2009, the water heater exploded, killing two Solus employees. (A1-2 [Compl. ¶ 1].)

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[1] Citations to " A __" are to the page number of the one-volume appendix filed in the Court of Appeal.

B. Cal/OSHA Investigates and Issues Citations

After the accident, Cal/OSHA opened an investigation and cited Solus (but not Emerson) with five "serious" violations of sections 467(a), 3328(a), 3328(b), 3328(f), and 3328(h) of Title 8 of the California Code of Regulations. (A 12 [Compl. ¶ 43].) Cal/OSHA also cited Solus (again, not Emerson) with one "willful" violation of section 3328(g) of Title 8 of the California Code of Regulations. (*Ibid.*) Based on its authority under Labor Code section 6317, Cal/OSHA issued a Citation and Notification of Penalty, imposing civil penalties under Labor Code, section 6428 for the five alleged "serious" violations, and civil penalties under Labor Code section 6429 for one alleged "willful" violation. (*Id.*; see also A71–86.)

C. The District Attorney Files a Copycat Civil Lawsuit Based on the Same Alleged Violations of Workplace Safety Standards

In July 2012, the Orange County District Attorney filed this lawsuit, alleging causes of action under California Labor Code sections 6428 and 6429 and California Business and Professions Code section 17200 and 17500. The District Attorney's Complaint relies entirely on the same facts, statutory sections, and regulations at issue in Cal/OSHA's administrative proceeding. (Compare A12 [Compl. ¶ 43] with A14–17 [Compl. ¶¶ 54, 60–61, 64–66, 69–75].)

D. Defendants' Demurrer

Defendants demurred to all four causes of action in the Complaint. (A40–61.) As to the first two causes of action, brought under the Labor Code, defendants argued that the California Legislature had not authorized the district attorneys to bring such claims. Defendants also argued that federal law preempted all four causes of action, because the California workplace safety plan approved by the U.S. Secretary of Labor does not include enforcement of worker health and safety standards through original civil actions brought by district attorneys in the superior courts. The Superior Court sustained defendants' demurrer to the Labor Code causes of action, but it overruled the demurrer as to the UCL and FAL causes of action. (A230–231.)

E. The Court of Appeal's First Opinion

Defendants petitioned for a writ of mandate from the Court of Appeal. After the Court of Appeal summarily denied the petition, Defendants petitioned for review. This Court granted review and transferred the case to the Court of Appeal with directions to review the petition on its merits. After full briefing and oral argument, the Court of Appeal granted Defendants' writ petition, holding that federal law preempts the District Attorney's claims under the UCL and FAL. (*Solus Industrial Innovations v. Superior Court* (2014) 224 Cal.App.4th 17 (*Solus I*), review granted and transferred June 8, 2014, S217651.)

The District Attorney then petitioned this Court for review. In its petition, the District Attorney noted that the Court of Appeal's opinion stated that the UCL was enacted in 1977, which is when the UCL was recodified as Business and Professions Code section 17200. This Court granted the Petition for Review and transferred the case back to the Court of Appeal "with directions to reconsider the matter in light of Statues 1972, chapter 1084, pp. 2020-2021."

F. The Court of Appeal's Second Opinion

On remand, Defendants filed a supplemental brief pursuant to California Rule of Court 8.200(b), and the District Attorney filed a supplemental responding brief. After receiving the parties' supplemental briefs, the Court of Appeal requested additional supplemental briefing to address specific questions about former Civil Code section 3370.1. The parties each submitted a supplemental letter brief to address the Court of Appeal's questions. A month later, the Court of Appeal issued a revised opinion specifically addressing former Civil Code section 3370.1 and again holding that the District Attorney's claims under the UCL and FAL are preempted by federal law.

The District Attorney filed a petition for rehearing notable for its strident tone. Among other things, the District Attorney suggested that the Court of Appeal had not provided a "fair judicial application" of the law, citing to the Code of Judicial Ethics. (Petn. for Rehg. at p. 5.) The District

Attorney also asserted that the Opinion "inexplicably" fails to consider binding legal authorities, thereby denying the People a "fair and complete analysis of the issues presented." (*Ibid.*) As the District Attorney should know, these statements are not only groundless but improper. (See *In re White* (2004) 121 Cal.App.4th 1453, 1478 ["[I]t is contemptuous for an attorney to say or imply that the court knows the law but has deliberately chosen not to follow it."].) The Court of Appeal denied the petition for rehearing, but modified the disposition to remove "without leave to amend" from its direction to the Superior Court to sustain Defendants' demurrer.

IV. ARGUMENT

The District Attorney has not provided any compelling reason for this Court to grant review. As explained below, the Court of Appeal's opinion in this matter rests on a binding decision of the U.S. Supreme Court, the applicable federal statutes and regulations, the applicable state statutes and regulations, as well as cases decided by the California courts and the Ninth Circuit. The District Attorney has not cited a single opinion holding to the contrary. There is no evidence that other district attorneys need further guidance in this matter. And, to the extent district attorneys may need such guidance, they can turn to the well-reasoned opinion of the Court of Appeal.

A. Federal Law Preempts All State Worker Health and Safety Standards Except to the Extent That the State Has Submitted its Plan to the Secretary of Labor and Obtained the Secretary's Approval of That Plan.

"Congress has the authority to preempt state law by virtue of the supremacy clause of the United States Constitution, which provides that 'laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.'" (*Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 612 (*Washington Mutual*), quoting U.S. Const., art. VI, cl. 2.)

In *Gade v. National Solid Wastes Management Association*, the U.S. Supreme Court determined that Congress enacted the OSH Act "to promote occupational safety and health while at the same time avoiding duplicative, and possibly counterproductive, regulation." (*Gade, supra,* 505 U.S. at p. 102.) 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.*)

But before a state may enforce its own occupational safety and health program, the OSH Act requires that state to obtain approval from 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, subd. (b), italics added.)

Based on its review of this statute, 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, italics added.)

The U.S. Supreme Court noted further that "'[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. . . .' [Citation.]" (*Id.* at p. 103, italics added.) Applying that principle to the OSH Act, the Court concluded that "States are not permitted to assume an enforcement role without the Secretary's approval . . . ." (*Id.* at p. 101.)

Further, the OSH Act completely preempts state law:

> The scope of preemption in each area in which a federal standard has been promulgated is complete. All state regulations relating to the "issue" of a federal standard are preempted even if they do not conflict with the federal scheme.

(*Industrial Truck, supra*, 125 F.3d at p. 1310, citing *Gade, supra,* 505 U.S. at p. 103.)

Because Congress preempted state regulation of worker safety standards, a state can regulate worker safety only by obtaining the prior approval of the Secretary of Labor:

> If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the Secretary of Labor, as described in [29 U.S.C. § 667(c)].

(*Gade, supra,* 505 U.S. at pp. 103–104.) As the Court of Appeal held in an earlier case, federal OSHA "permits a state to enforce its own OSHA regulations in areas subject to federal standards *only after the state plan has been approved by Fed/OSHA.*" (*Loskouski, supra,* 4 Cal.App.4th at p. 456, italics added; see also *Cal. Lab. Fed., supra,* 221 Cal.App.3d at p. 1552 ["[U]nless a state occupational safety and health law is incorporated in an approved state plan, it will be preempted to the extent it covers subject matter as to which there is a federal standard."].)[2]

Finally, after a state has submitted its plan, it must follow the plan. It cannot submit one plan and then enforce a different plan. As the Ninth Circuit has explained, such an approach would make the Secretary of Labor's review of the plan meaningless:

> [A] state may not submit some regulations on a worker safety issue to OSHA as part of its state plan and omit other

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[2] See also 62 Fed.Reg. 31159, 31160 (June 6, 1997) ("The Occupational Safety and Health Act generally preempts any State occupational safety and health standard that addresses an issue covered by an OSHA standard, unless a State plan has been submitted and approved.").

> regulations relating to the same issue from the plan. The omitted regulations, even if complementary to the OSH Act's scheme, are subject to the "background preemption" of the federal standard. . . . *It would make the state plan approval requirement superfluous if a state could pick and choose which occupational health and safety regulations to submit to OSHA.*

(*Industrial Truck, supra,* 125 F.3d at p. 1311, italics added; see also *Cal. Lab. Fed., supra,* 221 Cal.App.3d at pp. 1558–1559 [directing Cal/OSHA to add toxic chemical regulations to state plan and submit to U.S. Secretary of Labor for approval].)

Both the OSH Act and the federal regulations implementing the act provide for continued review and evaluation of state plans by the Secretary of Labor. (29 U.S.C. § 667, subd. (f); 29 C.F.R. § 1954.) The Secretary of Labor may withdraw approval of a state plan for several reasons, including a "determin[ation by the Secretary] that in the operation or administration of a State plan, or as a result of any modifications to a plan, there is a failure to comply substantially with any provision of the plan, including assurances contained in the plan." (29 C.F.R. § 1955.3(a)(3).)

As the Court of Appeal noted, "this retained federal power to approve or disapprove the state's laws . . . distinguishes the federal preemption scheme at issue here from the one recently considered by our Supreme Court in *Rose v. Bank of America* (2013) 57 Cal.4th 390 [*Rose*]." (*Solus II, supra,* 224 Cal.App.4th at p. 29.) *Rose* dealt with a federal statute (the Truth in Savings Act) with a savings clause that explicitly approved the

enforcement consistent state laws. (*Rose*, *supra*, 57 Cal.4th at p. 395.) By contrast, the OSH Act "saves" only those state laws submitted to and approved by the Secretary of Labor (29 U.S.C. § 667, subd. (b)) and provides for further federal oversight and approval (29 U.S.C. § 667, subd. (f)).[3]

B. California's Workplace Safety Plan Does Not Include Business and Professions Code Sections 17200 and 17500 and Does Not Provide for Enforcement by the District Attorney's Through Original Actions in the Superior Courts.

Acting under the authority granted by Congress, the Secretary of Labor has promulgated extensive regulations governing the submission, approval, and modification of state plans. (29 C.F.R. § 1902.)

California submitted its worker safety plan to the U.S. Secretary of Labor, who approved that plan. (29 C.F.R. § 1952.170 *et seq.* [subpart K].) The approved California 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. . . .

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[3] The District Attorney cites *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 816, as "finding no preemption under [a] similar federal state cooperative program." (Petn. at p. 18.) In fact, the Court held that federal law *did* preempt the California statutes at issue. (See *Olszewski*, at p. 826.)

> Administrative adjudications will be the responsibility of the California Occupational Safety and Health Appeals Board.

(29 C.F.R.§ 1952.170(a).)

The California worker safety plan does *not* include, and has never included, Business and Professions Code sections 17200 or 17500. (See 29 C.F.R. § 1952, subpart K; see also *Kelly, supra,* 101 Fed.Appx. at p. 184 ["[Section] 17200 is not part of California's approved occupational health and safety plan."].)

Further, the approved plan does *not* provide for enforcement by the district attorneys through original civil actions filed in the superior courts. (See 29 C.F.R. § 1952.170(a); see generally 29 C.F.R. § 1952, subpart K.) Instead, the Legislature has 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.)

Moreover, California has *never* included in its plan *either* the challenged UCL laws *or* the enforcement of its plan through original actions brought by the district attorneys in the superior courts. (See 29 C.F.R. § 1952, subpart K; 29 C.F.R. § 1952.170(a).)

The District Attorney is simply not acting in accordance with the California plan, approved or otherwise. Federal law preempts such an

approach, which evades the system for submission and approval set out by Congress in 29 U.S.C. § 667. This conclusion follows from the U.S. Supreme Court's decision in *Gade,* in which Illinois enacted worker safety laws but did not submit them to the Secretary of Labor for approval. (See *Gade, supra,* 505 U.S. 88.)

In the Petition for Review, the District Attorney selectively quotes from the Court of Appeal's opinion to imply that the Court of Appeal misstates when the UCL was first enacted. Yet the opinion accurately notes that the UCL "in its current form" was enacted in 1977 (Stats. 1977, ch. 299, § 1, p. 1202), which is when the UCL was moved from former Civil Code section 3370.1 and recodified in the Business and Professions Code. And the opinion extensively discusses former Civil Code section 3370.1. (See *Solus II, supra,* 229 Cal.App.4th at pp. 1303-05.)

Moreover, the enactment date of the UCL does not change the fact that the UCL cannot be used to enforce workplace safety standards unless approved by the U.S. Secretary of Labor, and here they were not. This point is made throughout the Court of Appeal's opinion. (See, e.g., *Solus II, supra,* 229 Cal.App.4th at pp. 1305-1306.)

The District Attorney argues that the U.S. Secretary of Labor should be *presumed* to have known about former Civil Code section 3370.1, but the Court of Appeal correctly concluded that there was no basis for such a

presumption.[4] Moreover, such presumed knowledge would be "insufficient to support an inference that the Secretary had *approved* the imposition of those penalties as part of California's plan," and thus preemption would still apply. (*Solus II, supra,* 229 Cal.App.4th at p. 1304.)

Given OSHA's requirement that the U.S. Secretary of Labor approve any state plan, the District Attorney's reliance on the "presumption against preemption" is similarly misplaced:

> Because the OSH Act allows a state to avoid federal preemption only if it obtains federal approval of its own plan, it necessarily follows that a state has no authority to enact and enforce laws governing workplace safety which fall outside of that approved plan. The OSH Act expressly requires a state to comply with its approved plan, and allows the Secretary to rescind approval of the plan if the state fails to do so. (29 U.S.C., § 667(f).) Under this statutory scheme, we conclude the approved state plan operates, in effect, as a "safe harbor" within which the state may exercise its jurisdiction. It is only when the state stays within the terms of its approved plan, that its actions will not be preempted by federal law.

(*Solus II, supra,* 229 Cal.App.4th at pp. 1306-1307 [distinguishing *Farm Raised Salmon Cases* (2009) 42 Cal.4th 1077].) For this reason, cases applying a "presumption against preemption" are distinguishable. (See, e.g., *People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal. 4th 772, 782, 784 [finding no preemption of the People's UCL claim under the Federal Aviation Administration Authorization Act of 1994 where the

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[4] Indeed, because the UCL predated California's worker safety plan, yet was not included as part of that plan, the most natural conclusion is that California did not consider the UCL to be part of its plan.

defendant's alleged misclassification of employees did not relate to "prices, routes, or services with respect to the transportation of property"].)

The District Attorney also mistakenly relies upon a string of criminal cases to argue that the UCL and FAL are not preempted by federal law. (See Petn. at p. 22.) The criminal cases cited by the District Attorney do not address the holding of *Gade* that a state's "authority to establish and enforce any laws in this area is *expressly conditioned* on submission of a proposed state plan to the Secretary—a plan which reflects not only the state's establishment of appropriate workplace safety requirements, but also the manner in which those requirements will be enforced and the remedies provided—and *the Secretary's approval* of that specific plan." (*Solus II, supra,* 229 Cal.App.4th at pp. 1305-1306.) Here, the People brought a criminal prosecution against certain Solus employees, and there was no argument that those criminal claims were preempted.

Finally, the District Attorney claims that the Court of Appeal did not adequately analyze whether federal law preempts the FAL independently of whether federal law preempts the UCL. (Petn. at p. 15.) Yet the District Attorney's FAL claims are based upon allegations that Solus falsely advertised its compliance with the same workplace safety standards upon which the District Attorney's UCL claims are based. As a result, the same preemption analysis applies to the District Attorney's UCL and FAL claims.

C. The District Attorney's Attempted Justifications Lack Any Merit

As noted above, the District Attorney has failed to cite a single statute, case, or other precedent that supports his attempt to invest himself with the authority that was granted to Cal/OSHA. Instead, the District Attorney attempts to reframe the question to try to avoid the force of *Gade.* These attempts fail.

1. Federal Law Preempts Methods of Enforcement Inconsistent with 29 U.S.C. § 667 and the Federal Regulations Implementing That Statute.

The District Attorney argues (1) that California in general may enforce its worker safety standards and (2) that federal law does not preempt the method by which California may enforce those standards. Specifically, he argues that there is no "'time, place or manner' preemption." (Petn. at p. 31.)

The District Attorney's first proposition is correct, but only so far as it goes. California may enforce its own worker safety standards—but only to the extent that the Secretary of Labor has approved both the *content* of its standards and the *method* by which the state intends to enforce those standards. (See 29 U.S.C. § 667, subd. (b).) The U.S. Supreme Court made that point clear in *Gade:* "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." (*Gade, supra*, 505 U.S. at p. 103, italics added.)[5] Applying that principle to the OSH Act, the Supreme Court concluded that "States are not permitted to assume an enforcement role without the Secretary's approval . . . ." (*Id.* at p. 101.) The OSH Act sets out the only method by which a state may enforce its worker safety standards—that is, in accordance with a plan submitted to and approved by the Secretary of Labor. (29 U.S.C. § 667, subd. (b).) The OSH Act's "background preemption" preempts any contrary methods. (See *Industrial Truck, supra,* 125 F.3d at p. 1311.)

As explained above, the Secretary of Labor did *not* approve a plan that provided for enforcement of regulations through civil actions brought in superior courts by the district attorneys. (See 29 C.F.R. § 1952.170.) Indeed, the State of California never devised such a plan: it is an ad hoc creation of the District Attorney. The "background preemption" of the OSH Act preempts both the content and the method of enforcement chosen here by the District Attorney. (See *Industrial Truck, supra,* 125 F.3d. at p. 1311.)

The District Attorney attempts to fashion an argument based on the Secretary of Labor's approval of the amendments to the California plan

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[5] (See also *Internat. Paper Co. v. Ouellette* (1987) 479 U.S. 481, 494 ["A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal. [Citation.]"].)

made under Proposition 65. (See Petn. at pp. 31–32, citing and quoting 62 Fed.Reg. 31159 (June 6, 1997).) But that argument undoes itself: the District Attorney relies on an analysis made by the Secretary of Labor as part of the *approval process* required by 29 U.S.C. section 667, subdivision (b). Supplemental enforcement mechanisms are permissible only if *approved by the Secretary.* (See 62 Fed.Reg. at p. 31178 [Prop. 65's private right of action "does not render the California standard unapprovable"].) Indeed, the Secretary's analysis began by citing *Gade*: "The Occupational Safety and Health Act generally preempts any State occupational safety and health standard that addresses an issue covered by an OSHA standard, unless a State plan has been submitted and approved." (62 Fed.Reg. at p. 31160, citing *Gade, supra,* 505 U.S. 88.)

The entire procedural history of Proposition 65—including the opinion in *California Labor Federation*—confirms that federal law preempts the enforcement of any state law relating to worker safety standards that is not part of a plan submitted to and approved by the Secretary of Labor. (See *Cal. Lab. Fed., supra,* 221 Cal.App.3d at pp. 1551–1552.)

The District Attorney's argument is fundamentally a non sequitur. California could seek to include the UCL in its state plan, and it could seek to provide in that plan for imposition of civil penalties through original actions filed by the district attorneys in superior courts. And it is possible

that the Secretary of Labor might approve such amendments to the plan. But California has never amended its plan to include these features, and it has never submitted any such amendments to the Secretary of Labor for approval.

2. Federal Law Preempts Variations from the Approved State Plan.

The District Attorney appears to argue that, having once submitted a plan for approval, a state can then implement regulations or use enforcement methods that are not part of the approved plan. (See Petn. at pp. 30–33.)

As explained above, that is simply not the case. State regulation of worker safety escapes federal preemption only to the extent that the state submits *and adheres to* a plan approved by the Secretary of Labor. That is the purpose of 29 U.S.C. section 667, subdivision (f), which calls for the Secretary to continue to monitor approved state plans and for withdrawal of approval. (See also 29 C.F.R. §§ 1954, 1955 [procedures for monitoring and withdrawing approval of state plans].)

Indeed, in *California Labor Federation*, the Court of Appeal directed Cal/OSHA to submit to the Secretary of Labor the amendments to the state worker safety plan as mandated by Proposition 65. (221 Cal.App.3d at p. 1551). The court did so precisely to avoid the force of federal preemption. (*Id.* at p. 1552 ["[U]nless a state occupational safety

and health law is incorporated in an approved state plan, it will be preempted to the extent it covers subject matter as to which there is a federal standard."].)

Not a single authority supports the proposition that a state may enact and enforce regulations, or enforce regulations in an unapproved manner, and evade federal preemption until the Secretary of Labor chooses to act. Such an approach would encourage states *not* to report their program activity to the Secretary of Labor, as required by 29 U.S.C. section 667, subdivision (c), and would render the provisions of subdivision (f) a nullity. (See *Industrial Truck, supra,* 125 F.3d at p. 1311.)

3. California's Approved Plan Does Not Provide for Enforcement Through Civil Actions Filed by the District Attorneys in the Superior Courts.

The District Attorney also argues that California's approved plan provides for imposition of civil penalties through original actions filed by the district attorneys in the superior courts. (See, e.g., Petn. at p. 32.) That argument, too, has no merit.

The U.S. Secretary of Labor confirmed that Cal/OSHA—not the district attorneys—will enforce California's program, with adjudication through the 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).) It is impossible to square the District Attorney's argument with the unambiguous language of this regulation, and indeed the District Attorney does not address this regulation.

4. As Used Here, the Challenged Sections of the Business and Professions Code Are Not Laws of "General Applicability"

The District Attorney argues contradictorily that Business and Professions Code sections 17200 and 17500 are part of California's approved worker safety plan *and* that they are laws of general applicability. (See Petn. at p. 32 ["Although the UCL and FAL are laws of general applicability governing non-worker safety concerns, they similarly serve as a supplemental and cumulative action to redress violations related to worker safety violations . . . ."].)

As set out above, it is demonstrably untrue that California's worker safety plan includes the challenged UCL sections. (See generally 29 C.F.R. § 1952, subpart K; see also *Kelly, supra,* 101 Fed.Appx. at p. 184 ["[Section] 17200 is not part of California's approved occupational health and safety plan."].) Moreover, the District Attorney is bound by its admission of this point in paragraph 11 of his Return to the Petition for Writ of Mandate.

It is also not the case that the District Attorney may rely on these UCL sections as laws of "general applicability" and thereby evade federal

preemption. As the Supreme Court has explained, state laws are preempted if they are being used in a way that interferes with the goals of OSHA:

> 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. . . . 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. If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the Secretary of Labor . . . .

(*Gade, supra,* 505 U.S. at pp. 103–104, internal quotation marks and citations omitted; bracketing in original.)

Here, the District Attorney is attempting to use the challenged UCL sections to enforce worker safety standards. The District Attorney argues time and again that he should be permitted to bring this action precisely to enforce worker safety standards. (See, e.g., Petn. at p. 32 ["[T]he UCL and FAL ... similarly serves [sic] as a supplemental and cumulative action to redress violations related to worker safety violations...."]; *id.* at p. 33 ["The UCL and FAL are used to assess additional penalties against employers that violate workplace safety (or any) laws . . . ."].)

Further, if the District Attorney's argument had any merit, then any state could regulate any issue otherwise regulated by federal law simply by acting under the aegis of laws such as sections 17200 and 17500. A state could adopt its own laws of copyright, could regulate the safety of nuclear power plants, or could determine who is eligible for the office of the U.S.

president simply by purporting to act under some law of general applicability.

The teeth of the supremacy clause are not so dull as the District Attorney suggests. The U.S. Supreme Court has explained that states may not evade preemption simply by claiming that a law serves some legitimate state purpose:

> We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law. . . . [A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause. [Citation.]

(*Gade, supra,* 505 U.S. at pp. 105–106, ellipses and bracketing in original, internal quotation marks omitted.)

Moreover, courts routinely hold that federal laws completely preempt section 17200. (See *People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.* (1985) 38 Cal.3d 509, 523 [Highway Beautification Act]; *Washington Mutual, supra,* 95 Cal.App.4th at pp. 612, 621 [regulation adopted under the Home Owners' Loan Act]; *Kodadek v. MTV Networks, Inc.* (9th Cir. 1998) 152 F.3d 1209, 1213 [Copyright Act];

Rogers v. NationsCredit Financial Services Corp. (N.D. Cal. 1999) 233 B.R. 98, 110 [bankruptcy law].)

With nowhere else to turn, the District Attorney asserts that "[f]or decades, California prosecutors have sought civil penalties against corporate employers that engage in unfair competition by violating worker safety laws under the UCL, particularly when these violations cause worker deaths." (Petn. at p. 1.) But the District Attorney fails to cite any support for that assertion. (See *Solus II*, *supra*, 229 Cal.App.4th at p. 1303.)[6] By contrast, *Gade, Industrial Truck, California Labor Federation,* and *Loskouski,* along with the relevant statutes and regulations, compel the conclusion that a state may enforce its worker safety standards only in accordance with a plan approved by the Secretary of Labor.

D. Policy Principles Also Counsel Strongly Against Allowing Such Actions to Be Brought in the Superior Courts.

Sound policy principles also counsel against adopting the approach taken by the District Attorney in this case. That approach would duplicate regulation and run the risk of uneven enforcement and interpretation of the worker safety standards.

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[6] An amicus earlier sought judicial notice of superior court filings to show that district attorneys have pursued civil actions against employers for violations of worker safety statutes. (See *Solus I*, *supra*, 224 Cal.App.4th at p. 45.) The Court of Appeal declined to take judicial notice of the materials as there was no evidence that any of the courts had considered the preemption question. (*Ibid.*)

Congress enacted the OSH Act "to promote occupational safety and health while at the same time avoiding *duplicative*, and possibly counterproductive, regulation." (*Gade, supra,* 505 U.S. at p. 102, italics added.) Further, 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.*, italics added.) As this Court has noted, Congress adopted the OSH Act "to address the problem of *uneven* and inadequate state protection of employee health and safety." (*United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal.3d 762, 772 (*United Air Lines*), italics added.)

The District Attorney's approach conflicts with Congress' purpose, as identified in *Gade* and *United Air Lines.* Under the District Attorney's approach, both Cal/OSHA and a district attorney could file separate actions arising from the same incident. That would create "duplicative regulation" and it would be highly counterproductive. The same appellate court might hear appeals from the separate actions and, applying the highly deferential "substantial evidence" standard of review, be obligated to affirm contrary results. No appellate procedures or principles would allow the appellate

court to harmonize such conflicting results.[7] Such an absurdity would plague not only the employer who was a party to the actions but also all other similarly situated employers in the state, who could well find themselves trying to determine how to follow two contrary pronouncements from the very same court.

The District Attorney's proposed approach would create a significant potential for conflicting rules and uneven application for employers with workplaces in multiple California counties. Under the approach, any district attorney in any one of the 58 California counties could bring an action against any employer within the jurisdiction of the superior court of that county. Each of those cases could proceed to trial, with each trial resulting in a different set of rules for the employer, and there would be no way to harmonize those separate rules. Thus, employers

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[7] The Division of Labor Standards Enforcement (DLSE) of the Department of Industrial Relations has also recognized the potential for "chaos" that could result from dual administrative and judicial actions: "A claim filed with the Labor Commissioner may be sent to a hearing; the result of that hearing . . . will, unless appealed by either party, become a judgment. Thus, it would be possible for the parties to have two conflicting judgments or two concurrent judgments covering the same issue or facts. Obviously, this will lead to chaos." (Cal. Dept. of Industrial Relations, Division of Labor Standards Enforcement, Chief Counsel H. Thomas Caddell, Jr., opinion letter, Multiplicity of Actions (Apr. 19, 1995), p. 1, *available at* http://www.dir.ca.gov/dlse/opinions/1995-04-19.pdf; see also *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 815 [DLSE advice letters "'"constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" [Citation.]' [Citation.]".)

with multiple locations would be faced with a confusing patchwork of rules, varying from county to county, as well as a potentially separate Cal/OSHA rule overlaying that patchwork.

Maintaining the uniformity of the current system benefits employees as well as well as employers. The district attorneys of California's 58 counties cannot be expected to have the same knowledge of worker safety standards or the same prosecutorial zeal to enforce those standards. It would be unfair to have employees in, for example, Modoc County operate under a worker safety regime different from that in place in San Francisco County. But the District Attorney's approach would run a severe risk of just such a fractured approach to enforcement.

V. CONCLUSION

Just as the State of California was required to submit Proposition 65 to the U.S. Secretary of Labor to avoid federal preemption, the State is required to submit Section 17200 and Section 17500 to the U.S. Secretary of Labor to avoid federal preemption. Although the State has this option, it has chosen not to exercise it. As the Court of Appeal noted, it is not the judiciary's role to decide whether Section 17200 and Section 17500 should be include in the State's workplace safety plan. Accordingly, the Petition for Review should be denied.

Dated: November 21, 2014

Respectfully submitted,

JONES DAY

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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 Answer to Petition for Review was produced using 13-point type, including footnotes, and contains 7,407 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 21, 2014

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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 November 21, 2014, 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): **ANSWER TO PETITION FOR REVIEW**, addressed as follows:

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Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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

Executed on November 21, 2014, at Los Angeles, California.

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