No. S222314

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

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

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Parties in Interest.

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

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

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

The Occupational Safety and Health Act ("OSHA") preempts any state regulation of workplace safety issues covered by federal standards absent a "State plan for the development of such standards and their enforcement" that has been approved by the U.S. Secretary of Labor. (29 U.S.C. §§ 651, 667(b).) As a result, to avoid federal preemption, states must adhere to their approved plans when enforcing any workplace safety standard that relates to a federal standard. (*Gade v. Nat. Solid Wastes Management Assn.* (1992) 505 U.S. 88, 102–104 (*Gade*).) This remains true even if the unapproved assertion of state jurisdiction is consistent with federal law and is "designed to promote worker safety." (*Id.* at p. 103.)

The District Attorney argues that prosecutors *should be* permitted to use the Unfair Competition Law (UCL) and False Advertising Law (FAL) to enhance workplace safety through civil penalties. But as the District Attorney admits, the U.S. Secretary of Labor has approved neither the UCL nor FAL as part of California's "plan for the development of [workplace safety] standards and their enforcement." (29 U.S.C. § 667(b).) Instead, the approved California state plan vests the state Division of Occupational Safety and Health ("Cal/OSHA") with the exclusive authority to seek civil penalties, and Cal/OSHA has already exercised that authority in this case. Accordingly, the Court of Appeal correctly held that the District Attorney's UCL and FAL claims for civil penalties are preempted by federal OSHA.

II. COUNTER-STATEMENT OF ISSUES

The District Attorney carefully frames his "Statement of the Issues" to avoid addressing whether the UCL and FAL were actually included as part of any California workplace safety plan approved by the U.S. Secretary of Labor. The Court of Appeal, however, correctly framed the issue as follows: Does federal OSHA preempt the UCL and FAL as *enforcement* mechanisms for workplace safety standards, because California never included the UCL or FAL as part of any California workplace safety plan that was approved by the U.S. Secretary of Labor?

III. STATEMENT OF THE CASE

A. Parties

The District Attorney filed this lawsuit, 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, 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

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

[Compl. ¶ 13].) On March 19, 2009, the water heater exploded, killing two Solus employees. (A1–2 [Compl. ¶ 1].)

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. (A12 [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 Copycat Civil Lawsuit Based on Same Alleged Violations of Workplace Safety Standards

On July 6, 2012, the Orange County District Attorney filed this lawsuit, alleging causes of action under Labor Code sections 6428 and 6429 and Business and Professions Code sections 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 A14 [Compl. ¶ 43] with Compl. ¶¶ 54, 60–61, 64–66, 69–75.)

D. Defendants File Demurrer

Defendants demurred to all four causes of action in the Complaint. (A40–61.) On the first two causes of action, defendants argued that the California Legislature had not authorized the district attorneys to bring suit under the Labor Code. Defendants also contended 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 heard oral argument on defendants' demurrer. Recognizing that the complaint trespasses on the work of Cal/OSHA, the Superior Court sustained defendants' demurrer to the first two causes of action, but overruled the demurrer as to the second two causes of action. (A230–231.)

E. The Court of Appeal's First Ruling

Defendants and the District Attorney both petitioned the Court of Appeal for writs of mandate or other appropriate relief. After the Court of Appeal summarily denied both petitions, both sides petitioned this Court for review. This Court directed the Court of Appeal to review both petitions arising out of the Superior Court's decision. The Court of Appeal heard oral argument on December 19, 2013, and entered its opinions in both matters on February 24, 2014. In *People v. Superior Court* (2014) 224

Cal.App.4th 33 (*Solus I*), review den., the Court of Appeal affirmed the Superior Court's decision sustaining defendants' demurrer to the first two causes of action, holding that the District Attorney lacked standing to file civil actions under Labor Code sections 6428 and 6429. In *Solus Industrial Innovations, LLC v. Superior Court* (2014) 224 Cal.App.4th 17 (*Solus II*), superseded after remand by 229 Cal.App.4th 1291, review granted, the Court of Appeal held that federal law preempted the District Attorney's claims under the UCL and FAL.

The District Attorney moved for reconsideration of the Court of Appeal's decision in *Solus II*. The Court of Appeal amended its order relating to preemption by deleting "without leave to amend" from that part of the decision giving instructions to the trial court on remand. The District Attorney then petitioned this Court for review.

In the Petition for Review, the District Attorney noted that the Court of Appeal 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 Statutes 1972, chapter 1084, pp. 2020–2021."

F. The Court of Appeal's Second Ruling

After receiving the case back from this Court, the Court of Appeal requested supplemental briefing to address former Civil Code section

3370.1 (as reflected in Stats. 1972, ch. 1084, § 2, pp. 2020–2021). The parties each submitted supplemental briefs, and the Court of Appeal issued a revised opinion that specifically addresses former Civil Code section 3370.1. Again, the Court of Appeal ruled that the District Attorney's claims under the UCL and FAL are preempted by federal law. (*Solus Industrial Innovations, LLC v. Superior Court* (2014) 229 Cal.App.4th 1291 (*Solus III*), review granted.)

The District Attorney moved for reconsideration again, and the Court of Appeal again amended its order relating to preemption by deleting "without leave to amend" from that part of the decision giving instructions to the trial court on remand. The District Attorney then filed a Petition for Review, which this Court granted.

IV. ARGUMENT

A. OSHA Preempts State Workplace Safety Regulations Absent Federal Approval of a State 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, FA v. Superior Court* (2002) 95 Cal.App.4th 606, 612 (*Washington Mutual*), quoting U.S. Const., art. VI, cl. 2.)

In *Gade*, *supra*, the U.S. Supreme Court determined that Congress enacted OSHA "to promote occupational safety and health while at the same time avoiding duplicative, and possibly counterproductive, regulation." (505 U.S. at p. 102.) To achieve these goals, OSHA "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.*)

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

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

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

The Supreme Court also noted that the scope of this preemption includes any state law that "'interferes with the *methods* by which the

federal statute was designed to reach th[at] goal. . . .' [Citation.]." (*Gade*, *supra*, 505 U.S. at p. 103, italics added, brackets in original.) In other words, "States are not permitted to assume an enforcement role without the Secretary's approval . . . ." (*Id.* at p. 101.) Further, OSHA preemption of state law over issues related to federal workplace safety standards is complete:

> 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 Assn., Inc. v. Henry* (9th Cir. 1997) 125 F.3d 1305, 1310 (*Industrial Truck*), citing *Gade*, *supra*, 505 U.S. at p. 103.)

California courts have faithfully applied the *Gade* preemption analysis. In an earlier case, the Court of Appeal held that 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 v. State Personnel Bd.* (1992) 4 Cal.App.4th 453, 456, italics added.) In other words, "unless 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."

(*California Lab. Federation v. Occupational Safety & Health Stds. Bd.* (1990) 221 Cal.App.3d 1547, 1552 (*Cal. Lab. Fed.*), italics added.)[2]

B. The UCL and FAL Claims Are Preempted Because the U.S. Secretary of Labor Did Not Approve Them.

California submitted its workplace safety plan to the U.S. Secretary of Labor, who approved that plan. (29 C.F.R. § 1952.170 *et seq.* [subpart K].) The approved California plan, however, 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 approved California plan calls for enforcement by Cal/OSHA, with administrative adjudications entrusted to the Occupational Safety and Health Appeals Board:

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

(29 C.F.R.§ 1952.170(a).) In addition, our Legislature specifically provided that *only* Cal/OSHA may seek civil penalties for violation of the regulations at issue: "The division [Cal/OSHA] may impose a civil penalty

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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.").

against an employer as specified in Chapter 4 (commencing with Section 6423) of this part." (Lab. Code, § 6317.)

Indeed, the California workplace safety plan does *not* include the UCL or FAL. (See 29 C.F.R. § 1952, subpart K.) The People admit this factual point in paragraph 11 of their Return to the Petitioner's Petition for Writ of Mandate, filed in the Court of Appeal on June 10, 2013. Moreover, it does not matter when the UCL and FAL were enacted. The relevant point is that neither the UCL nor FAL were part of any California plan approved by the U.S. Secretary of Labor.[3]

This same preemption issue was addressed by the Ninth Circuit in *Kelly v. USS-POSCO Industries* (9th Cir. 2003) 101 Fed.Appx. 182 (*Kelly*). In *Kelly*, the plaintiff asserted a UCL claim based on her former employer's allegedly inadequate workplace safety training program. (*Id.* at p. 184.) The Ninth Circuit noted that UCL section "17200 is not part of California's approved occupational health and safety plan." (*Ibid.*) In an amended complaint, the plaintiff had removed any reference to workplace safety standards, but this did not change the fact that "her unfair business practices

[3] Of course, because the UCL and FAL predated California's worker safety plan, yet were not included as part of that plan, then the conclusion must be that the State of California did not consider those statutes to be part of the worker safety plan. To the extent the District Attorney is trying to suggest that the U.S. Secretary of Labor had presumed knowledge of the UCL and FAL when approving the California state plan, the Court of Appeal's opinion thoroughly debunks this suggestion. (*Solus III*, *supra*, 229 Cal.App.4th at pp. 1303–1305.)

claim is intrinsically related to occupational health and safety and is preempted by OSHA." (*Ibid.*) Accordingly, the *Kelly* court applied the *Gade* preemption analysis and affirmed the dismissal of the plaintiff's UCL claim on the pleadings. (*Ibid.*)

Like the plaintiff in *Kelly*, the District Attorney in this case is attempting to enforce workplace safety standards through the Business and Professions Code. But again, neither the UCL nor FAL is part of California's workplace safety plan approved by the U.S. Secretary of Labor. (See 29 C.F.R. § 1952, subpart K; see also *Kelly*, supra, 101 Fed. Appx. at p. 184.) And it makes no difference whether the unapproved "manner of enforcement" is an unapproved civil lawsuit filed by a private plaintiff or an unapproved civil lawsuit filed by a district attorney. Accordingly, federal law preempts the District Attorney's UCL and FAL claims. (See *Gade*, *supra*, 505 U.S. at p. 105; *Kelly*, supra, at p. 184.)

C. The District Attorney's Efforts to Avoid the *Gade* Preemption Analysis Should Be Rejected.

The District Attorney allocates a significant portion of his brief trying to fashion an argument that the *Gade* preemption analysis does not apply to the UCL and FAL, and explaining why he thinks "supplemental actions by prosecutors" to enhance workplace safety standards are good public policy. As further explained below, the *Gade* preemption analysis applies equally to the UCL and FAL as the underlying workplace safety

standards where, as here, the UCL and FAL are being used to enforce those workplace safety standards. Any different conclusion would eviscerate the U.S. Secretary of Labor's authority to determine whether such enforcement mechanisms are consistent with public policy and permissible under OSHA.

1. A "Presumption Against Preemption" Does Not Allow the State to Bypass Federal Approval.

The District Attorney argues that the UCL and FAL "are laws of general applicability" and "there is a strong 'presumption against preemption' that protects these laws from preemption." (Op. Br. at p. 2, citing *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088.) The District Attorney's argument, however, ignores OSHA's express requirement that state plans for development and enforcement of workplace safety laws must be approved by the U.S. Secretary of Labor. As the Court of Appeal reasoned, the District Attorney cannot use a "presumption against preclusion" to avoid obtaining the U.S. Secretary of Labor's approval:

> 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 III*, 229 Cal.App.4th at pp. 1306–1307, italics added [distinguishing *Farm Raised Salmon Cases* (2009) 42 Cal.4th 1077].) In other words, the District Attorney is attempting to use the UCL and FAL not under any historic police powers, but as a device to seek civil penalties not authorized by California's workplace safety plan and without U.S. Secretary of Labor's approval. The District Attorney's attempt to make an end run around the legislative and federal administrative processes is exactly what *Gade* preemption is meant to prevent.[4]

The Court of Appeal's conclusion that the state must follow its workplace safety plan approved by the U.S. Secretary of Labor only makes sense. As the Ninth Circuit has explained, allowing a state to change its plan after approval would render 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 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 pre-emption" of the federal standard. . . . *It would make the state plan*

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[4] For the same reasons, other cases that analyze whether state laws improperly regulate areas of federal regulation based on a "presumption against preemption" are also easily distinguishable. (See, e.g., *People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 782–787 [analyzing whether the Federal Aviation Administration Authorization Act preempts the UCL].)

> *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].)

The District Attorney also cannot avoid the *Gade* preemption analysis by arguing that the UCL and FAL are "consumer protection laws" that apply outside the context of workplace safety. As the U.S. Supreme Court has explained, state laws are preempted if they are being used to regulate workplace safety without the U.S. Secretary of Labor's approval:

> 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.)

A prime example is Proposition 65 (the Safe Drinking Water and Toxic Enforcement Act of 1986), which requires health warnings for carcinogen exposure. In *California Labor Federation*, *supra*, the Court of Appeal rejected an argument that Proposition 65 was not a workplace

safety law "simply because it also applies outside the workplace and exempts certain employers [with 10 or fewer employees] from its requirements." (221 Cal.App.3d at p. 1557.)

Here, the District Attorney is admittedly attempting to "enhance" workplace safety by assessing penalties under the UCL and FAL for alleged workplace safety violations. (Op. Br. at p. 41.) But just as Proposition 65 could not be used to enforce workplace safety standards without the U.S. Secretary of Labor's approval, the UCL and FAL cannot be used to enforce workplace safety standards without the U.S. Secretary of Labor's approval.

Indeed, courts routinely hold that other federal laws completely preempt the UCL and/or FAL on specific areas of regulation. This Court held that the federal Highway Beautification Act preempts the UCL. (*People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.* (1985) 38 Cal.3d 509, 523.) The Court of Appeal held that a federal regulation adopted under the Home Owners' Loan Act preempted a state law claim under the UCL. (*Washington Mutual, supra*, 95 Cal.App.4th at pp. 612, 621.) The Ninth Circuit held that the Copyright Act completely preempts any attempt to use the UCL as a surrogate for a copyright claim. (*Kodadek v. MTV Networks, Inc.* (9th Cir. 1998) 152 F.3d 1209, 1213.) The Ninth Circuit also held that both the UCL and FAL were preempted by

the Home Owners' Loan Act. (*Silvas v. E*Trade Mortgage Corp.* (9th Cir. 2008) 514 F.3d 1001, 1008.)

Finally, the District Attorney attempts to distinguish its UCL claims from its FAL claims by arguing that its FAL claims do not rely upon any specific workplace safety standard. The District Attorney's FAL claims, however, 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. Indeed, the District Attorney could not prove that Solus falsely advertised its compliance with workplace safety standards without proving that Solus violated some workplace safety standards. As result, the same preemption analysis applies to the District Attorney's claims under both the UCL and FAL.

2. Stricter State Enforcement of Workplace Safety is Permissible But Still Requires Federal Approval.

The District Attorney also argues that nothing in OSHA precludes a state "from adopting more stringent enforcement regulations than the federal government at any time." (Op. Br. at p. 24.) There is no dispute about this, except that the U.S. Secretary of Labor still must approve the more stringent state enforcement regulations included within the state's workplace safety plan. Proposition 65 again provides a prime example.

As discussed above, the *California Labor Federation* court issued a writ compelling the Cal/OSHA Board to submit Proposition 65 to the U.S.

Secretary of Labor for possible approval that would avoid federal preemption of workplace violations. (*Cal. Lab. Fed.*, *supra*, 221 Cal.App.3d at p. 1559.) The U.S. Secretary of Labor preliminarily determined that the private right of action under Proposition 65 met the criteria for approval. (62 Fed.Reg. 31159, 31162 [June 6, 1997].) The U.S. Secretary of Labor then received statements from 207 commentators, many of whom opposed approval. (*Id.*) Upon considering the public comments, the U.S. Secretary of Labor approved the private right of action under Proposition 65 but with restrictions on claims against out-of-state manufacturers. (*Id.* at pp. 31166–31167, 31180.) In doing so, the U.S. Secretary of Labor specifically discussed the *Gade* preemption analysis. (*Id.* at pp. 31160, 31163, 31166.)

While California's "manner of enforcement" for Proposition 65 may have differed from the federal approach, it does not follow—as the District Attorney suggests—that the state can bypass obtaining approval from the U.S. Secretary of Labor. The U.S. Secretary of Labor was still required to review Proposition 65 as it applied to workplaces and ultimately limited the "manner of enforcement" in the workplace based on that review. (*Solus III*, *supra*, 229 Cal.App.4th at pp. 1307–1308.) Again, a state's authority to establish and enforce workplace safety laws "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." (*Id.* at pp. 1305–1306.)

As the Court of Appeal also noted, "this retained federal power to approve or disapprove the state's laws . . . also distinguishes the federal preemption scheme at issue here from the one recently considered by our Supreme Court in *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390 (*Rose*)." (*Solus III*, *supra*, 229 Cal.App.4th at p. 1306.) *Rose* dealt with a federal statute (the Truth in Savings Act) that included a clause explicitly saving consistent state laws. (*Rose*, *supra*, 57 Cal.4th at p. 395.) By contrast, OSHA requires that even consistent state laws be submitted to and approved by the Secretary of Labor (29 U.S.C. § 667(b)) and provides for further federal oversight and approval (29 U.S.C. § 667(f)).

The District Attorney also cites a handful of foreign cases as support for a state to adopt more stringent enforcement than federal regulations. (Op. Br. at pp. 35–36.) Those foreign cases, however, do not excuse the state from obtaining the necessary approval from the U.S. Secretary of Labor or otherwise allow a state to sidestep the *Gade* preemption analysis that applies here. In fact, the only civil case cited by the District Attorney does not involve a state failing to follow its own workplace safety plan and applies a "purpose" test that the U.S. Supreme Court later rejected in *Gade*. (See *West Virginia Manufacturers Assn. v. State of West Virginia* (4th Cir.

1983) 714 F.2d 308, 313–314.) The others are criminal cases that rely upon OSHA's savings clause and a state's historical police power to seek retributive justice. (See Op. Br. at pp. 35–36, and cases cited therein.)

Regardless, as further discussed below, the California state workplace safety plan specifically authorizes referrals from Cal/OSHA to district attorneys for potential *criminal* prosecutions. (Labor Code, § 6315, subd. (g).) Accordingly, California's criminal referral process was approved by the U.S. Secretary of Labor. By contrast, the District Attorney's attempt to use the UCL and FAL to seek civil penalties for alleged workplace safety violations was not.

3. California's Approved Plan Does Not Authorize Enforcement Through Civil Actions.

Alternatively, the District Attorney argues that the California state plan *generally* allows "supplemental actions by prosecutors" to enhance and support the efforts of Cal/OSHA. The linchpin of the District Attorney's argument is the criminal referral provision in Labor Code section 6315, subdivision (g). The Court of Appeal, however, soundly rejected the District Attorney's interpretation of Labor Code section 6315, subdivision (g) in *Solus I*, *supra*, 224 Cal.App.4th at p. 44, review den. This ruling is now the law of the case. (See *People v. Stanley* (1995) 10 Cal.4th 764, 786 ["Th[is] principle applies to criminal as well as civil

matters [citations], and it applies to this court even though the previous appeal was before a Court of Appeal [citation]."].)

In *Solus I*, the District Attorney argued that Labor Code section 6315, subdivision (g) authorized the district attorneys to seek civil penalties for alleged workplace safety violations by filing lawsuits under Labor Code sections 6428 and 6429. (*Solus I, supra*, 224 Cal.App.4th at p. 36.) As the Court of Appeal summarized it, the District Attorney argued that Labor Code section 6315, subdivision (g)'s "requirement that cases be referred to [prosecutors] for 'appropriate action' confers upon prosecutors the discretion to file whatever actions, civil or criminal, that *they deem* appropriate." (*Id.* at p. 44.)

The Court of Appeal first compared the criminal procedures set forth in Labor Code section 6315 with the civil procedures set forth in Labor Code section 6317. (*Solus I, supra*, 224 Cal.App.4th at pp. 39–40.) The Court of Appeal noted that sections 6428 and 6429 are part of the California workplace safety plan, and specifically authorized *Cal/OSHA*—not the district attorneys—to seek civil penalties for alleged workplace safety violations. (*Id.* at pp. 39–40, 43–44) Accordingly, the Court of Appeal rejected the District Attorney's argument that Labor Code section 6315, subdivision (g) statutorily authorized or otherwise implied standing for the district attorneys to bring civil actions to seek penalties for alleged workplace safety violations. (*Id.* at p. 44.)

In this appeal of *Solus III*, the District Attorney argues that Labor Code section 6315, along with section 6423 and 6425, confirm that the California state plan "contemplated supplemental action by prosecutors" to enhance the enforcement of workplace safety standards. (Op. Br. at p. 37.) Labor Code sections 6423 and 6425, however, set forth the potential *criminal* penalties for workplace safety violations; they do not authorize district attorneys to seek civil penalties for workplace safety violations. Nor does Labor Code section 6315.

Instead, Labor Code section 6315 merely directs Cal/OSHA's criminal investigation unit to "notify the appropriate prosecuting authority" of findings that might support a criminal prosecution:

> In any case where [Cal/OSHA's Bureau of Investigations] 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. If the bureau determines that there is legally insufficient evidence of a violation of the law, the bureau shall notify the appropriate prosecuting authority, if the prosecuting authority requests notice.

(Lab. Code, § 6315, subd. (g).) Because the Bureau of Investigations conducts criminal investigations, its referrals to "appropriate prosecuting authorities" must necessarily be for criminal prosecution:

> The central function of the Bureau of Investigations, within the Division of Occupational Safety and Health, is to conduct criminal investigations. . . . The Bureau of Investigations is

> the only entity within the Division which is empowered to conduct *criminal investigations* and to refer the results of such investigations when appropriate to a city attorney or district attorney for necessary action. The Bureau must analyze the circumstances surrounding the violation to determine whether the conduct is sufficiently aggravated to fall within the scope of Labor Code sections 6423, 6425 and *other penal statutes*.

(Cal. Code Regs., tit. 8, § 344.51, italics added.) Thus, any referral under Labor Code section 6315 would necessarily be for criminal prosecution.[5]

This analysis is further confirmed by section 6317 of the Labor Code, which provides that "[t]he division [Cal/OSHA] may impose a civil penalty against an employer as specified in Chapter 4 (commencing with Section 6423) of this part." The code sections at issue in the first two causes of action set forth in the Complaint—Labor Code sections 6428 and 6429—are part of chapter 4 of part 1 of the code. Consequently, as the Court of Appeal concluded in the prior appeal, the Legislature authorized Cal/OSHA *and only Cal/OSHA* to impose civil penalties under those provisions. (*Solus I, supra*, 224 Cal.App.4th at pp. 43–44, review den.)

Applying the principle of *expressio unius est exclusio alterius*—that is, the expression of one thing in a statute ordinarily implies the exclusion of others—the courts presume that, when the Legislature has stated one thing in a statute, it has excluded all other things. (See, e.g., *Rojas v.*

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[5] Cal/OSHA's compliance personnel are charged with seeking civil enforcement remedies. (Cal. Code Regs., tit. 8, § 344.50.)

Superior Court (2004) 33 Cal.4th 407, 424.) The Legislature and the state plan expressly authorize only Cal/OSHA to assess civil penalties. Consistent with the principle of *expressio unius,* this Court should conclude that the Legislature did not authorize the district attorneys to bring such actions. Nothing about the brief reference in Labor Code section 6315, subdivision (g) giving district attorneys the power to take "appropriate action" upon receipt of a criminal referral changes this analysis.

With nowhere else to turn, the District Attorney essentially asserts that his claims under the UCL and FAL should be permitted because they have been allowed in the past: "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." (Op. Br. at p. 38.) But as the Court of Appeal concluded, such "nonspecific" assertions that district attorneys have alleged UCL claims for workplace violations—even if properly considered—does not answer whether such claims are preempted by OSHA. (*Solus III*, *supra*, 229 Cal.App.4th at p. 1303.) Indeed, "the mere fact that some trial courts have allowed such claims to proceed without objection does nothing to establish those claims were pursued appropriately." (*Solus I*, *supra*, 224 Cal.App.4th at p. 45.)

In sum, there is no dispute that district attorneys generally have standing to bring civil actions under the UCL and FAL, but it does not

follow that district attorneys are authorized to use the UCL and FAL to enforce work place safety standards. The approved California state plan does not include the UCL and FAL, and those statutes certainly were not incorporated into the California state plan by the criminal referral provision contained in Labor Code section 6315, subdivision (g). Accordingly, federal law preempts the use of the UCL and FAL to assess civil penalties on top of those Cal/OSHA is authorized to assess against employers that violate workplace safety laws.

4. Public Policy Arguments Must Be Weighed by the U.S. Secretary of Labor—Not the Courts.

As discussed above, the District Attorney allocates a significant portion of his brief to recite a history of workplace safety regulation in our state and advocating that "supplementary actions by prosecutors" under the UCL and FAL will improve workplace safety. Notably, the District Attorney's own historical recitation acknowledges that the Legislature has increased the civil fines that Cal/OSHA (not the district attorneys) can seek based on perceptions that increased enforcement of workplace safety standards were needed. (Op. Br. at p. 19 ["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."].)[6]

Here, the District Attorney seeks to bypass Legislative amendment of the California state workplace safety plan to create new and potentially larger fines under the UCL and FAL. As the Court of Appeals concluded, this argument should be rejected for two reasons:

> First, while it may be true that the penalty statutes and regulations underlying these UCL claims are included in the approved state plan, the district attorney is not seeking to directly enforce those approved penalties and regulations. Instead, he is seeking to enforce *separate penalties under the UCL* which have *not been approved* for application in the otherwise preempted area of workplace safety regulation.
>
> Second, the standard for assessing whether reliance on the UCL as a tool of enforcing workplace safety laws is preempted is not whether *we believe* it appears "consistent with the goals" of the OSH Act to do so. It is the Secretary, not this court, which retains the discretion to determine whether changes in the state's already approved enforcement plan are appropriate. Stated simply, avoidance of federal preemption is dependent upon the Secretary's approval, not ours.

(*Solus III*, *supra*, 229 Cal.App.4th at p. 1307, paragraph break added.) Just as in the case of Proposition 65 when the U.S. Secretary of Labor limited its application to out-of-state manufacturers after receiving public comments,

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[6] It is also notable that the District Attorney's lone "authority" favoring use of the UCL to enhance workplace safety is a "note" from 1968 that was written by a second-year law student. (Op. Br. at p. 11.)

the same process must occur before district attorneys may use the UCL or FAL to assess civil penalties for workplace safety violations.

Again, this is not even a debate for this Court, but there are a number of public policy reasons that the California Legislature and U.S. Secretary of Labor would likely consider as weighing *against* such "supplemental actions by prosecutors" (as the District Attorney calls them). The U.S. Supreme Court has explained that Congress enacted OSHA "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, OSHA "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.) This Court, too, has noted that Congress adopted the OSHA "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, italics added.)

Under the District Attorney's proposed approach, both Cal/OSHA and a district attorney could file separate actions arising from the same incident. That would obviously create "duplicative regulation." Further, that duplicative regulation would likely be highly counterproductive. The same appellate court might hear appeals from those separate actions and,

applying the highly deferential "substantial evidence" standard, be obligated to affirm two contrary results. No appellate procedures or principles would allow the appellate court to harmonize such conflicting results.[7] And 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.

Finally, it should be noted that Cal/OSHA issued penalties against Solus of $98,800. (A82.) By contrast, the District Attorney is seeking that penalties of $2,500 per violation be counted on a per-day and per-employee basis. If permitted by statute, that method of counting could expose the employer to a judgment of many millions of dollars. As the Court of

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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.]")

Appeal noted, the U.S. Secretary of Labor—not the courts—must evaluate the public policy implications of such a change:

> It is not our place to assess whether such an extraordinary jump in the potential civil penalty an employer such as Solus might incur for workplace safety violations through application of the UCL is a good idea. For our purposes, it is enough to note that *it is* an extraordinary jump. And because it is, we conclude it will have to be the Secretary, and not this court, who assesses its merits.

(*Solus III*, *supra*, 229 Cal.App.4th at p. 1308.)

V. CONCLUSION

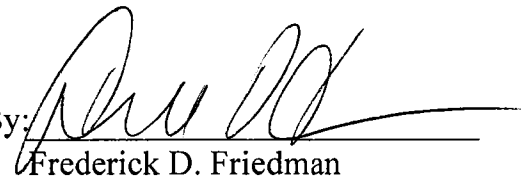
Just as the State of California was required to submit Proposition 65 to the U.S. Secretary of Labor to avoid federal preemption, the State is required to submit the UCL and FAL to the U.S. Secretary of Labor to avoid federal preemption. Although the State has this option, it has chosen not to exercise it. As the Court of Appeal noted, it is not the judiciary's role to decide whether the UCL and FAL should be include in the State's workplace safety plan. That is the role of the California Legislature, subject to approval by the U.S. Secretary of Labor. Accordingly, the Court

of Appeal properly held that the District Attorney's claims are preempted by OSHA.

Dated: March 16, 2015

Respectfully submitted,

JONES DAY

By: 
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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 Brief on the Merits was produced using 13-point type, including footnotes, and contains 6,727 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 16, 2015

Respectfully submitted,

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LAI-383235320

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 March 16, 2015, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s): **ANSWER BRIEF ON THE MERITS**, addressed as follows:

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Executed on March 16, 2015, at Los Angeles, California.

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