S222314

No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOLUS INDUSTRIAL INNOVATIONS, LLC, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

THE PEOPLE,

Real Party 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

PETITION FOR REVIEW

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA
BY: KELLY A. ROOSEVELT
DEPUTY DISTRICT ATTORNEY
STATE BAR NO. 222969
Post Office Box 808
Santa Ana, California 92702
Telephone: (714) 834-3600

Attorneys for Petitioner

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EMERSON POWER TRANSMISSION
CORPORATION; and EMERSON ELECTRIC CO.

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Santa Ana, California 92702
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Attorneys for Petitioner

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I. STATEMENT OF THE ISSUES

This petition seeks review of two important issues of first impression in the State of California regarding preemption of California's Unfair Competition Law ("UCL") and its False Advertising Law ("FAL") by the federal Occupational Safety and Health Act of 1970 (the "Act"). Specifically, the questions presented are as follows:

1. Does the Act preempt a cause of action under 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?

II. INTRODUCTION

For decades, California prosecutors have sought civil penalties against corporate employers that engage in unfair competition by violating worker safety laws under the UCL, particularly when these violations cause worker deaths. Given this long-standing practice, there are currently a number of such prosecutions pending in various counties of this state. Yet, according to the unprecedented opinion of the Fourth District Court of Appeal in this case, which was published on September 22, 2014 (the "Opinion"), none of these actions may properly proceed because they are

all preempted by federal law.[1] All pending statewide prosecutions are potentially at risk of dismissal as a result. The matter is thus a pressing concern, not only for prosecutors, but also for employers and employees throughout the state that may be affected by current or future UCL actions. Immediate review of the Opinion by this Court is therefore warranted to resolve important questions of law of statewide impact.

Review is also particularly appropriate here because the Fourth District's Opinion is contrary to well-settled law governing UCL actions and federal preemption and is thus clearly erroneous as a matter of law. To begin with, despite the directive from this Court to reconsider its analysis stemming from this very error, the Opinion is still premised on a false statement that the UCL was enacted in 1977 *after* the California worker safety state plan was initially approved, when, in fact, the UCL was originally codified in 1933 under Civil Code Sections 3369 *et seq.*, well *before* the federal Act was enacted. The analysis also fails to apply the proper presumptions against preemption and erroneously treats the UCL as a worker safety law contrary to numerous prior decisions of this Court. The Opinion also neglects to mention, let alone even attempt to analyze, Business and Professions Code Section 17500 so as to explain how a statute

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1 A true and correct copy of the September 22, 2014 Opinion is attached hereto as Exhibit 1. A true and correct copy of the October 16, 2014 order modifying the Opinion but denying the People's petition for rehearing without a change in judgment is attached hereto as Exhibit 2.

about false and misleading representations could possibly be preempted by the federal worker safety Act.

In addition to addressing these, and other, legal errors in the Opinion, review by this Court is also appropriate to ensure a uniformity of treatment in these actions across the state and country. At present, there is a risk of conflicting rulings in other districts that are, or soon will be, faced with similar cases. According to the trial court (which, contrary to the Fourth District, held the UCL and FAL were *not* preempted), the issue here involves a "controlling question of law as to which there are substantial grounds for difference of opinion." Defendants do not disagree.[2] In fact, Defendants successfully sought review of this issue from this Court for the same reason only a short time ago. (*See* Cal. Supreme Court Case No. S209199.)

Finally, the ruling, if upheld, could have significantly negative ramifications long term, resulting in the judicial relinquishment of California's jurisdictional power and state's rights in areas historically regulated and controlled by the state without interference with federal laws. This is not good precedent for the People of this state, including competing businesses, who may be left with inadequate remedies for violations of state law. For these additional reasons as well, therefore, the issues presented

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2 The "Defendants" or "Employers" herein refers collectively to real parties in interest, Solus Industrial Innovations, LLC, Emerson Power Transmission Corporation, and Emerson Electric Co.

should be fully vetted by the Highest Court of law in this state.

For all the foregoing reasons, and those set forth in more detail below, therefore, there are ample grounds supporting the granting of this petition so as "to secure uniformity of decision" and "to settle [these] important question[s] of law." (Cal. R. Ct. 8.500, subd. (b).)

III. STATEMENT OF THE CASE

This is an egregious case of employer workplace safety violations that resulted in the untimely and horrific death of two workers at a commercial plastics manufacturing facility in Rancho Santa Margarita on March 19, 2009. (Compl. ¶¶ 1-51.)[3] 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 the Defendants during the relevant time frame from November 2007 when the water heater was installed until its explosion in March 2009.

3 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 Defendants in re 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.

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

As required by law, immediately following the tragic deaths of these workers, CalOSHA opened an investigation into the fatalities. (Compl. ¶ 41.) CalOSHA concluded that the deaths were caused by a number of "serious" and "willful" violations of the safety laws and regulations by Defendant Solus Industrial Innovations, LLC ("Solus") and, therefore, 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"), which is a separate unit within the Division that conducted a further investigation into the worker deaths, referred the case to the Orange County District Attorney's office for additional "appropriate action" as it is required to do pursuant to Labor Code Section 6315, subdivision (g). (Compl. ¶ 44.) Based on this referral, the District Attorney 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 legal authority 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

in the Complaint without leave to amend, overruling the Demurrer to the Third and Fourth Causes of Action in the Complaint, and denying Defendants' Motion to Strike certain allegations in the Complaint. Defendants served notice of the Order on October 10, 2012.[4]

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. (A0217, A0225-226.) Based on this ruling, the court dismissed the causes of action for civil penalties under Labor Code Sections 6428 and 6429 with prejudice.[5] 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 in the Complaint, 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") or False Advertising Law {"FAL")). Petitioners argued that the causes of action were preempted by federal law. The trial court was

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4 A true and correct copy of the October 3, 2012 Minute Order is attached hereto as Exhibit 4. A true and correct copy of the October 10, 2012 Notice of Ruling is attached hereto as Exhibit 5.

5 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.

"not persuaded that this is a federal preemption issue" and overruled the Demurrer. (A0219.)

C. Trial Court Certified The Preemption Issue For Review Under Civil Procedure Section 166.1

Pursuant to the parties' request, on November 14, 2012, the trial court entered an order certifying two legal issues presented by the Motions under California Code of Civil Procedure Section 166.1 for early appellate review, finding in pertinent part here:

> The Court indicates that in its belief the federal preemption issue raised in Defendants' demurrer to the Third and Fourth Causes of Action in the Complaint presents a controlling question of law as to which there are substantial grounds for difference of opinion and that appellate resolution of this issue may materially advance the conclusion of the litigation.[6]

D. 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.

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6 A true and correct copy of the November 14, 2012 Jointly Submitted Order Granting Ex Parte Application for Order Under Code of Civil Procedure 166.1 is attached hereto as Exhibit 3.

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 and ordering the trial court to vacate its prior order overruling Defendants' Demurrer to the Third and Fourth Causes of Action and to enter a new order sustaining such Demurrer "without leave to amend." The Opinion was certified for publication.

The People filed a petition for rehearing on March 11, 2014, arguing, among other things, that the District Court improperly directed the trial court to sustain the Demurrer "without leave to amend." In response, the Fourth District denied the petition for rehearing, but issued a modified order striking the mandate that the Demurrer be sustained "without leave to amend."

E. 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, for all the same reasons, that California's UCL was preempted. The Opinion was certified for publication and once again directed the Respondent Court to sustain the Demurrer "without leave to amend." The People again filed a petition for rehearing, which resulted in a modified order striking the mandate that the trial court sustain the Demurrer "without leave to amend," but no change of Judgment in the Opinion.

The People hereby petition for review of the Fourth District's September 22, 2014 Opinion.

IV. WHY REVIEW BY THE SUPREME COURT SHOULD BE GRANTED

Supreme Court review is warranted when it is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. R. Ct. 8.500, subd. (b), subd. (1).) As the court of last resort, the Supreme Court may grant review:

> to supervise and control the opinions of the several district courts of appeal, each of which is acting concurrently and independently of the others, and by such supervision to endeavor to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law, a uniform rule of decision throughout the state, a correct and uniform construction of the constitution, statutes, and charters, and, in some instances, a final decision by the court of last resort of some doubtful or disputed question of law.

(*People v. Davis* (1905) 147 Cal. 346, 348.) Review is particularly

important when, as here, the disputed questions of law are ones of statewide impact.

A. The Preemption Issue Is An Issue Of First Impression Important To Pending And Future Prosecutions Throughout The State

The legal questions presented are issues of first impression that impact numerous pending prosecutions and cases currently under investigation by prosecutors, not only in Orange County, but in counties across the state. (*See, e.g., People v. Nibbelink Masonry Construction Corp.*, San Bernardino County Case No. CIVDS1406990 [filed May 23, 2014].) As acknowledged by the Defendants here in their prior successful petition to this Court regarding the same issues, such matters are also a concern to California employers statewide. (Cal. Supreme Court Case No. S209199.) As Defendants pointed out then, and the People agree, a final "disposition of this issue is important for a large number of cases and litigants," thus justifying review by this Court.

B. The Opinion Is Clearly Erroneous And Contrary To Well-Settled Law Governing The UCL And Federal Preemption

The Opinion holds that California's UCL and FAL, including specifically Business and Professions Code Sections 17200 and 17500, are preempted by the Act because these statutes are not incorporated into and adopted as part of California's federally approved workplace safety laws.

(Opinion at pp.11-19.) In reaching this conclusion, however, the Opinion ignores numerous important legal precedents and fails to apply the appropriate presumptions, thus leading to a legally erroneous analysis and result. Review should be granted to correct these clear legal errors.

1. The UCL Was Enacted In 1933 Under Civil Code Sections 3369 *et seq.*, Not In 1977 As The Opinion States

Despite the directive from this Court to reconsider its prior Opinion in this regard, in support of its most recent holding, the Fourth District's Opinion still states:

> Our assessment of whether the district attorney's UCL causes of action are preempted by federal law begins with the observation that the UCL was enacted in 1977 (Stats. 1977.ch. 299,§1,p.1202), which is *after* the Secretary initially approved California's workplace safety plan. Hence, there is no basis to infer that reliance on those provisions as a supplemental remedy for violation of California's workplace safety standards was contemplated as part of the Secretary's initial decision approving California's plan.

The factual predicate to the Fourth District's conclusion is incorrect.

California's UCL was, in fact, originally enacted in 1933 under Civil Code Sections 3369 *et seq*, which is *before* the Secretary initially approved California's workplace safety plan in 1973, not afterwards as the Opinion erroneously states. (*See* Cal. Civ. Code § 3370.1, added by Stats.1972, c. 1004, p. 2021, § 2 [containing UCL civil penalty provisions re-codified in 1977 at Bus. & Prof. Code § 17206]; *Barquis v. Merchants Collection Ass'n of Oakland, Inc.* (1972) 7 Cal.3d 94, 111-113 [explaining legislative

history of UCL]; *see also* Bus. & Prof. Code § 17500 [enacted in 1941].) In 1977, as part of a general reorganization of business regulation statutes, the UCL provisions were merely moved to the Business and Professions Code.

The error is significant. Indeed, under the mistaken belief that the UCL/FAL were enacted after the federal Act or state plan approval, the Court neglected to apply a number of important presumptions, including the *presumption against preemption* that governs laws of general applicability like these that predate federal laws. (*Wyeth v. Levine* (2009) 55 U.S. 555, 565; *People v. PAC Anchor Transp., Inc.* (Cal. Sup. Ct., July 28, 2014) – P.3d --, 2014 WL 3702674; *Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1060; *Farm Raised Salmon Cases* (2009) 42 Cal.4th 1077, 1088; *People v. Guiamelon* (2012) 205 Cal.App.4th 383, 400-407.) The entire framework of the analysis is materially flawed from the outset as a result.

2. The UCL Is Not An Occupational Safety And Health Standard Or Law That Requires Incorporation Into The State Plan

The Opinion holds that the UCL is preempted unless and until it is "incorporated" into and "approved" as part of California's occupational safety state plan. (Opinion at pp.16-17.) In so holding, the Fourth District necessarily determined either: (a) that the UCL is a workplace safety law

or standard; or (b) the UCL action is being used in an attempt to enforce workplace safety laws. Either way, the Fourth District's determination is a material misstatement of both fact and well-established law regarding UCL actions.

First, the UCL is *not* a workplace safety law, but rather, a consumer protection law of general applicability which is protected from federal preemption under the historic police powers of the state of California. (*Farm Raised Salmon*, *supra*, at p.1088.) There can be no federal preemption by federal OSHA laws over a non-occupational safety law or standard such as this. (*Cal. Labor Federation v. Cal. Occupational Safety & Health* (1990) 221 Cal.App.3d 1547, 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"].) 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." (*Id.; see also* 62 Fed. Reg. 31159, 31159, 31163 [June 6, 1997].)

Second, contrary to the Opinion, the District Attorney's attempt to seek civil penalties under the UCL is not an attempt to enforce workplace safety laws. To be sure, this Court has routinely held that "a UCL action does not 'enforce' the law on which a claim of unlawful business practice is based." (*Rose v. Bank of America* (2013) 57 Cal.4th 390, 396; *see also Farm Raised Salmon*, *supra*, at p.1095; *Stop Youth Addiction, Inc. v. Lucky*

Stores, Inc. (1998) 17 Cal.4th 553, 570-576.) Instead, the UCL "'borrows' violations of other laws and treats them as unlawful practices that the [UCL] makes *independently* actionable." (*Rose, supra*, at p.396.) "[T]he UCL does not serve as a mere enforcement mechanism." (*Id.* at p.397.)

Because the holding in the Opinion is based primarily on the incorrect notion that the UCL is a workplace safety law and/or a law being used to "enforce" workplace safety laws, it is clearly erroneous, thus warranting a review, and reversal, by this Court.

3. No Legal Authority Or Analysis Supports The Holding That California's FAL Is Preempted

Although the Opinion holds that both the UCL and FAL causes of action are preempted, the Opinion fails to separately consider and analyze the asserted preemption with respect to the 17500 cause of action. Review to address this separate and distinct cause of action is warranted. Unlike the People's Third Cause of Action under Section 17200, the People's Fourth Cause of Action under Section 17500 is not predicated on the same violations of California's workplace safety laws, but rather, on a set of false and misleading representations to workers and the public that "resulted in the illegal retention of employees and customers in violation of the unfair competition laws." (Compl. ¶ 73.) The Opinion fails to explain how such an action is preempted under federal OSHA laws, and there is no legal precedent supporting such a ruling.

4. Fourth District's Holding Is Contrary To Congressional Intent And The Federal Agency's Express Views On Preemption

The Opinion also fails to identify any express Congressional intent or legislative history suggesting that Congress intended to preempt California's UCL or FAL when it enacted the federal worker safety Act. This is because there was never such an intent. Indeed, FedOSHA has expressly recognized that it "has no authority to address ... non-occupational applications" of California state law, including "consumer" protection laws like the UCL and the FAL and has confirmed that "laws of general applicability are not preempted." (62 Fed. Reg. 31159, 31159, 31163 [June 6, 1997].) 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.) Despite these directives, the Fourth District did not acknowledge, much less give any weight to, Federal OSHA's views with respect to what is preempted and what is not.

Moreover, in contrast to the overly broad description of federal jurisdiction on which the Opinion is based, the retained powers of the federal government are expressly and narrowly limited to certain discrete areas under 29 C.F.R. § 1952.172, subdivision (b), such as maritime

activities, which are not applicable in the present case. The Opinion does not address the important impact of the expressly limited reservations of federal jurisdiction. Yet, when the relevant statutes and regulations confirm an express intention to limit 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*, *supra*, at pp.1091-1092 [internal citations omitted].)

With respect to the federal OSHA oversight function (which the Opinion solely relies upon to find an intent to preempt the claims here), 29 C.F.R. 1952.172, subdivisions (b) and (c), expressly confirm that no federal enforcement jurisdiction was retained under this authority. Instead, OSHA is expressly required to take affirmative steps to *resume* the exercise of federal enforcement 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 monitoring of California's state plan. (29 C.F.R. 1952.172, subds. (b)-(c); 29 U.S.C. 667, subd. (f).) There is no evidence of any intent by federal OSHA 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 signal an intent to preempt state actions. (*See Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 816 [finding no preemption under similar federal-state cooperative program where, as here, a "participating state creates and administers its own plan which must be approved by the Secretary"]; *Guiamelon, supra*, 205 Cal.App.4th at p.401 [same].) "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, supra,* 30 Cal.4th at p.816].) By holding otherwise here, the Fourth District's reasoning and holding are clearly erroneous.

5. The Unprecedented "Manner Of Enforcement" Preemption Argument Should Be Fully Vetted By This Court

In addition to the other errors and omissions in the Opinion, notably missing from the Opinion is any traditional analysis with respect to federal preemption. Under traditional principles of preemption, a state law may only be preempted if the state law is expressly or impliedly preempted by federal law in certain ways. (*Farm Raised Salmon, supra*, at pp.1077, 1087-1088.) As this Court explained:

> "**[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.' [Citations.]" (*Medtronic, supra,* 518 U.S. at p. 485, 116 S.Ct. 2240; *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687 (*Bates*); *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1150, fn. 7, 45 Cal.Rptr.3d 21, 136 P.3d 821.)

(*Id.* at p.1088 [emphasis in bold added].)

The analysis of the Fourth District, and the arguments of the Employers in this case, are a far cry from these basic principles of preemption. Indeed, as noted above, the presumption against preemption was ignored entirely, even though California was engaged in its own enforcement of both worker safety and consumer protection laws long before the Act was adopted. There is further no analysis whatsoever that supports a finding of express or implied preemption of California's UCL (or any other worker safety law alleged in the Complaint, for that matter) under the traditional understanding of those principles. (*See id.*)

There is no state law raised in this case, for instance, that conflicts with federal law and no action by the District Attorney here stands as an obstacle to interfere with federal law in any way. (*Id.*) Rather than an intent to dominate the entire field of worker safety, which is necessary to find implied preemption, the Act here encourages the states to take full responsibility for such matters. (*Id.;* 29 U.S.C. § 651, subd. (11).)

There can be no implied preemption under these circumstances. There is also no express intent to preempt the UCL or FAL that could support preemption on an express basis. Review is necessary, therefore, to conform the ruling on the merits to the laws of this state and country regarding preemption.

Not only that, but this is an extremely important matter that affects the core powers and rights of this state. To be sure, federal preemption interferes with the state's ability to exercise its own jurisdiction over matters and should not be taken lightly, especially here, when there is no conflict between state and federal law. (*See PAC Anchor Transp., Inc.*, *supra*, 2014 WL 3702674, at *3 [noting the "role" of the "presumption against preemption ... is to provide[ ] assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts" (internal quotations and citations omitted)].) Unless there is reason to believe a particular enforcement action interferes with federal law (which there is not), the manner of enforcement should be a matter of state discretion. Whether CalOSHA, prosecutors, or private parties -- or any combination of such parties -- may enforce California laws that are not otherwise preempted is not of concern to the federal government, but rather, should be a matter governed under California law.[7]

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7 Under California law, unless otherwise specified, state agencies and prosecutors may have concurrent jurisdiction over similar legal violations

Review of the Fourth District's unprecedented ruling by this Court is, therefore, necessary to protect California's historical police powers and sovereign jurisdiction over matters of concern to the People of this state.

C. Review Is Necessary To Avoid Inconsistent Rulings In Other District Courts And Ensure Uniformity Of Decisions

Given that there are currently other pending similar actions in other counties, review of this important question should be granted by this Court to ensure uniformity of rulings in similarly situated actions statewide. There is a risk of inconsistent rulings in other counties and district courts of appeal that may face these same issues, but are not bound to follow the Fourth District's Opinion. The likelihood of inconsistent rulings is evidenced by the different holdings of the trial court and appellate court already with respect to this issue in this case.

Moreover, the Opinion stands in stark contrast to every other decision in the United States which has considered federal preemption of state prosecutions regarding work place deaths. To be sure, it has routinely

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to maximize enforcement efforts. As a matter of law, this concurrent jurisdiction can be properly exercised as long as: (1) the actions of the administrative agency and the prosecution are consistent; and (2) the prosecution does not undermine the authority of the state agency. (*See People v. Pacific Bell* (2003) 31 Cal.4th 1132, 1155 [public utilities commission actions and public prosecutions permitted]; *see also Cal. Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 203 [water board actions and related court actions both permitted]; *Fresno Unified School District v. Nat'l Education Ass'n* (1981) 125 Cal.App.3d 259, 274 [public employment relations board and court have concurrent jurisdiction].)

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.* (1991) 806 S.W.2d 553 [Texas law not preempted); *People v. Pymm* (1990) 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 should be no different.

V. NEITHER THE UCL OR FAL IS PREEMPTED

Upon review, if granted, the People respectfully submit that the Opinion should be reversed and the Order of the trial court overruling the Demurrer should be affirmed. The trial court correctly overruled Defendants' Demurrer based on numerous statutory authorities and published decisions of the highest courts in this state and country. As explained in more detail below, these authorities unambiguously hold that: (1) the UCL is a law of "general applicability" that is protected by a

presumption against preemption; and (2) California workplace safety laws and regulations preempt federal law (not the other way around). (29 U.S.C. §§ 651, 667, 1952.170 & 1952.172; *Gade v. Nat'l Solid Wastes Mgmt Assoc.* (1992) 500 U.S. 88, 89 & 96-97; *United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal.3d 762, 772; *Farm Raised Salmon*, *supra*, at p.1088.)

A. Standard Of Review

"On appeal from ... an order sustaining a demurrer," the standard of review is de novo. (*City of Morgan Hill v. Bay Area Air Quality Management District* (2004) 118 Cal.App.4th 481, 869-70.) The issue of preemption presents a pure question of law. (*Farm Raised Salmon*, *supra*, at p.1089 n.10.) 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]

(*Id.* 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 was not met in this case.

B. Background Regarding California's Unfair Competition Law

1. Business and Professions Code Section 17200

Business and Professions code section 17200 defines "unfair competition" as any "unlawful, unfair or fraudulent business act or practice ..." (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838.) "[S]ection 17200 'borrows' violations of other laws and treats them as unlawful practices independently actionable under Section 17200 *et seq.*" (*Id.* at p.839.) There is no dispute that the District Attorney has standing to seek civil penalties in an amount "not to exceed two thousand five hundred dollars ($2,500) for each violation" to redress unfair business practices that give defendants a competitive advantage over competitors that incurred the costs necessary to comply with the law. (Bus. & Prof. Code § 17204.)

The penalties under Business and Professions Code Section 17200 are expressly meant to be cumulative of other penalties assessed, including any that have been or will be assessed by CalOSHA or under other laws of the state in relation to the illegal conduct alleged in this case. (Bus. & Prof. Code § 17205 [stating that "[u]nless 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"]; *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.)

Here, as alleged in the Third Cause of Action in the Complaint, Defendants attempted to cut corners to save money in a manner that violated the labor laws of this state. In so doing, in addition to violating the labor laws, 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 harms specifically caused to the competitive business market by Defendants' illegal misconduct. (Bus. & Prof. Code §§ 17203-17206.)

2. Business and Professions Code Section 17500

The People's Fourth Cause of Action is premised on Business and Professions Code Section 17500, which 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. (*See* Bus. & Prof. Code § 17500.) Specifically, Section 17500 states:

> It is unlawful ... 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 ... 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. 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 §§ 17535-17536.) 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. The penalties sought therein are based on each false representation and not on the various individual violations of the worker safety laws.

C. Background Regarding Federal And California OSHA Acts

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 and a federal enforcement program was created. However, it has long 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, subd. (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, subd. (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,* 500 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 approved approximately forty years ago. (29 U.S.C. §§ 1952.170-1952.175.) As long as the state continues to maintain the minimal protections required under federal law (which it does), the state automatically retains exclusive jurisdiction over such matters with few exceptions. (*Id.*)

Under the approved plan, *federal* jurisdiction is accordingly preempted, except in limited circumstances where federal jurisdiction was retained, including, *e.g.*: (1) to enforce federal standards not yet adopted in California; (2) to enforce federal standards that provide "a significantly greater level of worker protection than corresponding Cal/OSHA standards"; and (3) to enforce standards affecting various particular workplace environments that are not at issue here (including maritime and off-shore employers). (29 U.S.C. § 1952.172.) As such, unless an exception applies, *California law* preempts federal OSHA law. (*United Air Lines, Inc., supra,* 32 Cal.3d at p.772 [noting approval of California's state plan "removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health"].)

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

California's UCL and FAL are state laws of "general applicability" to all businesses that are subject to a presumption against preemption. (*Gade*, *supra*, 505 U.S. at p. 107 [noting laws of "general applicability" are not preempted]; *Farm Raised Salmon*, *supra*, at p.1088 [noting the UCL is "within the state's historic police powers, and therefore [is] subject to the presumption against preemption"].) Neither the UCL, nor the FAL, is a workplace safety law. Both predated the federal Act by decades. These laws are further not in conflict with the federal Act and there is no other

basis to overcome the presumption against preemption here. On this basis alone, the Opinion is legally in error.

E. The CalOSHA Laws Alleged Here Are Not Preempted, But, Rather, Approved Parts Of California's State Plan

There is no doubt that the relevant California worker safety penalty statutes (Labor Code Sections 6428 and 6429) and regulations (Title 8 CCR 3328) alleged in the Complaint are fully approved parts of California's state plan. Thus, the relevant workplace safety laws and regulations allegedly violated are not preempted by federal law. The Opinion does not hold otherwise. Because the underlying violations of law that are "borrowed" for purposes of the People's UCL action are not preempted, the UCL causes of action are not, and cannot be, preempted either.

F. Enforcement Actions That "Supplement" CalOSHA's Efforts -- Via Prosecutors Or Private Parties -- Are Always Permissible

Forced to recognize that federal law does not preempt enforcement of the alleged worker safety laws in this case, Defendants advanced an unprecedented theory of preemption before the lower courts, arguing that the "method chosen" for enforcement is all that is preempted (*e.g.*, only the *District Attorney's* civil enforcement action under the UCL or FAL is preempted, but CalOSHA's administrative action may proceed without interfering with federal jurisdiction). This argument is unsupported by any authority or legal principles regarding preemption. There is no such thing

as a "time, place or manner" preemption like that urged by the Employers and now adopted by the Fourth District here. The violations of law are either entirely preempted from enforcement under California law, or they are not; and here, they are not.

Moreover, without any congressional intent or legislative history suggesting otherwise, the law is clear that the state may properly proscribe the means of enforcing its workplace safety laws in the manner it sees fit. (*See Farm Raised Salmon*, *supra*, 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, a similar "manner of enforcement" argument was rejected by FedOSHA itself over a decade ago when asked to consider whether supplemental enforcement efforts by private parties with respect to California's Proposition 65 comport with federal law. In response, "OSHA [found] that neither a distribution of functions among agencies nor private rights of action are prohibited under State plan provisions." (62 Fed. Reg. 31159, 31167 [June 6, 1997].) "[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. (62 Fed. Reg. 31159, 31168 [June 6, 1997].)

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.***" (62 Fed. Reg. 31159, 31170 [June 6, 1997] [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. (Labor Code §§ 6315, 6425, 6428-6429.) The contemplated supplemental action by prosecutors serves only to enhance and support the enforcement efforts of CalOSHA, and is fully consistent with federal law.

Although the UCL and FAL are laws of general applicability governing non-worker safety concerns, they similarly serves as a supplemental and cumulative action to redress harms caused by worker safety violations, and as such, cannot be preempted by federal law for

similar reasons. The UCL and FAL are used to assess additional penalties against employers that violate workplace safety (or any) laws and gain unfair competitive advantages as a result. These actions protect against unfair competition caused by the violation of any law, in any context. Worker safety is not an exception. (*Barquis, supra,*7 Cal.3d at pp.111-113 [emphasis added], citing Note, *Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition* (1968) 19 Hastings L.J. 398, 408-409.) There is no federal statute or law that conflicts with or suggests any intention to preempt these separate and distinct types of actions.

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

Finally, the Fourth District neglected to consider in its analysis that there is nothing preventing the state from adopting more stringent enforcement regulations than the federal government at any time. Indeed:

> Our Supreme Court has explained that the 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 civil prosecutions as a further aid to enforce occupational safety and health and unfair competition laws in this state without interfering with any retained federal jurisdiction. To the extent the Fourth District holds otherwise, it is clearly in error.

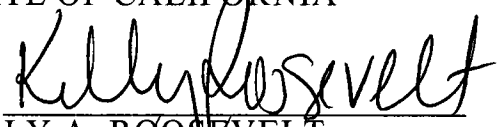
VI. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Review be granted. The Opinion should be reversed.

Dated this 30th day of October, 2014.

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, Rule 8.504(d)]

The text of this Petition for Review (excluding tables and caption pages) consists of 8,390 words as counted by the word-processing program used to generate this brief.

Dated this 30th day of October, 2014.

Respectfully submitted,

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

BY: Kelly Roosevelt

KELLY A. ROOSEVELT
DEPUTY DISTRICT ATTORNEY

Filed 9/22/14 Opinion following transfer by the Supreme Court

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SOLUS INDUSTRIAL INNOVATIONS, LLC, et al., Petitioners, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	G047661 (Super. Ct. No. 30-2012-00581868) O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Kim Garlin Dunning, Judge. Petition granted.

Jones Day, Brian A. Sun and Frederick D. Friedman, for Petitioners.

No appearance for Respondent.

Tony Rackauckas, District Attorney, and Kelly A. Roosevelt, Deputy District Attorney, for Real Party in Interest.

EXHIBIT 1

Amy D. Martin and Kathryn J. Woods for the Department of Industrial Relations Division of Occupational Safety and Health as Amicus Curiae on behalf of the Real Party in Interest.

Lawrence H. Kay for Construction Employers Association as Amicus Curiae on behalf of Petitioners

* * *

In this case we are called on to determine whether federal law preempts the effort by a district attorney to recover civil penalties under California's Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) based on an employer's alleged violation of workplace safety standards. Petitioners Solus Industrial Innovations, Emerson Power Transmission Corp., and Emerson Electric Co. (collectively Solus) contend the trial court erred by overruling their demurrer to two causes of action filed against them by Respondent, the Orange County District Attorney, alleging a right to recover such penalties. Solus argues that federal workplace safety law (Fed/OSHA) preempts any state law workplace safety enforcement mechanism which has not been specifically incorporated into the state workplace safety plan approved by the U.S. Secretary of Labor (the Secretary).

The district attorney contends that once a state workplace safety plan has been approved by the Secretary, as California's was, the state retains significant discretion to determine how it will enforce the safety standards incorporated therein, and thus the state may empower prosecutors to enforce those standards through whatever legal mechanism is available when such a case is referred to them.

The trial court agreed with the district attorney and consequently overruled Solus's demurrer to the two causes of action based on the UCL. But the court also

certified this issue as presenting a controlling issue of law suitable for early appellate review under Code of Civil Procedure section 166.1. Solus then filed a petition for writ of mandate with this court, asking us to review the trial court's ruling. After we summarily denied the petition, the Supreme Court granted review and transferred the case back to us with directions to issue an order to show cause.

We issued the order to show cause and then an initial opinion concluding the trial court's ruling was incorrect on the merits. We reasoned that under controlling law, any part of a state plan not expressly approved is preempted, and that California's workplace safety plan, as approved by the Secretary, does not include any provision for civil enforcement of workplace safety standards by a prosecutor through a cause of action for penalties under the UCL. In the course of our opinion, we noted that the UCL, in its current form, was not even in effect when California's plan was approved.

The California Supreme Court then granted review, and transferred the matter back to this court with directions to reconsider the matter in light of former Civil Code section 3370.1 (former section 3370.1) repealed by stats. 1977, ch. 299, § 3, p. 1204 – which was in effect when California's plan was approved – providing for the imposition of similar penalties based on acts of unfair competition. Having done so, we again conclude that the district attorney's reliance on the UCL to address workplace safety violations is preempted.

FACTS

As is typical when we review the propriety of the trial court's ruling on a demurrer, "'we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law.'" (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.)

Solus makes plastics at an Orange County manufacturing facility. In 2007, Solus installed an electric water heater intended for *residential use* at the facility. In March 2009, that water heater exploded, killing two workers instantly in what district attorney refers to as an "untimely and horrific death."

After the incident, California's Division of Occupational Safety and Health (Cal/OSHA) opened an investigation and determined the explosion had been caused by a failed safety valve and the lack of "any other suitable safety feature on the heater" due to "manipulation and misuse." Based on Cal/OSHA's investigation, it charged Solus with five "'[s]erious'" violations of Title 8 of the California Code of Regulations in an administrative proceeding, including violations of: "(1) section 467(a) for failure to provide a proper safety valve on the heater; (2) section 3328(a) for permitting the unsafe operation of the water heater; (3) section 3328(b) for improperly maintaining the water heater; (4) section 3328(f) for failing to use good engineering practices when selecting and using the unfit residential water heater in the extrusion operations; and (5) section 3328(h) for permitting unqualified and untrained personnel to operate and maintain the water heater." Cal/OSHA also cited Solus with one "'[w]illful'" violation of the same regulation, based on its "willful failure to maintain the residential water heater in a safe operating condition."

Because the incident involved the death of two employees, and there was evidence that a violation of law had occurred, Cal/OSHA's Bureau of Investigation forwarded the results of its internal investigation to the district attorney as required by Labor Code section 6315, subdivision (g). In March 2012, the district attorney filed criminal charges against two individuals, including Solus's plant manager and its maintenance supervisor, for felony counts of violating Labor Code section 6425, subdivision (a). (See *People v. Faulkinbury* (Super. Ct. Orange County, 2012, No.

12CF0698).) No party challenges the district attorney's standing to bring these or other appropriate criminal prosecutions.

The district attorney also filed the instant civil action against Solus. The complaint contains four causes of action, all based on the same worker health and safety standards placed at issue in the administrative proceedings.

The first two causes of action are not at issue in this writ proceeding. The third cause of action alleges that Solus's failure to comply with workplace safety standards amounts to an unlawful, unfair and fraudulent business practice under Business and Professions Code section 17200, and the district attorney requests imposition of civil penalties as a consequence of that practice, in the amount of up to $2,500 per day, per employee, for the period from November 29, 2007 through March 19, 2009.

The fourth cause of action alleges Solus made numerous false and misleading representations concerning its commitment to workplace safety and its compliance with all applicable workplace safety standards, and as a result of those false and misleading statements, Solus was allegedly able to retain employees and customers in violation of Business and Professions Code section 17500. Again, the district attorney requests imposition of civil penalties as a consequence of this alleged misconduct, in the amount of up to $2,500 per day, per employee, for the period from November 29, 2007 through March 19, 2009.

Solus demurred to these two causes of action, contending they were preempted under Fed/OSHA, because a prosecutor's pursuit of civil penalties under the UCL is not part of California's workplace safety plan approved by the Secretary. The trial court disagreed, and overruled the demurrer to the district attorney's two causes of action based on violations of the UCL.

The trial court subsequently granted a request to certify the preemption issue as appropriate for early appellate review under Code of Civil Procedure section

166.1, finding "the federal preemption issue raised in [Solus's] demurrer as to the Third and Fourth Causes of Action in the Complaint presents a controlling question of law as to which there are substantial grounds for difference of opinion and that appellate resolution of this issue may materially advance the conclusion of the litigation."

Solus filed a petition for writ of mandate with this court, which we summarily denied. After our denial, the Supreme Court granted review and transferred the case back to us with directions to issue an order to show cause. On May 10, 2013, we issued the order to show cause.

DISCUSSION

1. Standard of Review

"We apply a de novo standard of review because this case was resolved on demurrer [citation] and because federal preemption presents a pure question of law [citation]." (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10.) However, "[i]t is well established that the party who asserts that a state law is preempted bears the burden of so demonstrating." (*Id.* at p. 1088.) And further, "[t]he interpretation of the federal law at issue here is further informed by a strong presumption against preemption." (*Ibid.*)

2. The Fed/OSHA Preemption

"'The basic rules 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. 1087.)

On the matter of workplace safety regulation, the federal government's intent to preempt is clear: The federal Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq; (OSH Act)), and the standards promulgated thereunder by Fed/OSHA were designed "'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.' [Citation.] To that end, Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards applicable to all businesses affecting interstate commerce, 29 U.S.C. § 651(b)(3), and thereby brought the Federal Government into a field that traditionally had been occupied by the States." (*Gade v. National Solid Wastes Management Association* (1992) 505 U.S. 88, 96 [112 S.Ct. 2374, 120 L.Ed.2d 73] (*Gade*).)

However, "Congress expressly saved two areas from federal pre-emption. . . . [T]he Act does not 'supersede or in any manner affect any workmen's compensation law [and] the Act does not 'prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect.'" (*Gade, supra*, 505 U.S. at pp. 96-97.)

Moreover, Congress also gave states the option of side-stepping federal preemption entirely, by allowing any state which "desires to assume responsibility for *development and enforcement* therein of occupational safety and health standards relating

to any occupational safety or health issue [to] submit a State plan for the development of *such standards and their enforcement*." (29 U.S.C. § 667(b), italics added; *Gade, supra*, 505 U.S. at p. 97.) "The section . . . 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.)

But "[t]wo prerequisites to such [state] regulation are that the state law be 'at least as effective' as the federal standard covering the same subject matter and that the state law be incorporated in a state plan submitted to and approved by the federal Secretary of Labor (the Secretary). [Citation.]" (*California Lab. Federation v. Occupational Safety & Health Stds. Bd.* (1990) 221 Cal.App.3d 1547, 1551 (*California Labor Federation*).) However, if the proposed state plan incorporates standards which are distinct from the federal ones, "[t]he Secretary is not required to approve such a plan unless in her judgment [the state] 'standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce.'" (*Id.* at pp. 1551-1552.) The state plan must designate "a [s]tate agency or agencies as the agency or agencies responsible for administering the plan throughout the [s]tate" (29 U.S.C. § 667(c)(1)) and "contain[] satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards." (29 U.S.C. § 667(c)(4).)

Further, the Secretary may rescind approval of the state plan "[w]henever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein) . . . ." (29 U.S.C. § 667(f).)

Finally, if the state makes changes to its occupational safety and health laws, those changes must be formally incorporated into its approved workplace safety plan or be preempted. (*California Lab. Federation v. Occupational Safety and Health Stds. Bd., supra*, 221 Cal.App.3d at p. 1559 [writ issued to compel the Department of Industrial Relations to formally incorporate the provisions of Proposition 65 into its plan, and submit it to the Secretary for approval, to avoid preemption of those provisions as applied to the workplace]; see 29 C.F.R. § 1952.175, listing federally approved changes made to California's approved plan.)

3. The Cal/OSHA Workplace Safety Plan

As explained in *California Labor Federation*, "In 1973, the Legislature enacted the California Occupational Safety and Health Act (Cal/OSHA). [Citation.] Section 107 of Cal/OSHA states in pertinent part: 'The purpose of this act is to allow the State of California to assume responsibility for development and enforcement of occupational safety and health standards under a state plan pursuant to Section 18 [29 United States Code section 667] of the Federal Occupational Safety and Health Act of 1970 (Public Law 91-596) which was enacted December 29, 1970.' (Stats. 1973, ch. 993, § 107, pp. 1954-1955.)" (*California Lab. Federation v. Occupational Safety and Health Stds. Bd., supra*, 221 Cal.App.3d at p. 1552.)

The federal regulation approving California's workplace safety plan is detailed, and describes the plan as incorporating an enforcement component that includes "prompt notice to employers and employees of alleged violations of standards and abatement requirements, *effective remedies against employers*, and *the right to review alleged violations*, abatement periods, *and proposed penalties with opportunity for employee participation in the review proceedings* . . . ." (29 C.F.R. 1952.170(c), italics added.) The approval regulation also specifies "[t]he State's program will be enforced *by*

the Division of Industrial Safety of the Department of Industrial Relations" and "*[a]dministrative adjudications will be the responsibility of the California Occupational Safety and Health Appeals Board.*" (29 C.F.R. 1952.170(a), italics added.) The regulation does allow other agencies to be involved in the enforcement effort, but requires that "[i]nter-agency agreements to provide technical support to the program will be fully functioning within 1 year of plan approval" (29 C.F.R. § 1952.173(d).) It then confirms, pursuant to that requirement, that "formal interagency agreements were negotiated and signed between the Department of Industrial Relations and the State Department of Health (June 28, 1973) and between the State Department of Industrial Relations and the State Fire Marshal (August 14, 1973)." (29 C.F.R. § 1952.174(b).)

That plan description is entirely consistent with Labor Code section 144, subdivision (a), which expressly requires that "[t]he authority of any agency, department, division, bureau or any other political subdivision other than the Division of Occupational Safety and Health *to assist in* the administration *or enforcement* of any occupational safety or health standard, order, or rule adopted pursuant to this chapter *shall be contained in a written agreement with the Department of Industrial Relations or an agency authorized by the department to enter into such agreement.*" (*Ibid.*, italics added.)

4. The UCL

California's "UCL defines 'unfair competition' as 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.' [Citation.] By proscribing 'any unlawful' business act or practice (*ibid.*), the UCL '" borrows"' rules set out in other laws and makes violations of those rules independently actionable." (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370.)

Actions for relief under the UCL may be initiated by a public prosecutor. (Bus. & Prof. Code, § 17204.) Available remedies for violation of the UCL include (1) restitution and injunctive relief, which can be pursued by either a public prosecutor or a private party who has suffered injury in fact, or (2) civil penalties, which can only be pursued by a public prosecutor. (Bus. & Prof. Code, §§ 17203, 17206, subd. (a).) These UCL remedies are "cumulative . . . to the remedies or penalties available under all other laws of this state." (Bus. & Prof. Code, § 17205.)

The purpose of the UCL is to "provide[] an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. . . . [T]he 'overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.' [Citation.] Because of this objective, the remedies provided are limited." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150.)

5. Preemption of the UCL Causes of Action in This Case

Our assessment of whether the district attorney's UCL causes of action are preempted by federal law begins with the observation that the UCL was enacted in 1977 (Stats. 1977, ch. 299, § 1, p. 1202), which is *after* the Secretary initially approved California's workplace safety plan. Hence, there is no basis to infer that reliance on the UCL, in its current form, could have been contemplated by the Secretary as part of the initial decision approving California's plan. And while the district attorney points out that former section 3370.1, which was in effect from 1972 to 1977 (added by stats. 1972, ch. 1004, § 2, p. 2021; repealed by stats. 1977, ch. 299, §§ 3, 4, p. 1204.) also provided for imposition of a similar civil penalty based on acts of unfair competition, he makes no claim that the availability of such a penalty, or its potential use in connection with

violations of workplace safety laws, was ever brought to the attention of the Secretary in connection with California's plan.

Indeed, after the Supreme Court's transfer of this case back to us, with directions to reconsider our decision in light of former section 3370.1, we requested that the parties provide us with supplemental briefs addressing that specific issue, as well as whether former section 3370.1 was ever actually applied to penalize unfair competition arising out of violations of workplace safety laws (either before or after California's workplace safety plan was approved in 1973).

In his brief, the district attorney first concedes "[t]here are insufficient historical records" to demonstrate that former section 3370.1 was ever relied upon by prosecutors to penalize unfair competition arising out of violations of the workplace safety laws prior to 1973, when the Secretary approved California's workplace safety plan.

And while the district attorney does claim that prosecutors relied on former section 3370.1 to penalize unfair competition arising out of violations of the workplace safety laws *after* the Secretary's 1973 approval of California's plan, he supports that assertion solely by referencing a record of nonspecific "civil actions taken by prosecutors following referrals from the [Division of Occupational Safety and Health's Bureau of Investigations]" which even he acknowledges dates back only to 1995 – i.e., 18 years *after* former section 3370.1 was superseded by the current UCL in 1977. Thus, that evidence, even if it were otherwise appropriate for us to consider, would not support the district attorney's contention.

Finally, in response to our query about whether former section 3370.1 was ever brought to the attention of the Secretary in connection with California's proposed workplace safety plan, the district attorney argues that the Secretary is *presumed* to have known about it. That assertion, however, suffers from several analytical flaws. First, the

presumption the district attorney relies upon is that "[t]he legislature is presumed to know existing law." (*Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1500.) But that rule refers to *our own state legislature's* presumed knowledge of existing California law when it enacts a new statute. It does not establish that members of the federal government's executive branch are also presumed to know the entirety of California law – let alone how California's laws of general application might be employed to address workplace safety issues.

Second, the district attorney suggests the Secretary would have been aware of the relevance of former section 3370.1 to our state's workplace safety plan through our Supreme Court's decision in *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d. 94 (*Barquis*). But that case does not address the potential use of unfair competition law in connection with regulating workplace safety. Instead, the court was concerned with the wholly unrelated issue of whether a collection agency's alleged practice of knowingly and willfully filing actions in improper counties would qualify as an unlawful business practice. In the course of deciding that issue, the court merely notes that California's unfair competition law was amended in 1963, "to add the word 'unlawful' to the types of wrongful business conduct that could be enjoined." (*Id.* at p. 112.) The court then adds that "[a]lthough the legislative history of [the 1963] 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.)" (*Id.* at pp. 112-113, fn. omitted.) It is that commentator (a second year law student) – not the Supreme Court – who suggests in the cited law review article that California's unfair competition law might *also* be employed to address unlawful working conditions. The Supreme Court itself expresses no opinion on that issue.

Consequently *Barquis* cannot be viewed as a basis for imputing *presumptive knowledge* to the Secretary, back in 1973, that former section 3370.1 could be relied upon as a basis for imposing additional penalties on employers that violate workplace safety laws.

And third, even if we agreed the Secretary could fairly be taxed with *presumptive* knowledge that former section 3370.1 might be relied upon by prosecutors to impose additional penalties on employers that violate California's workplace safety laws, we would still conclude that such knowledge is insufficient to support an inference that the Secretary had *approved* the imposition of those penalties as part of California's plan. As we have explained, a state seeking to exempt itself from the federal preemption over workplace safety regulation must specifically inform the Secretary of its proposed plan, detailing both the "*standards [to be employed] and their enforcement.*" (29 U.S.C. § 667(b), italics added; *Gade, supra*, 505 U.S. at p. 97.) That requirement cannot be fulfilled by simply asserting the Secretary is *presumed* to be familiar with the entirely of the California law and to understand how that law might be employed in connection with regulating workplace safety. If it were, the Secretary's *presumed* knowledge would effectively relieve California of any obligation to affirmatively disclose its plan.

Rather than claiming that reliance on UCL penalties as an additional remedy for wrongs associated with workplace safety violations was ever specifically included in California's approved plan, the district attorney simply relies on the "strong presumption against preemption" and argues Solus failed to establish Congress had any specific intention of "bar[ring] the People's prosecution" of these UCL causes of action. The district attorney asserts that the underlying violations of the workplace safety laws are "properly within the jurisdiction of the State of California to remedy" and "[a]s such, these violations are the proper subject matter" for him to prosecute as authorized by California law under the UCL. We find these contentions unpersuasive.

As we have already explained, Congress's intention to preempt essentially the entire field of workplace safety regulation (other than workers' compensation) was made clear when it passed the OSH Act. (*Gade, supra*, 505 U.S. at p. 96.) While the OSH Act does not preempt states from "'asserting jurisdiction under [s]tate law over any occupational safety or health issue *with respect to which no [federal] standard is in effect*'" (*id.* at p. 97, italics added), the district attorney has made no claim that this case involves any such discrete issue. Consequently, we conclude federal preemption has been established.

The district attorney relies on *Farm Raised Salmon Cases, supra*, 42 Cal.4th 1077, to support its assertion that preemption is not established here. But that case is distinguishable. As our Supreme Court explained, the federal law at issue in *Farm Raised Salmon Cases* preempted only those state laws that "'establish . . . any requirement for the labeling of food . . . *that is not identical to the requirement* of'" federal law. (*Id.* at p. 1086.) Thus, the court concluded that to the extent California's laws established requirements which were identical to those established by federal law, its enforcement of those laws was *not preempted.* (*Id.* at p. 1083 ["plaintiffs' claims for deceptive marketing of food products are predicated on state laws establishing independent state disclosure requirements 'identical to' the disclosure requirements imposed by the FDCA, something Congress explicitly approved"].) The same cannot be said here.

By contrast to the federal law at issue *Farm Raised Salmon Cases*, the OSH Act *does not* allow states to *independently establish* workplace safety laws, even if those laws mirror federal law requirements. Instead, the states' authority to establish and enforce any laws in this area is *expressly conditioned* on submission of a proposed state plan to the Secretary – a plan which reflects not only the state's establishment of appropriate workplace safety requirements, but also the manner in which those

requirements will be enforced and the remedies provided – and *the Secretary's approval* of that specific plan. In fact, unlike the federal law at issue in *Farm Raised Salmon Cases*, the OSH Act actually contemplates that states *could deviate* from established federal standards, as long as those deviations are approved by the Secretary. The Secretary retains explicit discretion to determine whether a state plan is appropriate, and to reject any state plan that, *in the Secretary's view*, incorporates standards which are either less effective than those established by the OSH Act or unduly burdensome to interstate commerce.

It is this retained federal power to approve or disapprove the state's laws which also distinguishes the federal preemption scheme at issue here from the one recently considered by our Supreme Court in *Rose v. Bank of America* (2013) 57 Cal.4th 390. In *Rose*, the issue was whether a private party's cause of action for restitution and injunctive relief under the UCL, based upon the defendant's alleged violations of the federal Truth in Savings Act (TISA) – a law which did not itself authorize any private enforcement – was preempted. The Supreme Court held it was not, because when Congress repealed TISA's provision allowing for private enforcement, it also "explicitly approved the enforcement of state laws 'relating to the disclosure of yields payable or terms for accounts . . . except to the extent that those laws are inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency.'" (*Id.* at p. 395.) The court then concluded that a private right of action under the UCL, based on an alleged violation of TISA, was not inconsistent with the provisions of TISA. (*Ibid.*)

In this case, however, freedom from federal preemption hinges not only on whether a state's proposed laws are "'at least as effective'" as those contained in the OSH act – a standard we might be able to assess – but also on whether they are "incorporated in a state plan submitted to and approved by the federal Secretary of Labor (the Secretary)." (*California Lab. Federation v. Occupational Safety and Health Stds. Bd.,*

supra, 221 Cal.App.3d at p. 1551.) That latter requirement is not one we are empowered to dispose of.

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.

The district attorney's alternative argument is that even assuming preemption is established in the first instance, these UCL causes of action must be viewed as falling within the safe harbor created by California's approved state plan. As he explains, "the California worker safety penalty statutes and regulations [underlying these UCL claims] are fully approved as part of California's State Plan and *any* action to enforce such laws is fully consistent with the goals of the federal mandate." We cannot agree.

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.

And finally, we reject the district attorney's implicit assertion that any opportunity for *enhanced* enforcement of workplace safety regulations would necessarily be met with the Secretary's approval. As we have already noted, one of the grounds for the Secretary's rejection of a plan is the determination that some distinct state workplace safety provision would unduly burden interstate commerce. Indeed, as Solus points out, after the court in *California Labor Federation* issued a writ compelling the Department of Industrial Relations to formally incorporate the provisions of Proposition 65 into its workplace safety plan, so as to avoid preemption (*California Lab. Federation v. Occupational Safety and Health Stds. Bd., supra*, 221 Cal.App.3d 1547), the Secretary's approval of the new law for application in the workplace actually *limited* the scope of private enforcement that would otherwise have been permitted. As reflected in the analysis underlying that decision, "[m]any [who submitted responses to the Secretary's request for comment on the proposed modification] are companies which have experienced, or fear experiencing, private enforcement lawsuits under Proposition 65." (62 Fed.Reg. 31159, 31162 (June 6, 1997).) And after consideration of the concerns expressed by those commenters, the Secretary concluded that private enforcement of the substantive provisions included in Proposition 65 would be permissible only if restricted to in-state manufacturers. (62 Fed.Reg. 31159, 31178 (June 6, 1997).)

Here, the district attorney proposes to utilize the UCL as a means of imposing truly massive penalties against Solus, based specifically upon its alleged violation of workplace safety laws. Significantly, and in contrast to *Rose*, this is not merely a private UCL cause of action, brought by a litigant who has suffered injury in fact as a result of defendant's anti-competitive conduct, and who seeks restitution for that

injury and to enjoin such conduct in the future. This is instead an action, available only to a representative of the state, which is expressly intended *to penalize* a party for past misconduct. (Bus. & Prof. Code, § 17206, subd. (a) [civil penalties "shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel . . . or . . . by a city prosecutor"].)

Under each of these two UCL causes of action, the district attorney seeks to recover penalties of up to $2,500 *per day*, *per employee*, for the period from November 29, 2007 to March 19, 2009. That represents a potential penalty in excess of $1 million per employee, for each cause of action. And of course, the penalties available under the UCL are cumulative, and thus would be assessed *in addition to* whatever penalties were directly provided for under the Labor Code (and thus directly approved by the Secretary as part of California's state plan.) By contrast, as the district attorney acknowledges, the *total penalty* actually imposed by Cal/OSHA in the stayed administrative action arising out of these same violations was under $100,000.

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.

In light of our determination that state regulation of workplace safety standards is explicitly preempted by federal law under the OSH Act, and that consequently California is entitled to exercise its regulatory power only in accordance with the terms of its federally approved workplace safety plan, we conclude the district attorney cannot presently rely on the UCL to provide an additional means of penalizing an employer for its violation of workplace safety standards.

DISPOSITION

The petition for writ of mandate is granted. The superior court is directed to vacate the portion of its October 3, 2012 order which overruled Solus's demurrer to the district attorney's third and fourth causes of action, and enter a new order sustaining Solus's demurrer to those two causes of action without leave to amend. Solus is to recover its costs in this writ proceeding.

CERTIFIED FOR PUBLICATION

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SOLUS INDUSTRIAL INNOVATIONS, LLC, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G047661

(Super. Ct. No. 30-2012-00581868)

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING; NO CHANGE IN JUGMENT

It is ordered that the opinion filed September 22, 2014, be modified as follows:

On page 20, in the second sentence of the Disposition beginning with "The superior court is directed" delete "without leave to amend" so the sentence reads:

The superior court is directed to vacate the portion of its October 3, 2012 order which overruled Solus's demurrer to the district attorney's third and fourth causes of action, and enter a new order sustaining Solus's demurrer to those two causes of action.

EXHIBIT 2

The modification does not change the judgment. The Petition for Rehearing is denied.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.

Brian A. Sun (State Bar No. 089410)
Frederick D. Friedman (State Bar No. 73620)
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071.2300
Telephone: +1.213.489.3939
Facsimile: +1.213.243.2539
Email: ffriedman@JonesDay.com

Attorneys for Defendants
Solus Industrial Innovations, LLC; Emerson Power Transmission Corporation; and Emerson Electric Co.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

CIVIL COMPLEX CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

SOLUS INDUSTRIAL INNOVATIONS, LLC; EMERSON POWER TRANSMISSION CORPORATION; EMERSON ELECTRIC CO.; and DOES 1-10,

Defendant.

CASE NO. 30-2012-00581868-CU-MC-CXC

Assigned for all purposes to Hon. Kim G. Dunning

JOINTLY SUBMITTED [~~PROPOSED~~] ORDER GRANTING EX PARTE APPLICATION FOR ORDER UNDER CODE OF CIVIL PROCEDURE SECTION 166.1

DATE: November 13, 2012
TIME: 1:30 p.m.
DEPT: CX104

Complaint Filed: July 6, 2012
Trial Date: Not Set

The Court having read and considered the *Ex Parte* application (the "Application") of defendants Solus Industrial Innovations, LLC, Emerson Power Transmission Corporation and Emerson Electric Co. (collectively, "Defendants") for an Order under Code of Civil Procedure section 166.1 with respect to the preemption issue raised in Defendants' demurrer to the Third and Fourth Causes of Action in the Complaint of plaintiff the People of the State of California ("Plaintiff"), having read and considered Plaintiff's Opposition to the Application and Plaintiff's request therein for an Order under Code of Civil Procedure section 666.1 with respect to the Court's ruling sustaining Defendants' demurrer as to the First and Second Causes of Action in the Complaint, and good cause appearing,

IT IS HEREBY ORDERED that the Application is granted.

The Court hereby indicates that in its belief the federal preemption issue raised in Defendants' demurrer as to the Third and Fourth Causes of Action in the Complaint presents a controlling question of law as to which there are substantial grounds for difference of opinion and that appellate resolution of this issue may materially advance the conclusion of the litigation.

The Court further indicates that in its belief the issue of Plaintiff's standing to bring the First and Second Causes of Action in the Complaint also presents a controlling question of law as to which there are substantial grounds for difference of opinion and that appellate resolution of this issue may materially advance the conclusion of the litigation.

Dated: November 14, 2012

Kim G. Dunning
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 10/03/2012 TIME: 02:00:00 PM DEPT: CX104

JUDICIAL OFFICER PRESIDING: Kim G. Dunning
CLERK: Cheryl Henderson
REPORTER/ERM: Lisa Suzanne Rouly-9524 CSR# 9524
BAILIFF/COURT ATTENDANT: Nestor Peraza

CASE NO: **30-2012-00581868-CU-MC-CXC** CASE INIT.DATE: 07/06/2012
CASE TITLE: **The People of the State of California vs. Solus Industrial Innovations, LLC.**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

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EVENT ID/DOCUMENT ID: 71563107

EVENT TYPE: Demurrer to Complaint
MOVING PARTY: Emerson Power Transmission Corporation, Emerson Electric Co., Solus Industrial Innovations, LLC.
CAUSAL DOCUMENT/DATE FILED: Demurrer to Complaint, 07/23/2012

EVENT ID/DOCUMENT ID: 71563108

EVENT TYPE: Motion to Strike Portions Of Complaint
MOVING PARTY: Emerson Power Transmission Corporation, Emerson Electric Co., Solus Industrial Innovations, LLC.
CAUSAL DOCUMENT/DATE FILED: Motion to Strike, 07/23/2012

APPEARANCES
Tony Rackauckas, D.A., counsel, present for Plaintiff(s).
Frederick D. Friedman, from Jones Day, present for Defendant(s).

APPLICATION TO ADMIT PATRICK D. MCVEY PRO HAC VICE
DEMURRER TO COMPLAINT
MOTION TO STRIKE PORTIONS OF COMPLAINT

Tentative Ruling posted on the Internet .

Application to Admit Patrick D. McVey Pro Hac Vice is **GRANTED**

Application of Patrick D. McVey for admission to the Bar of this court Pro Hac Vice and appear as counsel for defendants Emerson Electric Co., Emerson Power Transmission Corporation, and Solus Industrial Innovations, LLC is granted.

As to the Demurrer, the Court **sustains without leave to amend as to the 1st and 2nd causes of action. Overruled as to the 3rd and 4th causes of action.**

The Court **denies the Motion to Strike the paragraphs that are identified in the 3rd and 4th causes of action.**

The Court is rejecting defendant's Federal Preemption argument.

Plaintiff to amend by 10/17/12.

Status Conference is currently set for 10/24/12. If all counsel agree to a Status Conference continuance date, they can notify the courtroom.

Court orders Frederick D. Friedman, counsel for the defendant to give notice.

Brian A. Sun (State Bar No. 89410)
Frederick D. Friedman (State Bar No. 73620)
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071.2300
Telephone: 213.489.3939
Facsimile: 213.243.2539
Email: ffriedman@JonesDay.com

Attorneys for Defendants
Solus Industrial Innovations, LLC; Emerson Power Transmission Corporation; and Emerson Electric Co.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

CIVIL COMPLEX CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

SOLUS INDUSTRIAL INNOVATIONS, LLC; EMERSON POWER TRANSMISSION CORPORATION; EMERSON ELECTRIC CO.; and DOES 1-10,

Defendant.

Case No. 30-2012-00581868-CU-MC-CXC
[Related Case No.: 12CF0698]

Assigned for all purposes to
Hon. Kim G. Dunning

NOTICE OF RULING RE DEMURRER AND MOTION TO STRIKE

DATE: October 3, 2012
TIME: 2:00 p.m.
DEPT: CX104

Complaint Filed: July 6, 2012
Trial Date: Not Set

PLEASE TAKE NOTICE that, on October 3, 2012, at 2:00 pm, before the Honorable Kim G. Dunning (Dept. CX104), the Demurrer and Motion to Strike of defendants Solus Industrial Innovations, LLC, Emerson Power Transmission Corp. and Emerson Electric Co. (collectively, "Defendants") to the Complaint of plaintiff People of the State of California ("Plaintiff") came on for hearing. Frederick D. Friedman of Jones Day appeared for Defendants. Deputy District Attorney Kelly A. Roosevelt and Senior Assistant District Attorney Joe D'Agostino appeared for Plaintiff.

Having read the briefs and heard argument of counsel, the Court sustained the Demurrer with prejudice as to the First and Second Causes of Action in the Complaint (alleged under sections 6428 and 6429, respectively, of the California Labor Code). The Court overruled the Demurrer as to the Third and Fourth Causes of Action in the Complaint (alleged under sections 17200 and 17500, respectively, of the California Business & Professions Code).

As to the Motion to Strike, the portion of the Motion to Strike that challenged Plaintiff's request for daily penalties and per-employee penalties was taken off-calendar as moot in light of Plaintiff's agreement to file a First Amended Complaint that seeks penalties "per violation to the fullest extent permitted by law," as opposed to penalties per day or per employee. As to that part of the Motion to Strike addressed to the request for an injunction and for restitution, the Motion was denied without prejudice to Defendants' asking for limitations on discovery should Plaintiff seek discovery relating to restitution or injunction issues that Defendants believe is improper.

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Plaintiff will file a First Amended Complaint on or before October 17, 2012. The time for Defendants' response to the First Amended Complaint will be governed by the Code of Civil Procedure.

Dated: October 10, 2012

JONES DAY

By: _____
Frederick D. Friedman

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

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 October 31, 2014, I served a copy of the following document(s):

PETITION FOR REVIEW

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

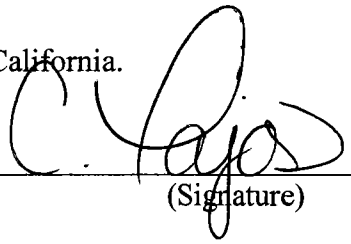
The Honorable Kim G. Dunning
Orange County Superior Court
Civil Complex Center
751 West Santa Ana Blvd., Dept. CX104
Santa Ana, CA 92701
TEL: (657) 622-5304

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 October 31, 2014, 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 October 31, 2014, I served a copy of the following document(s):

PETITION FOR REVIEW

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 October 31, 2014, at Santa Ana, California.

Christina Lajos
(Type or print name)

C. Lajos
(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 October 31, 2014, I served a copy of the following document(s):

PETITION FOR REVIEW

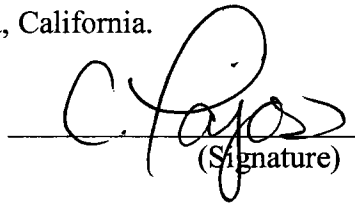
by causing said document to be served by transmitting said documents via email to the person(s) listed below:

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.

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

Executed on October 31, 2014, at Santa Ana, California.

Christina Lajos
(Type or print name)


(Signature)