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.

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

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

OPENING BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

1. Does the federal Occupational Safety and Health Act of 1970 (the "Act") preempt a cause of action under California Business and Professions Code Section 17200 when based on worker safety violations under the California Code of Regulations that are part of California's federally approved state plan under the Act?

2. Does the Act preempt a cause of action under Business and Professions Code Section 17500 based on false and misleading representations about worker safety?

INTRODUCTION

The United States Department of Labor, Occupational Safety and Health Administration ("FedOSHA") has long recognized that it "has no authority to address ... non-occupational applications" of California state law, including "consumer" protection laws like California's Unfair Competition Law ("UCL") and False Advertising Law ("FAL"). (62 Fed. Reg. 31159, 31159 (June 6, 1997).) With respect to occupational hazards and safety, Congress also expressly granted the State authority to exercise jurisdiction over the enforcement of its own workplace safety laws and regulations -- with few narrow expressly defined exceptions that are not applicable here. California thus has broad jurisdiction to regulate and enforce its UCL, FAL and workplace safety laws and regulations without being preempted by federal law.

Nonetheless, the Fourth District held that State prosecutors cannot base a California UCL action on the same un-preempted violations of California law on the grounds that the UCL is separately preempted because it is not a workplace safety law incorporated into California's federally approved State Plan. Without explanation, the Fourth District also concluded that the District Attorney's FAL action is preempted.

The Fourth District's ruling is clearly erroneous. Neither the UCL nor FAL are preempted by the Act. First, because these are laws of general applicability under the historic police powers of the State, there is a "strong presumption against preemption" that protects these laws from preemption. (*Farm Raised Salmon Cases* (2009) 42 Cal.4th 1077, 1088.) Second, there is no express congressional intent to bar the People's prosecution, as necessary to overcome the applicable presumption, but rather, the expressed Congressional intent is fully in support of any such action. Third, the People's prosecution is not in conflict with federal law, and it does not interfere with or obstruct any retained federal powers with respect to worker safety so as to render these actions preempted under any implied preemption theory.

For each of these reasons, and those discussed in more detail below, the People respectfully submit that the Fourth District's Opinion should be reversed and the matter remanded accordingly.

STATEMENT OF THE CASE

This is an egregious case of employer workplace safety violations that resulted in the horrific death of two workers at a commercial plastics manufacturing facility in Rancho Santa Margarita on March 19, 2009. (Compl. ¶¶ 1-51.)[1] Both men died instantly when an improperly installed and maintained residential water heater that was being used to melt plastic exploded. (Compl. ¶¶ 1-39.) The facility was owned, operated and controlled by Petitioners Solus Industrial Innovations, LLC, Emerson Power Technology Corporation and Emerson Electric Co. (collectively referred to herein as "Petitioners," "Defendants," or "Employers") during the relevant time frame from November 2007 when the water heater was installed until its explosion in March 2009.

A. CalOSHA Referred This Case To Prosecutors As Required Under California's Federally Approved Statutory Framework

As required by law, immediately following the tragic deaths of these workers, the California Division of Occupational Safety and Health ("CalOSHA") opened an investigation into the workplace fatalities. (Compl. ¶ 41.) CalOSHA concluded that the deaths were caused by a number of "serious" and "willful" violations of California's safety laws and

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1 The Complaint is attached as Exhibit 1 (bates range 0001-0039) to the Appendix of Exhibits re Petition for Writ of Mandate or Other Appropriate Relief (the "Appendix") filed by Petitioners in Case No. G047661 on or about November 19, 2012 in the Fourth Appellate District, Division Three. Citations to "A" are to the page numbers in the Appendix.

regulations and filed an administrative action against Solus "and its successors" for civil penalties under Title 8 of the California Code of Regulations in the amount of approximately $98,000. (Compl. ¶¶ 42-43.) The administrative action is currently stayed. (Compl. ¶ 46.)

In addition to initiating an administrative action against Solus, CalOSHA's Bureau of Investigation (the "BOI") conducted a further investigation into the worker deaths, and based thereon, referred the case to the Orange County District Attorney's office for additional "appropriate action" pursuant to Labor Code Section 6315, subdivision (g). (Compl. ¶ 44.) The District Attorney then exercised his charging discretion to file criminal charges against two individuals, including Solus' Plant Manager and its Maintenance Supervisor, who were both responsible for orchestrating the plan to employ the residential water heater (instead of an available and more appropriate commercial boiler, to save costs) and then facilitating the continued unsafe operation of the residential water heater for months on end. (Compl. ¶¶ 1-45.) Both defendants were thereafter indicted on two felony counts of violating Labor Code Section 6425 by the Orange County Grand Jury in the action entitled *People v Faulkinbury & Richardson*, Orange County Superior Court, Case No. 12ZF0159.

On July 6, 2012, the District Attorney further exercised his prosecutorial discretion to file a Civil Complaint alleging four causes of action against all three corporate Defendants for violations of: (1) Labor

Code Section 6428; (2) Labor Code Section 6429; (3) Business and Professions Code Section 17200; and (4) Business and Professions Code Section 17500. (Compl. ¶¶ 1-75.)

B. Respondent Court's October 3, 2012 Order Sustained In Part And Overruled In Part The Demurrer To The Complaint

On July 23, 2012, Defendants filed a Demurrer to All Causes of Action Set Out in Plaintiff's Complaint and a Motion to Strike Portions of Plaintiff's Complaint. By way of the Demurrer, the Employers argued that: (1) the District Attorney has no standing to prosecute civil causes of action under Labor Code Sections 6428 and 6429 in the first two causes of action; and (2) that all four causes of action are preempted by federal law.

On October 3, 2012, the trial court entered its order (the "Order") sustaining Defendants' Demurrer to the First and Second Causes of Action, overruling the Demurrer to the Third and Fourth Causes of Action, and denying Defendants' Motion to Strike. In sustaining Defendants' Demurrer to the First and Second Causes of Action, the trial court held that prosecutors lack standing to pursue civil penalties under Labor Code Section 6428 and 6429.[2] (A0217, A0225-226.) Based on this ruling, the court dismissed the causes of action for civil penalties under

2 The Fourth District, Division Three, affirmed this ruling on February 24, 2014. The dismissal of the People's causes of action for civil penalties under Labor Code Sections 6428 and 6429 was the subject of a separate petition for review that was denied by this Court on June 18, 2014. (Supreme Court Case No. S217653.)

Labor Code Sections 6428 and 6429 with prejudice. The preemption arguments with respect to the first two causes of action were rendered moot and not ruled upon.

The trial court also overruled Defendants' Demurrer to the Third and Fourth Causes of action, which seek civil penalties for additional wrongs -- separate and apart from the Labor Code violations -- that Petitioners committed in violation of Business and Professions Code Sections 17200 and 17500 (also known as California's Unfair Competition Law, "UCL" and False Advertising Law, "FAL"). Petitioners argued that the causes of action were preempted by the federal occupational safety and health Act. The trial court was "not persuaded that this is a federal preemption issue" and overruled the Demurrer. (A0219.)

C. Fourth District Court Of Appeal Granted Defendants' Writ Of Mandate And Reversed The Trial Court Order

On November 19, 2012, Defendants filed a Petition for Writ of Mandate (Fourth Appellate District, Division Three, Appellate Case No. G047661) seeking to vacate the Order to the extent it overruled their Demurrer to the Third and Fourth Causes of Action on the grounds of preemption. Without hearing or other order, on February 28, 2013, the Fourth District summarily denied the writ petition without decision.

This Court subsequently granted the Defendants' petition for review (Supreme Court Case No. S209199) and transferred the case to the Fourth

District with directions to enter an order to show cause, which was entered on May 10, 2013. After full briefing and hearing, the Fourth District issued its opinion granting the Employers' petition on February 24, 2014, holding the UCL and FAL causes of action are preempted by the Act, and ordering the trial court to vacate its prior Order overruling Defendants' Demurrer to the Third and Fourth Causes of Action.

D. Fourth District Issues Same Ruling After People's Petition For Review Was Granted With Transfer Order By This Court

On April 8, 2014, the People filed a Petition for Review of the February 24, 2014 Opinion in this Court. (Supreme Court Case No. S217651.) The Court granted the Petition for Review on June 18, 2014 and transferred the cause back to the Fourth District "with directions to reconsider the matter in light of Statutes 1972, chapter 1084, pp.2020-2021."

After further briefing, pursuant to the Supreme Court directive, the matter was resubmitted for decision in the Fourth District. On September 22, 2014, the Fourth District issued its Opinion after transfer (the "Opinion"), holding, once again, that California's UCL and FAL are preempted by the Act. The Fourth District's Opinion is legally erroneous and should be reversed and the matter remanded accordingly.

ARGUMENT

The issue of preemption presents a pure question of law subject to a *de novo* standard of review. (*Farm Raised Salmon Cases*, *supra,* 42 Cal.4th at p. 1089 n.10; *City of Morgan Hill v. Bay Area Air Quality Management District* (2004) 118 Cal.App.4th 861, 869-70 ["On appeal from … an order sustaining a demurrer," the standard of review is de novo].)

The "principles of preemption" are "not in dispute":

> Under the supremacy clause of the United States Constitution (art. VI, cl. 2) Congress has the power to preempt state law concerning matters that lie within the authority of Congress. [Citation.] In determining whether federal law preempts state law, a court's task is to discern congressional intent. [Citation.] Congress's express intent in this regard will be found when Congress explicitly states that it is preempting state authority. [Citation.] Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law [citation]; (ii) when compliance with both federal and state regulations is an impossibility [citation]; or (iii) when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations]

(*Farm Raised Salmon Cases*, *supra,* 42 Cal.4th at p.1088 [citations omitted].) "It is well established that the party who asserts that a state law is preempted bears the burden of so demonstrating." (*Id.*) This burden has not, and cannot, be met in this case.

I. BACKGROUND REGARDING CALIFORNIA'S UNFAIR COMPETITION AND FALSE ADVERTISING LAWS

Currently codified in California's Business and Professions Code (§§ 17200 & 17500 et seq.), the UCL and FAL are laws of general applicability with a long history in this State.

A. Business and Professions Code Section 17200 et seq.

The UCL began as a law aimed at curbing trade mark abuse and deceptive, anti-competitive practices in the late 1800's and early 1900's. (Bus. & Prof. Code, § 17200 et seq. [formerly codified in 1933 at Civil Code, § 3369, subd. (3)].)[3] Since then, the definition of what constitutes "unfair competition" has broadened greatly to include any type of unlawful, unfair or fraudulent business practice. (*Int'l Ass'n of Cleaning & Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, 421-422 ["the common law concept of unfair competition has been broadened"]; Bus. & Prof. Code, § 17200 et seq. [defining "unfair competition" today as any "unlawful, unfair or fraudulent business act or practice"].)

This Court discussed the expanding notion of unfair competition in *Barquis v. Merchants Collection Association of Oakland, Inc.*, explaining:

> As originally enacted in 1933, section 3369 defined "unfair competition" only in terms of "unfair or fraudulent business

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3 For additional historical perspective, *see generally* Gilbert Holland Montague, "*Unfair Methods of Competition*" (1915) 25 Yale L.J. 20; Zechariah Chafee, Jr., *Unfair Competition* (1940) 53 Harv. L.R. 1289.

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

(*Barquis v. Merchants Collection Ass'n of Oakland, Inc.* (1972) 7 Cal.3d 94, 112-113.)

Under the "unlawful" business practices prong of the UCL, "section 17200 'borrows' violations of other laws and treats them as unlawful practices independently actionable under Section 17200 *et seq.*" (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 839.) An unlawful business practices action can be based on the violation of "any law, civil or criminal, statutory or judicially made[,] federal, state or local." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1474 [internal citations omitted].)

There is no intent to restrict application of the UCL to any particular subset of laws, but rather, an intent to "permit tribunals to enjoin ongoing wrongful business conduct *in whatever context such activity might occur.*" (*Barquis, supra,* 7 Cal.3d at p.111 [emphasis added]; *Cal-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20

Cal.4th 163, 180 ["the unfair competition law's scope is broad"; "Its coverage is 'sweeping, embracing *anything* that can properly be called a business practice and that at the same time is forbidden by law.'" (emphasis added; internal citations omitted)]; *People v. Nat'l Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 770-772 ["The very breadth of the terms used by the Legislature [in defining unfair competition] indicate, in our judgment, an intent to be inclusive rather than restrictive in the practices to be enjoined"]; *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 927 ["the section 17200 proscription of 'unfair competition' is not restricted to deceptive or fraudulent conduct but extends to any *Unlawful* business practice"].)

Workplace safety violations are no exception. Indeed, as one commentator aptly explained: "[t]he employer who violates the working condition laws competes unfairly with other growers and contractors in the business sense as well. By neglecting to provide the facilities required, the employer ... lowers his cost of production and thereby gains an advantage over his competitor who complies with the law." (Note, *Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition* (1968) 19 Hastings L.J. 368, 411.) "Failing to provide the required facilities" for a safe workplace, therefore, is "clearly an unlawful method of competition" contemplated under California's UCL. (*Id.*) This is precisely the type of unlawful business conduct that is alleged in this case.

Specifically, as alleged in the Third Cause of Action in the Complaint, Defendants attempted to cut corners to save money in violation of the labor laws of this state. In so doing, in addition to violating worker safety laws (and killing two workers), Defendants also engaged in an unlawful business practice that gave them an unfair competitive advantage over other businesses, *e.g.*, those that properly devoted adequate resources to workplace safety as legally required. Under the Business and Professions Code, civil penalties, restitution and injunctive relief are thus appropriately sought to redress the additional harms caused to the competitive business market by Defendants' illegal misconduct. (Bus. & Prof. Code, §§ 17203-17206.)

Under the UCL, the District Attorney has express authority to seek civil penalties in an amount "not to exceed two thousand five hundred dollars ($2,500) for each violation." (Bus. & Prof. Code, § 17206.) "Unless otherwise expressly provided," civil penalties under Business and Professions Code Sections 17200 are intended to be "cumulative to each other and to the remedies or penalties available under all other laws of this state," including any penalties that may be assessed by CalOSHA or under any other laws with respect to the violations in this case. (Bus. & Prof. Code, § 17205; *see also People v. Toomey* (1984) 157 Cal.App.3d 1, 22; *People v. Dollar Rent-A-Car Sys., Inc.* (1989) 211 Cal.App.3d 119, 132.)

B. Business and Professions Code Section 17500 et seq.

The People's Fourth Cause of Action is premised on Business and Professions Code Section 17500, which was enacted in 1941 and makes it unlawful for any person or corporation to use false and misleading statements or advertising to secure competitive advantages by deceiving the public with respect to their goods or services. Specifically, Section 17500 states:

> It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, ...

(Bus. & Prof. Code, § 17500.)

Violations of Section 17500 may be prosecuted by district attorneys either criminally or civilly. (Bus. & Prof. Code, §§ 17500, 17535-17536.) Under Sections 17535 and 17536, entities that violate Section 17500 may be enjoined from using false and misleading advertising and charged with:

> a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in

> a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(Bus. & Prof. Code, § 17536.) As above, the penalties under Section 17500 are expressly meant to be cumulative of other penalties assessed under any other law. (Bus. & Prof. Code, § 17534.5 [stating that "[u]nless otherwise expressly provided," civil penalties under Section 17500 are intended to be "cumulative to each other and to the remedies or penalties available under all other laws of this state"].)

Here, the Complaint alleges that the Defendants made false and misleading representations to their employees and the general public assuring that their workplace facilities were safe places to work. The People seek injunctive relief and penalties based on the competitive advantage the Employers received from deceiving the public regarding employee safety, particularly because these representations "resulted in the illegal retention of employees and customers in violation of the unfair competition laws." (Compl. ¶ 73.) Unlike the 17200 cause of action, the People's Fourth Cause of Action is not predicated on any particular workplace safety law, but rather, on a set of false and misleading representations.

II. BACKGROUND REGARDING THE FEDERAL OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

Under the federal William-Steiger Occupational Safety and Health Act of 1970, Congress established the Occupational Safety and Health Administration for the purpose of regulating "commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and women in the Nation safe and healthful working conditions and to preserve our human resources." (29 U.S.C. § 651.) Federal workplace safety laws and regulations were thereafter developed to establish a uniform minimum set of standards to be applied across the country, and a federal enforcement program was created.

However, it has always been the policy of the federal government to encourage "the States to assume the fullest responsibility for the administration and enforcement of their [own] occupational safety and health laws." (29 U.S.C. § 651(11).) States that desire to assume responsibility for enforcing their own occupational safety and health laws are therefore entitled, subject to approval by the Secretary of Labor, to "preempt Federal standards" and exert sole jurisdiction over the workplace safety laws and regulations, with very few inapplicable exceptions where federal jurisdiction was retained. (29 U.S.C. § 667(b).)

At the time of the federal Act, California was already engaged in enforcing its own occupational safety and health laws. (*See* Susan Ann

Meyers, *The California Occupational Safety and Health Act of 1973*, 9 Loy. L.A. L. Rev. 905, 906-909 (1976) [noting California worker safety laws have existed since the early 1900s].) Following enactment of the Act, California submitted its State Plan requesting federal approval from the Secretary of Labor to maintain responsibility for developing and enforcing its own workplace safety laws and regulations, and its Plan was approved. (29 C.F.R. §§ 1952.170-1952.175.)

III. BACKGROUND REGARDING CALIFORNIA'S FEDERALLY APPROVED WORKER SAFETY STATE PLAN

Consistent with the new federal Act, California's Occupational Safety and Health Act of 1973 (the "California Act") was "enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training and enforcement in the field of occupational safety and health." (Lab. Code, § 6300.) Sections 6400, *et seq*, establish strict duties upon all employers in the State to "furnish employment and a place of employment that is safe and healthful for the employees therein" and set forth both criminal and civil penalties for violations of these laws. (Lab. Code, § 6400 et seq.)

The California Act further established the "OSHA program for the adoption and enforcement of workplace safety and health standards," which is made up of three "branches," including: (a) "A Standards Board to adopt standards"; (b) "A Division to enforce standards"; and (c) "An Appeals Board to hear appeals of employers cited by the Division for violation of the standards." (Assembly Committee on Labor and Employment, California Bill Analysis, 1999-2000 Regular Session, Assembly Bill 1127 (April 14, 1999).) The "Division" responsible for enforcement refers to the California "Division of Occupational Safety and Health," which is commonly referred to as "CalOSHA," and is a division of the California Department of Industrial Relations. (Lab. Code, § 6302, subd. (d).)

A. Both The Federal And State Acts Are Intended To Maximize Enforcement Efforts To Protect Workers

The California State Plan was adopted following two tragedies, including the June 24, 1971 Sylmar Tunnel explosion that killed seventeen men and the October 16, 1972 Arroyo Seco freeway collapse in Pasadena that killed six and injured thirty others. (Meyers, *supra,* 9 Loy. L.A. L. Rev. at pp.914-918.) An Assembly "Subcommittee on the Sylmar Tunnel Disaster" was established in 1971 to evaluate "whether existing Labor Code and safety regulations were adequate to prevent the explosion and the fatalities." (*Id.* at p.914 [citing subcommittee reports and hearings].) The "Assembly Select Committee on Industrial Safety" was also established a

short time later to further investigate such issues.

The Industrial Safety Committee determined that there was an increase in workplace fatalities from 1966 to 1970, but criminal prosecutions and fines collected in relation thereto had decreased substantially. (*Id.* at pp.915-16.) The committee found "a deplorable lack of programs and planning to insure safety for California workers" under the laws existing at that time. (*Id.* at p.915 [quoting *Hearing of Dec. 12, 1973, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.*, at p.1].) Among other things, the committee determined that one of the problems was a "lack of enforcement" of the worker safety laws. (*Id.* at p.916 [quoting Select Comm. on Industrial Safety Of The Assembly General Research Comm., 1972 Sess., *Report On Preliminary Findings* (1972)].). In support of this finding, the Committee expressed concern "that there had been employment-related deaths in which a prosecutorial fine of $25-50 was levied, and that there had been many times when there was no prosecution, at all, for violations for safety orders that resulted in deaths." (*Id.* at p.916 [citing *Hearing of Jan. 12, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.*, at pp.31 & 46].)

Assembly Bill 150, entitled the "Occupational Safety and Health Act," was then introduced on January 23, 1973 with an aim to redesign the worker safety laws to increase enforcement, and address other problems, so

as to better protect workers in the State. (*Id.* at pp.917-918.) Included in the California Act, were provisions for both criminal and civil penalties to achieve the enforcement goals. (Lab. Code, § 6423 et seq.) The criminal penalties were "modeled on the federal program" and prior California law, but the civil penalty statutes, including Labor Code Sections 6428 and 6429, were newly adopted at this time. (Meyers, *supra*, at pp.926-27.) The Act went into effect in October 1973 and shortly thereafter became part of the first federally approved California State Plan under the federal Act.

B. Subsequent Amendments To The State Plan Increased Authorized Penalties

Since 1973, the penalty statutes in the State Plan have been amended to, among other things, increase the permissible penalty amounts and encourage greater enforcement efforts. The Legislature enacted these amendments most recently in 1999 in response, once again, to "a series of horrifying and preventable accidents where workers ha[d] been suffocated, crushed, or burnt to death in California following willful safety violations." (Senate Rules Committee, AB 1127 Bill Analysis (Sept. 3, 1999).) The purpose of the 1999 amendment was specifically "to increase the civil and criminal penalties for violations of statutes and regulations regarding worker safety" because there was "no adequate penalty on the books." (*Id.*) In so finding, the Senate Rules Committee referenced the minimalistic $70,000 penalty that existed at the time, noting that "[t]here are greater

penalties under pollution laws for discharges that threaten wildlife, than for safety violations [that] kill or maim workers." (*Id.*)

Similar to its intentions in 1973, therefore, the Legislature found it necessary to further "expand civil and criminal penalties for failure to maintain a safe workplace" to maximize enforcement of worker safety laws. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 935.) The "net effect of the proposed reforms was to increase significantly the sanctions available against those in control of workplace safety, with the goal of deterring unsafe practices and reducing the number and severity of future accidents." (*Elsner, supra,* 34 Cal.4th at p.930; *see also Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 440-445.)

C. The State Plan Has Always Contemplated A Special Prosecutorial Role In Enforcement

In furtherance of the intentions to maximize enforcement efforts in response to workplace safety violations, the California Act contemplates both administrative action and court action as deemed "appropriate" by prosecutors. (Lab. Code, §§ 6313, 6315 & 6317.) To initiate these efforts, the Legislature authorized the Division to investigate places of employment following work-related accidents or to redress occupational hazards or illnesses. (Lab. Code, §§ 6313-6314.)

The Division has discretion to "investigate the causes of any [non-fatal or non-serious] industrial accident or occupational illness which

occurs within the state in any employment or place of employment, or which directly or indirectly arises from or is connected with the maintenance or operation of the employment or place of employment." (Lab. Code, § 6313, subd. (b).) In such cases, the Division is further mandated to "issue any orders necessary to eliminate the causes and to prevent reoccurrence." (*Id.*) If a violation of the worker safety laws is uncovered, the Division is required to "issue a citation to the employer" no later than six months after the violation occurred, and it "may impose a civil penalty" in connection with any such citations. (Lab. Code, § 6317.) A "'notice' in lieu of citation may be issued" only for minor violations that are not "serious, repeated, willful, or arise from a failure to abate." (*Id.*) In non-serious, non-fatal accidents, there are no further enforcement related actions required.

The enforcement scheme of the California State Plan, however, does not end there. Additional investigations and enforcement efforts are *mandated* with respect to all workplace fatality cases or other instances involving "serious" or "willful" violations of the law. In these cases, unlike the procedures for lesser offenses, the Division "must investigate the causes of any employment accident that is fatal to one or more employee or that results in a serious injury or illness, or is a serious exposure, unless it determines that an investigation is unnecessary." (Lab. Code, § 6313, subd. (a).) If a "serious" or "willful" violation is found to exist, the Division is

required, as above, to "issue a citation to the employer" no later than six months after the violation occurred, and it "may impose a civil penalty" in connection with any such citations. (Lab. Code, § 6317.)

In addition to mandating administrative action, the Legislature also requires the Division to have a Bureau of Investigation (the "BOI") to investigate the most serious violations of OSHA standards and regulations for the sole purpose of referring cases to prosecutors for appropriate additional action in the courts of this State. (Lab. Code, § 6315; Gov. Code, § 26500.) The BOI is responsible for reviewing inspection reports from the Division inspections under Section 6313 that involve "serious violations where there have been serious injuries to one to four employees or a serious exposure." (Lab. Code, § 6315, subd. (a).) If the BOI "finds criminal violations may have occurred" it is then instructed to perform its own, additional, accident investigation. (Lab. Code, § 6315, subd. (a).)

Upon investigation, the BOI "is responsible for preparing cases for the purpose of prosecution, including evidence and findings." (*Id.*) Unless the BOI determines that no illegal conduct occurred, the BOI is *required* to refer the case to prosecuting authorities for further enforcement action. (Lab. Code, § 6315, subd. (g).) Specifically, pursuant to Labor Code Section 6315, subdivision (g):

> "In any case where the bureau is required to conduct an investigation, and in which there is a serious injury or death, the results of the investigation *shall be referred in a timely manner by*

> *the bureau to the appropriate prosecuting authority having jurisdiction for appropriate action*, unless the bureau determines that there is legally insufficient evidence of a violation of the law."

(Lab. Code, § 6315, subd. (g) [emphasis added].)

To accomplish its purpose, the BOI is specifically authorized to "communicate with the appropriate prosecuting authority at any time" and instructed to cooperate with both the administrative Division and the prosecuting authorities that receive BOI case referrals for investigation and prosecution. (Lab. Code, § 6315, subds. (h)-(i).) The BOI is a separate operating unit that is required to report annually to the Division regarding the number of cases investigated, the number of cases referred to prosecuting authorities and "the final court action if the case was prosecuted." (Lab. Code, § 6315.3.)

In accordance with these federally approved State Plan procedures, the BOI uncovered numerous violations of California law in this case and referred such violations to the Orange County District Attorney for further action under Labor Code Section 6315, subdivision (g). As discussed in detail below, there is no federal intent to limit the District Attorney's discretion to prosecute consumer actions when referred cases by the BOI under the State Plan. In fact, federal law fully supports such action.

IV. THERE IS NO EXPRESS CONGRESSIONAL INTENT TO PREEMPT CALIFORNIA'S UCL OR FAL IN THE ACT

"This court has recognized 'four species of federal preemption: express, conflict, obstacle and field.'" (*Parks v. MBNA America Bank, N.A.* (2012) 54 Cal.4th 376, 383 [quoting *Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935].) "[E]xpress preemption arises when Congress 'define[s] explicitly the extent to which its enactments pre-empt state law.'" (*Id.* [quoting *Viva!, supra*, 41 Cal.4th at p.936].)

When considering a claim of express preemption, this Court explained:

> The United States Supreme Court has identified "two cornerstones" of federal preemption analysis. (*Wyeth v. Levine* (2009) 555 U.S. 555, 564–565, 129 S.Ct. 1187, 1194, 173 L.Ed.2d 51.) First, the question of preemption "'fundamentally is a question of congressional intent.'" (*In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1265, 63 Cal.Rptr.3d 418, 163 P.3d 106, quoting *English v. General Electric Co.* (1990) 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65; see also *Wyeth,* 555 U.S. at p. 565, 129 S.Ct. at p. 1194 ["'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'"].) If a statute "contains an express pre-emption clause, our 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" (*Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 62–63, 123 S.Ct. 518, 154 L.Ed.2d 466; see also *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 939, 63 Cal.Rptr.3d 50, 162 P.3d 569.) "'Also relevant, however, is the "structure and purpose of the statute as a whole," [citation] as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business,

consumers, and the law.' " (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 816, 135 Cal.Rptr.2d 1, 69 P.3d 927, quoting *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 486, 116 S.Ct. 2240, 135 L.Ed.2d 700.)

(*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1059-1060.)

A. The UCL And FAL Are Subject To A Presumption Against Preemption

California's UCL and FAL are laws of "general applicability" that long predated the federal Act. As such, the UCL and FAL are subject to a presumption against preemption. (*Gade v. Nat'l Solid Wastes Mgmt Assoc.* (1992) 505 U.S. 88, 107 [noting laws of "general applicability" are not preempted]; *Farm Raised Salmon Cases, supra,* 42 Cal.4th at p.1088 [noting "[c]onsumer protection laws such as the [UCL], false advertising law, and CLRA, are within the state's historic police powers, and therefore are subject to the presumption against preemption"].)

Under this presumption, "in all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... [the Court] start[s] with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Brown, supra,* 51 Cal.4th at p.1060 [quoting *Wyeth, supra,* 55 U.S. at p.565]; *see also Farm Raised Salmon Cases, supra,* 42 Cal.4th at p.1088.) When the state law "long predates" the applicable federal regulation, as

here, there is no doubt that the state law "comprises a field traditionally occupied by the states and, accordingly, the presumption 'applies with particular force here." (*Brown, supra,* 51 Cal.4th at p.1052 [quoting *Farm Raised Salmon Cases, supra*, 42 Cal.4th at p.1088].)

The presumption applies to guide the Court's analysis with respect "to the *existence* as well as the *scope* of preemption." (*Farm Raised Salmon Cases, supra*, 42 Cal.4th at p.1088.) When applying the presumption:

> "courts should narrowly interpret the scope of Congress's 'intended invalidation of state law' whenever possible." (*Olszewski v. Scripps Health, supra,* 30 Cal.4th at p. 815, 135 Cal.Rptr.2d 1, 69 P.3d 927, quoting *Medtronic, Inc. v. Lohr, supra,* 518 U.S. at p. 485, 116 S.Ct. 2240; see also *Cipollone v. Liggett Group, Inc., supra,* 505 U.S. at p. 518, 112 S.Ct. 2608 [the "presumption reinforces the appropriateness of a narrow reading" of an express preemption provision]; *id.* at p. 533, 112 S.Ct. 2608 (conc. opn. of Blackmun, J.) ["We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language."].) Indeed, the presumption against preemption is sufficiently powerful to impose upon courts a "duty to accept the reading that disfavors pre-emption" as among equally plausible interpretations of an express preemption clause. (*Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687; see also *Altria Group, Inc. v. Good* (2008) 555 U.S. 70, 77, 129 S.Ct. 538, 543, 172 L.Ed.2d 398 ["When the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"].)

(*Brown, supra,* 51 Cal.4th at p.1064.)

B. California State Law Preempts Federal Law Here, Not The Other Way Around

Under the Act, Congress declared "its purpose and policy ... to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human recourses" in thirteen specific ways, including: "by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws ..." and "by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment." (29 U.S.C. § 651.)

In accordance with these intentions, "[a]ny States that desire to assume responsibility for development and enforcement therein of occupational safety and health standards" may elect to submit a state plan for approval by the Secretary of Labor "to preempt Federal standards." (29 U.S.C. § 667(b).) Commenting on the federal OSHA regulating authority, the U.S. Supreme Court explained this reverse preemption thus:

> The Act as a whole demonstrates that Congress intended to promote occupational safety and health while avoiding subjecting workers and employers to duplicative regulation. Thus, it established a system of uniform federal standards, but gave States the option of preempting the federal regulations entirely pursuant to an approved state plan that displaces the federal standards.

(*Gade, supra,* 505 U.S. at pp.89 & 96-97.)

California submitted its plan requesting approval to assume responsibility for developing and enforcing its own workplace safety laws and regulations, and its plan was initially approved approximately forty years ago. (29 C.F.R. §§ 1952.170-1952.175.) It was most recently amended and approved again, effective October 5, 1989. (29 C.F.R. § 1952.172 (a); *see also* Notice of Motion and Motion for Judicial Notice in Support of People's Petition for Rehearing in re February 27, 2014 Opinion, Ex. A [filed March 11, 2014, 4th Dist., Div. 3, Case No. G047661] [attaching copy of the 1989 Plan].) As long as the State continues to maintain the minimal protections required under federal law (which it does), California thus retains exclusive jurisdiction over occupational safety and health standards with few expressly established exceptions. (29 C.F.R. § 1952.172.)

C. Congress's Expressly Reserved Jurisdiction Under The Act Does Not Include Consumer Protection Actions

Upon approval of a state plan, Congress expressly reserved limited discretionary authority for the Secretary of Labor to exercise jurisdiction "with respect to comparable standards" for "at least three years after the plan's approval" and until it has been determined that the state plan meets federal standards in operation. (29 U.S.C. § 667(e).) The federal government also retained the power to withdraw approval of any state plan if "there is a failure to comply substantially with any provision of the State

plan." (29 U.S.C. § 667(f).) As a further "condition for retention of jurisdiction by [the] State," Congress mandated that the Secretary of Labor "shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan" so it can re-assert federal jurisdiction if necessary. (29 U.S.C. § 667(f); 29 C.F.R. § 1952.172(c).)

Upon approval of California's State Plan, FedOSHA specifically set forth the intended reservation of federal jurisdiction in this State under Section 1952.172 of the Code of Federal Regulations, entitled "Level of Federal Enforcement," as follows:

> **(b)** The U.S. Department of Labor will continue to exercise authority, among other things, with regard to:
>
> **(1)** Specific Federal standards which the State has not yet adopted or with respect to which the State has not amended its existing State standards when the Federal standard provides a significantly greater level of worker protection than the corresponding Cal/OSHA standard, enforcement of new permanent and temporary emergency Federal standards until such time as the State shall have adopted equivalent standards, and enforcement of unique and complex standards as determined by the Assistant Secretary.
>
> **(2)** The following maritime activities:
>
> > **(i)** Longshore operations on vessels from the shore side of the means of access to said vehicles.
> >
> > **(ii)** Marine vessels construction operations (from the means of access of the shore).

(iii) All afloat marine ship building and repair from the foot of the gangway.

(iv) All ship building and repair in graving docks or dry docks.

(v) All ship repairing done in marine railways or similar conveyances used to haul vessels out of the water.

(vi) All floating fuel operations.

(vii) All afloat dredging and pile driving and similar operations.

(viii) All diving from vessels afloat on the navigable waters.

(ix) All off-shore drilling rigs operating outside the 3-mile limit.

(3) Any hazard, industry, geographical area, operation or facility over which the State is unable to exercise jurisdiction fully or effectively.

(4) Private contractors on Federal installations where the Federal agency claims exclusive Federal jurisdiction, challenges State jurisdiction and/or refuses entry to the State; such Federal enforcement will continue at least until the jurisdictional question is resolved at the National level between OSHA and the cognizant Federal agency.

(5) Complaints filed with Federal OSHA alleging discrimination under section 11(c) of the OSH Act.

(6) Completion of Federal enforcement actions initiated prior to the effective date of the agreement.

(7) Situations where the State is refused entry and is unable to obtain a warrant or enforce the right of entry.

(8) Enforcement in situations where the State temporarily is unable to exercise its enforcement authority fully or effectively.

(9) Federal government employers and employees; and the U.S. Postal Service (USPS), including USPS employees, and contract employees and contractor-operated facilities engaged in USPS mail operations.

> **(c)** As required by section 18(f) of the Act, OSHA will continue to monitor the operations of the California State program to assure that the provisions of the State plan are substantially complied with and that the program remains at least as effective as the Federal program. The Regional Administrator for Occupational Safety and Health will make a prompt recommendation for the resumption of the exercise of Federal enforcement authority under section 18(e) of the Act (29 U.S.C. 667(e)) whenever, and to the degree, necessary to assure occupational safety and health protection to employees in California.

(29 C.F.R. § 1952.172(b)-(c).)

There is nothing in this reservation of power that expresses any intent to preempt non-occupational safety and health laws or standards such as the UCL or FAL which are at issue in this case. There is likewise no express preemption intended of any prosecution by State prosecutors under the State Plan or otherwise. If there was an intent to preempt such actions, Congress and/or FedOSHA would certainly have indicated that this was the intent.

When the relevant statutes and regulations confirm an express intention to limit retained federal jurisdiction, as here, "deference should be paid to Congress's detailed attempt to clearly define the scope of preemption" and it must be inferred that "Congress intended to preempt no more" than expressly indicated. (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at pp.1091-1092; *see also Viva!*, *supra*, 41 Cal.4th at pp.945-952 [holding no preemption existed under the "*Freightliner* inference" that "'an express definition of the pre-emptive reach of a statute ... supports a

reasonable inference ... that Congress did not intend to pre-empt other matters'" [quoting *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541].)

D. Rather Than Preemption, Express Federal Intentions Confirm Support For State Enforcement And Jurisdiction

Rather than an intent to preempt state law, the express language of the Act actually indicates an intent *not* to preempt state law. As discussed above, the federal Act encourages "States to assume the fullest responsibility" for enforcement of workplace safety laws, as long as the minimum federal standards are maintained. (29 U.S.C. § 651(11).) California submitted its State Plan for approval and its plan was certified and approved many years ago. Approval of California's State Plan "removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health." (*United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal.3d 762, 772.)

1. The Violations Of CalOSHA Laws Alleged Here Are Not Preempted, But, Rather, Approved Parts Of The State Plan

There is no doubt that the relevant California worker safety penalty statutes (Lab. Code, § 6400 et seq.) and regulations (Title 8 C.C.R. 3328) alleged in the Complaint are fully approved parts of California's State Plan. Thus, the relevant workplace safety laws and regulations that were

"borrowed" under the UCL here are not preempted by federal law. Because the underlying violations of law that are "borrowed" for purposes of the People's UCL causes of action are not preempted, the UCL causes of action are not preempted either.

2. FedOSHA Expressly Confirmed The Act Is Not Intended To Preempt Non-Occupational Consumer Protection Laws

A federal "agency's interpretation of statutes within its administrative jurisdiction [must be] given presumptive value as a consequence of the agency's special familiarity and presumed expertise with ... legal and regulatory issues." (*Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.) FedOSHA has long recognized that it "has no authority to address ... non-occupational applications" of California state law, including "consumer" protection laws like the UCL and FAL. (62 Fed. Reg. 31159, 31159 (June 6, 1997).) This is "[b]ecause [federal] OSHA standards by definition govern occupational safety and health issues [and] they do not preempt state laws that regulate other concerns." (*Cal. Labor Federation v. Cal. Occupational Safety & Health* (1990) 221 Cal.App.3d 1547, 1557 n.8; *see also* 62 Fed. Reg. at pp.31159 & 31163.)

Therefore, according to the federal government, there can be no federal preemption under the Act over non-occupational laws such as the UCL and FAL. (*Cal. Labor Federation, supra,* 221 Cal.App.3d at p.1557

n.8 [confirming that with any law which is "not an occupational safety and health law, there could be no prospect of its federal preemption"].) "[T]he UCL does not serve as a mere enforcement mechanism" of the workplace safety laws, but rather as an independent action to curb the additional harms caused to the competitive marketplace by unlawful conduct. (*Rose v. Bank of America* (2013) 57 Cal.4th 390, 396-397 [explaining that the UCL "'borrows' violations of other laws and treats them as unlawful practices that the [UCL] makes *independently* actionable"]; *see also Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p.1095.)

Thus, because the UCL and FAL are consumer protection laws of general applicability, and not workplace safety laws, there is no intent to preempt their prosecutions in the Act.

3. The State Is Entitled To Vigorously Enforce Its Laws Even If Broader Or Greater In Scope Than Federal Laws

29 U.S.C. Section 667 further expressly confirms that there is no federal intent to "prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect." (29 U.S.C. § 667(a).) There is no federal standard in effect that relates to the People's UCL or FAL claims here. There is thus nothing preventing the State from adopting more stringent enforcement regulations than the federal government at any time.

Moreover, as this Court explained:

> [T]he effect of the federal approval of a state plan "merely removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health." A state may elect to regulate more strictly than the federal government does; but to gain approval of its plan it must regulate at least as stringently. Thus, while the jurisdiction of the state and the federal government is concurrent, it is not necessarily coincident because *the state may choose to regulate a broader scope of activities or regulate them in greater detail than the federal government does*.

(*Loskouski v. State Personnel Bd.* (1992) 4 Cal.App.4th 453 [quoting *United Air Lines*, *supra*, 32 Cal.3d at p.772] [emphasis added].)

Hence, California has every right to authorize additional prosecutions under the State Plan, the UCL or its FAL as a further aid to enforce occupational safety and health and consumer protection laws in this State without interfering with any retained federal jurisdiction.

Indeed, it has routinely been held by courts across the country that the federal Act does *not* preempt a state's right to enforce substantial fines and penalties for workplace deaths, even if those fines and penalties far exceed that which are provided for under federal law. (*See State v. Far West Water & Sewer, Inc.* (2010) 224 Ariz. 173, 228 P.3d 909 [Arizona laws not preempted by federal OSHA law]; *Sabine Consolidated, Inc. v. State* (1991) 806 S.W.2d 553 [Texas law not preempted); *People v. Pymm* (1989) 151 A.D.2d 133, 546 N.Y.S.2d 871 [New York law not preempted];

People v. Chicago Magnet Wire Corp. (1989) 126 Ill.2d 356, 534 N.E.2d 962 [Illinois law not preempted]; *People v. Hegedus* (1989) 432 Mich. 598, 443 N.W.2d 127 [Michigan law not preempted]; *State v. Black* (1988) 144 Wis.2d 745, 425 N.W.2d 21 [Wisconsin laws not preempted): *W. Virginia Mfrs. Ass'n v. State of W. Va.* (4th Cir. 1983) 714 F.2d 308 [West Virginia law not preempted].) The preemption analysis required in this case is no different.

4. FedOSHA Also Expressly Confirmed That Supplemental Enforcement Actions Are Not Preempted By The Act

Under the Act, a State may also properly proscribe the means of enforcing its workplace safety laws in the manner it sees fit. (*See Farm Raised Salmon Cases*, *supra,* 42 Cal.4th at p.1090 [rejecting an argument, similar to Petitioners, that a private party's enforcement action was selectively preempted where, as here, Congress "said absolutely nothing about proscribing the range of available remedies states might choose to provide for the violation of those laws, such as private actions" and there was nothing "in the legislative history suggesting that any proponent of the legislation intended a sweeping preemption of private actions predicated on requirements contained in state laws"].)

To be sure, when addressing a claim of preemption due to the "manner of enforcement" used with respect to Proposition 65, FedOSHA found "that neither a distribution of functions among agencies nor private

rights of action are prohibited under State plan provisions." (62 Fed. Reg. at p.31167 .) "[P]rocedural differences" in enforcement, including the "supplemental" use of prosecutors or private parties in the judicial process, are permitted as long as the state effort "remains at least as effective" as the federal law, and the state agency remains responsible for ensuring adequate compliance and enforcement. (*Id.* at p.31168.)

Further, according to FedOSHA:

> "State plans do not operate under a delegation of Federal authority but under their own authority, and therefore they may use methods of enforcement not included under the Federal Act." (62 Fed. Reg. 31159, 31180 [June 6, 1997].) "Whether such supplements are a useful or appropriate addition to State plan authority is a matter for the State to decide. [¶] ***The OSH Act, therefore, does not bar the States from adopting supplemental enforcement mechanisms.***"

(*Id.* at p.31170 [emphasis added].)

In this case, the relevant labor laws and regulatory provisions were long ago approved as part of California's State plan. Such provisions include specific mandates for the referral of cases to prosecutors for "appropriate" supplemental enforcement action. (Lab. Code, §§ 6315, 6423 & 6425.) The contemplated supplemental action by prosecutors serves only to enhance and support the enforcement efforts of CalOSHA, and is fully consistent with federal law. Because supplemental actions permitted under California law further the intentions of both federal and state worker safety laws, the supplemental prosecutions authorized under the California Labor Code have properly been part of California's State

Plan since it was originally approved in the 1970s, and are not preempted.

Although the UCL and FAL are laws of general applicability governing non-worker safety concerns, they cannot be preempted by the federal Act for similar reasons. The UCL and FAL were both enacted before the Act and have been used for decades as a means to assess additional penalties against employers that violate workplace safety (or any) laws and gain unfair competitive advantages as a result. There is nothing in the Act that conflicts with or suggests any intention to preempt these separate and distinct types of supplemental enforcement actions under California law.

5. The Act Expressly States That The Retained Federal Oversight Function Does Not Impede State Jurisdiction

The fact that Congress granted FedOSHA authority to monitor the State's compliance with its State Plan does not indicate any intent to retain any specific federal jurisdiction or to bar the People's UCL and FAL actions. (29 U.S.C. § 667(f).) In fact, both 29 U.S.C. Section 667, subdivision (f), and 29 C.F.R. Section 1952.172, subdivision (c) expressly confirm that no federal enforcement jurisdiction was retained under this authority. Instead, FedOSHA is expressly required to take affirmative steps to "notify the State agency of [the] withdrawal of approval" of the State Plan and "make a prompt recommendation for the *resumption of the exercise of Federal enforcement authority*" in any area not otherwise

expressly reserved when it finds it "necessary to assure occupational safety and health protection to employees in California" during its regular auditing of California's State Plan. (29 C.F.R. 1952.172(b)-(c); 29 U.S.C. 667(f).) There is no evidence of any intent by FedOSHA either to resume or undertake any enforcement jurisdiction in relation to any of the alleged violations of California law in this case.

The mere fact that the federal government engages in an oversight function, therefore, does not legally preempt California law. (*See People v. Guiamelon* (2012) 205 Cal.App.4th 383, 400-407 [finding no preemption under similar federal-state cooperative program].) "Where, [as here,] coordinated state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." (*Guiamelon, supra*, 205 Cal.App.4th at p.401 [quoting *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 816]; *see also Viva!*, *supra*, 41 Cal.4th at pp.941-945 [holding there was no express or implied intent to preempt a similar "dual state-federal regulation"].)

V. THERE IS NO BASIS TO FIND THE UCL OR FAL ACTIONS IMPLIEDLY PREEMPTED EITHER

"Congress's implied intent to preempt is found [only] (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement

federal law [citation]; (ii) when compliance with both federal and state regulations is an impossibility [citation]; or (iii) when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at pp.1091-1092.) None of these theories have yet been advanced as a basis for holding the People's UCL or FAL causes of action preempted in this case, but even if they had, there is no basis on which to hold these claims preempted on such grounds. (*See Viva!*, *supra*, 41 Cal.4th at p.936 [noting: "'[C]ourts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it.'" (quoting *Olszewski*, *supra*, 30 Cal.4th at p.815)].)

First, rather than field preemption, the federal Act in question here expressly encourages the States to assume full responsibility for the enforcement of workplace safety laws. The Act further encourages the States to adopt more stringent standards and to enforce its laws in any manner that it sees fit. The Act also carefully limits the retained federal jurisdiction to a discrete set of circumstances not applicable here. There is thus no intent to preempt the entire field of worker safety (or any other) laws under the Act. (*See Viva!*, *supra*, 41 Cal.4th at pp.941-945 [holding there was no express or implied intent to preempt a similar "dual state-federal regulation" that established a "regulatory floor" and contained only a "narrow" expressly limited federal jurisdictional role].)

Second, there is no conflict between federal or state law at issue in this case. It is not "impossible" to comply with all of the federal and state laws alleged in this case. There is thus no basis to hold the UCL or FAL preempted under a theory of conflict preemption. (*Viva!*, *supra*, 41 Cal.4th at p.944 [holding, as here, that it is not "physically impossible" to comply with both federal and state law even if the state law "imposes a higher standard" and is more restrictive than federal law].)

Third, enforcement actions under the UCL and FAL do not pose as an obstacle to enforcement of the federal laws, but rather as a complement to them. As such, there is likewise no basis to hold the UCL or FAL preempted on a theory of obstacle preemption. (*Viva!*, *supra*, 41 Cal.4th at pp.945-952.)

VI. A FINDING OF PREEMPTION HERE WOULD LEAD TO ABSURD RESULTS

Finally, there is simply no reason the federal government would seek to preempt a consumer protection action under the federal worker safety Act. The People's action seeks to enforce the law and therefore serves to achieve similar purposes to those of both federal and State worker safety laws. Supplementary actions by prosecutors have always been approved parts of the California State Plan and have had the full support of both FedOSHA and CalOSHA for decades.

Hence, the very idea that the federal government would wish to bar a state consumer prosecution action such as this is absurd. (*See Reuter v. Board of Sup'rs of San Mateo County* (1934) 220 Cal. 314, 321 [noting the "cardinal rule in the interpretation of statutes and also of constitutional enactments that a construction should not be given to the statute or to the Constitution, if it can be avoided, which would lead to absurd results"].) There is no federal law enforcement counterpart to a State prosecutor seeking to assert jurisdiction against the Defendants for their wrongdoing here. There are further no federal rights or protections being violated by the present prosecution which would rise to the level of federal concern. Thus, federal preemption over the People's claims in this case would serve no purpose other than to shield corporate wrongdoers from liability for violating the laws of this State and country. This cannot be the law.

CONCLUSION

"[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state law causes of action. In all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' [citation] we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (*Farm Raised Salmon Cases, supra,* at p.1088 [citations omitted].) This is

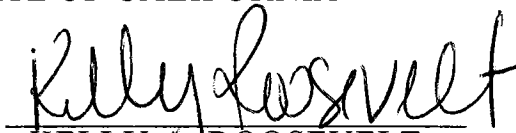
such a case. There is no express or implied Congressional intent to preempt California's consumer protection laws under the federal Act.

Accordingly, the Opinion should be reversed and the matter remanded to the Fourth District with instructions to enter a new order denying the Petition for Writ of Mandate and thereby affirming the Respondent Court's Order overruling the Defendant's Demurrer to the Third and Fourth Causes of Action in the People's Complaint.

Dated this 11th day of February, 2015.

Respectfully submitted,

TONY RACKAUCKAS, DISTRICT ATTORNEY COUNTY OF ORANGE, STATE OF CALIFORNIA

BY: 

KELLY A. ROOSEVELT
DEPUTY DISTRICT ATTORNEY

CERTIFICATE OF W ORD COUNT

[California Rules of Court, Rules 8.520(b) and 8.204(c)]

The text of this Opening Brief on the Merits (excluding tables and caption pages) consists of 10,151 words as counted by the word-processing program used to generate this brief.

Dated this 11th day of February, 2015.

Respectfully submitted,

TONY RACKAUCKAS, DISTRICT ATTORNEY COUNTY OF ORANGE, STATE OF CALIFORNIA

BY: 

KELLY A. ROOSEVELT
DEPUTY DISTRICT ATTORNEY

PROOF OF SERVICE BY MAIL

I, Christina Lajos, am employed in the Office of the District Attorney for the County of Orange, State of California. I am over the age of eighteen years and I am not a party to the within action. My business address is 401 Civic Center Drive West, Santa Ana, California 92701.

On February 11, 2015, I served a copy of the following document(s):

OPENING BRIEF ON THE MERITS

by placing a true copy of each document in a sealed envelope and placing such envelope, in the United States Postal Service mail at Santa Ana, California, that same day, in the ordinary course of business, postage thereon fully prepaid, addressed as follows:

Appellate Coordinator
Office of the Attorney General
California Department of Justice
300 S. Spring Street
Los Angeles, CA 90013-1230
TEL: (213) 897-2000

The Honorable Kim G. Dunning
Orange County Superior Court
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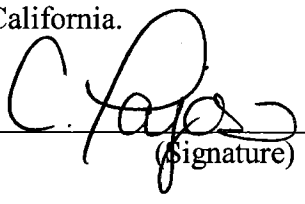
4th District Court of Appeal – Division 3
601 W. Santa Ana Blvd.
Santa Ana, California 92701

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

Executed on February 11, 2015, at Santa Ana, California.

Christina Lajos
(Type or print name)


(Signature)

PROOF OF SERVICE BY OVERNIGHT MAIL SERVICE

I, Christina Lajos, am employed in the Office of the District Attorney for the County of Orange, State of California. I am over the age of eighteen years and I am not a party to the within action. My business address is 401 Civic Center Drive West, Santa Ana, California 92701.

On February 11, 2015, I served a copy of the following document(s):

OPENING BRIEF ON THE MERITS

by placing a true copy of each document in a sealed envelope. I caused each envelope to be delivered by Overnight/Express Mail Delivery to the addressee(s) noted in this Proof of Service.

Supreme Court of California
Clerk of the Court
350 McAllister Street
San Francisco, CA 94102-4797
(14 Copies, 1 for Conforming and 1 Original)

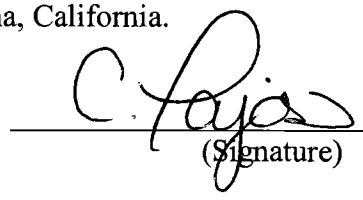
Brian A. Sun, Esq.
Frederick D. Friedman, Esq.
JONES DAY
555 South Flower Street, Fiftieth Floor
Los Angeles, CA 90071-2300
TEL: (213) 498-3939
Attorney for SOLUS INDUSTRIAL INNOVATIONS, LLC; EMERSON POWER TRANSMISSION CORPORATION; and EMERSON ELECTRIC CO.

Patrick D. McVey
Riddell Williams P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154-1192
TEL: (206) 389-1576
Attorney for SOLUS INDUSTRIAL INNOVATIONS, LLC; EMERSON POWER TRANSMISSION CORPORATION; and EMERSON ELECTRIC CO.

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

Executed on February 11, 2015, at Santa Ana, California.

Christina Lajos
(Type or print name)


(Signature)

PROOF OF SERVICE BY EMAIL

I, Christina Lajos, am employed in the Office of the District Attorney for the County of Orange, State of California. I am over the age of eighteen years and I am not a party to the within action. My business address is 401 Civic Center Drive West, Santa Ana, California 92701.

On February 11, 2015, I served a copy of the following document(s):

OPENING BRIEF ON THE MERITS

by causing said document to be served by transmitting said documents via email to the person(s) listed below:

Brian A. Sun, Esq.
Frederick D. Friedman, Esq.
JONES DAY
555 South Flower Street, Fiftieth Floor
Los Angeles, CA 90071-2300
TEL: (213) 498-3939
EMAIL: ffriedman@JonesDay.com
Attorney for SOLUS INDUSTRIAL INNOVATIONS, LLC; EMERSON POWER TRANSMISSION CORPORATION; and EMERSON ELECTRIC CO.

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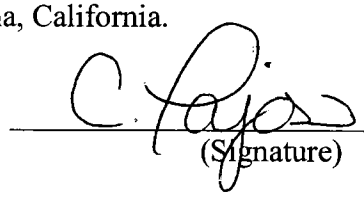
(Signature)