No. S222314

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

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

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Real Parties in Interest.

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

SUPREME COURT
FILED

DEC - 5 2014

Frank A. McGuire Clerk

Deputy

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

On March 12, 2013, Solus Industrial Innovations, Inc., et al. (collectively referred to herein as the "Employers" or "Defendants") filed a petition for review with this Court (Case No. S209199) seeking review of the exact same preemption issues that are now presented by the People for review in this Petition. In their prior petition, the Employers argued that review should be granted because "disposition of this issue is important for a large number of cases and litigants" and the issues involve a "controlling question of law as to which there are substantial grounds for difference of opinion." Although the People reserved the right to oppose the petition on the merits at that time, the People did not oppose the request for review and agreed that the matter raises a legal question of first impression of statewide importance. This Court thereafter granted the Defendants' petition, finding the preemption issues ripe and justifying review, and transferred the matter to the Fourth District for a hearing and ruling on the merits.

Nothing has changed to render the issues here any less important or deserving of a final decision by this Court. In fact, the preemption questions are now more pressing because the Fourth District entered another unprecedented order that is contrary to well established law regarding preemption that threatens to overturn decades of prosecutorial enforcement practices under California's Unfair Competition and False Advertising Laws. The issues also continue to raise a question upon which

there are substantial grounds for difference of opinion because the Fourth District's decision reaches the opposite conclusion from the trial court on the exact same legal question.

Despite their prior pleadings, which strenuously argued why review is appropriate -- arguments made not only in this Court, but also in the trial court and the Fourth District, by the same undersigned counsel -- the Defendants have changed their tune. Now, the Employers claim this Court "need not review this matter" and "request that this Court deny the Petition for Review." (Answer at p.5.)

In support of this change of heart, however, the Defendants do not dispute the many reasons review remains appropriate. They argue instead that they believe the Fourth District Opinion is correct on the merits. (Answer at p.5.) The entirety of the Answer, therefore, relates to the underlying merits of the issues presented (which is heavily contested), and not whether review should be granted in the first instance. The Employers thus fail to even attempt, let alone successfully refute, the numerous reasons why review is warranted to address the merits of these important legal questions.

For each of these reasons, and those discussed in more detail below, therefore, the People respectfully submit that their Petition should be granted and a full briefing and hearing on these important legal issues should proceed in this Court.

II. DEFENDANTS FAIL TO REFUTE ANY OF THE REASONS REVIEW SHOULD BE GRANTED IN THEIR ANSWER

Not only does the Answer fail to refute the many reasons the People presented supporting their request for review, but the Defendants' arguments actually highlight precisely why review should be granted.

A. There Is No Dispute That The Petition Presents Important Legal Questions of First Impression For Which "Substantial Grounds For Difference Of Opinion" Exist

As a preliminary matter, Defendants do not dispute that the issues presented are legal questions of first impression that have statewide impact. There is also no dispute, as the trial court found in response to the Defendants' own motion, that the preemption issue "presents a controlling question of law as to which there are substantial grounds for difference of opinion." For these reasons, alone, review is appropriate and should be granted.

B. There Is No Dispute That The Preemption Issues Impact Currently Pending And Future Prosecutions Statewide

In their Petition, the People argued review is also appropriate to ensure uniformity in the law because the preemption issues impact other currently pending prosecutions in various counties in the state. Because these other districts are not bound to follow the Fourth District's Opinion, there is a risk of conflicting decisions which can be avoided by review of

the Fourth District's Opinion now. The Employers do not dispute that there are numerous cases and parties that are impacted by these legal issues in their Answer. For this reason as well, therefore, the issues are appropriate and ripe for review by this Court.

C. The Answer Fails To Refute The Clear Legal Errors In The Opinion That Support Review

In their Petition, the People established several legal errors and omissions in the Fourth District's Opinion that warrant a review and reversal of the Opinion by this Court. In their Answer, the Defendants do not contest many of these points, but rather, mischaracterize the People's arguments, or ignore them entirely.

1. The UCL And FAL Are Not "Worker Safety" Laws

In the Petition, the People argue that the Opinion is clearly erroneous to the extent it finds, contrary to prior decisions of this Court, that the UCL/FAL are worker safety laws and/or laws being used to "enforce" worker safety laws. (Petition at pp. 13-15; *but see* Answer at p.25 [suggesting the People argued the opposite].) The causes of action at issue do *not* involve worker safety statutes, but rather, claims under the unfair competition and false advertising laws pursuant to Business and Professions Code Sections 17200 and 17500. Congress intended to exclude such non-occupational laws from the state worker safety plan. (62 Fed. Reg. 31159 [June 6, 1997].)

By holding that Business and Professions Code Sections 17200 and 17500 are worker safety laws that must be incorporated into the California *workplace safety* plan, the Fourth District materially mischaracterized the law of this state and express federal intentions. Rather than explain how 17200 and 17500 can possibly be characterized as worker safety laws, Defendants defend the Fourth District's Opinion by simply concluding they are, and then arguing "[j]ust as the State of California was required to submit Proposition 65 to the U.S. Secretary of Labor to avoid federal preemption, the State is required to submit Section 17200 and Section 17500 to the U.S. Secretary of Labor to avoid federal preemption." (Answer at p.31.)

There are a number of problems with this argument. First, Proposition 65 is nothing like California's UCL and FAL. Proposition 65 was enacted long after the UCL and FAL, and long after the federal Act was enacted and California's state plan was approved. Business and Professions Code Sections 17200 and 17500 are laws of general applicability that predated the federal Act by decades. Unlike Proposition 65, therefore, the UCL and FAL are laws protected against preemption under the historical police powers of this State.

Second, the State was not required to submit the entirety of Proposition 65 for approval as Defendants suggest, but only those portions that were considered worker safety laws. (*Cal. Labor Federation v.*

CalOSHA (1990) 221 Cal.App.3d 1547; 62 Fed. Reg. 31159 [June 6, 1997].). When reviewing Proposition 65, federal OSHA also expressly confirmed that "non-occupational" laws are not intended to be part of the state plan or preempted by the federal workplace safety Act. (62 Fed. Reg. 31159, 31163 [June 6, 1997].) Because Business and Professions Code Sections 17200 and 17500 are non-occupational laws of general applicability that in no way interfere with or conflict with federal law, there is simply no requirement that they be submitted to the Secretary of Labor for approval as part of California's workplace safety plan.

Third, the only authority Defendants cite in support of reaching such an odd result is an unpublished decision of the 9th Circuit Court of Appeals, *Kelly v. USS-OOSCO Industries,* that has no precedential value or relevance to the legal issue to be decided in this case. (Answer at pp.3-16, 25.) In that unpublished opinion, the 9th Circuit addressed a private right of action under Sections 17200 and 17500 (that was since largely abolished) and held, with extremely minimal analysis, that an individual party's action was preempted. The opinion has no bearing on the District Attorney's express authority to pursue civil penalties and equitable relief under the Business and Professions Code here. The holding is further contradicted by more recent binding authority from this Court. (*Farm Raised Salmon Cases* (2009) 42 Cal.4th 1077, 1088 [confirming the "strong

presumption against preemption" that applies to UCL actions and rejecting a preemption argument similar to that raised by Defendants in this case].)

2. The Fourth District Ignored The Legislative History Of The UCL Set Forth In The Supplemental Briefs After Transfer

In the current, and prior, petition to this Court in this matter, the People argued that the Fourth District erred because it predicated its preemption analysis on an inaccurate "observation that the UCL was enacted in 1977," when, in fact, it was enacted decades earlier. Despite the directive from this Court to reconsider its prior opinion based on the prior enacted version of this statute, in its most recent Opinion, the Fourth District maintained its initial "observation" and continued to rely upon this erroneous observation in its assessment of the issues presented.

Defendants argue the Opinion later notes that the UCL was technically enacted before 1977; therefore, the error was corrected and is of no consequence. This is not true. The error still forms the beginning of the Fourth District's "assessment of whether the district attorney's UCL causes of action are preempted," and leads to an improper analysis of the legislative history of the UCL and FAL as well as the congressional intentions behind the federal worker safety Act. (Opinion at p.11; *see* Petition at pp.12-15 [setting forth the presumption against preemption and authorities that govern the proper analysis of a UCL action].) Rather than reframing its analysis under the presumption against preemption that

applies, the amended Opinion inexplicably continues its analysis by attempting to compare the UCL before and after the federal Act was enacted, yet giving no weight to the historical use of the UCL in this State. (*See* Opinion at pp.12-14 [relying on an assumption the Secretary of Labor was unaware of the use of the UCL before the federal Act was adopted to find the UCL preempted].) Notably missing from this "before and after" analysis is any discussion regarding any congressional intent to bar a non-occupational law such as the UCL (or FAL) or how the use of these laws either before or after the federal Act was adopted interferes with or obstructs the application of federal law in any way. This is because there never has been any express or implied intent to bar any such actions.

Defendants next contend the Opinion is rightfully silent about the history of the UCL because there is no relevant legislative history to consider here. Again, Defendants are mistaken. The long history of the UCL/FAL, and the intent and purposes for these laws, is precisely what protects such laws from preemption under the presumption against preemption. (*See* Petition at pp.12-15.)

Despite requesting further supplemental briefing regarding the legislative history of the UCL upon reconsideration of such matters, the Fourth District neglected to give any consideration to the long history of the UCL in its "before and after" analysis. Yet, when specifically addressing the Fourth District's question whether "there [is] legislative history

suggesting our Legislature ever contemplated that former Civil Code section 3370.1 (as reflected in Stats. 1972, ch. 1084, § 2, pp. 2020-2021) would be applied to penalize unfair competition arising out of violations of workplace safety laws?" the People answered affirmatively, at length, explaining:

> Yes. In 1963, the legislature expressly amended the definition of "unfair competition" in the UCL to broadly include "any" business act that violates "any" law -- state or federal, civil or criminal. (Bus. & Prof. Code § 17200 [formerly codified in 1933 at Civil Code § 3369, subd. (3)]; *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1174 [noting an unlawful business practices action can be based on the violation of "any law, civil or criminal, statutory or judicially made[,] federal, state or local" [internal citations omitted].)
>
> There is no intent to restrict its application to any particular subset of laws, but rather, an intent to "permit tribunals to enjoin ongoing wrongful business conduct *in whatever context such activity might occur.*" (*Barquis v. Merchants Collection Ass'n of Oakland, Inc.* (1972) 7 Cal.3d 94, 111 [emphasis added].) The California Supreme Court summarized the relevant legislative history in 1972 in *Barquis v. Merchants Collection Association of Oakland, Inc.*, explaining:
>
>> As originally enacted in 1933, section 3369 defined "unfair competition" only in terms of "unfair or fraudulent business practice[s]"; most of the reported cases, dealing in deceptive conduct, arose under the statute as so worded. In 1963, however, the Legislature amended section 3369 to add the word "unlawful" to the types of wrongful business conduct that could be enjoined. Although the legislative history of this amendment is not particularly instructive, nevertheless, as one commentator has noted "it is difficult to see any other purpose than to extend the meaning of unfair competition to anything

> that can properly be called a business practice and that at the same time is forbidden by law." (Note, *Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition* (1968) 19 Hastings L.J. 398, 408-409.)
>
> (*Barquis, supra,* 7 Cal.3d at pp.112-113.)

In interpreting the meaning of "unfair competition" courts have long viewed the legislative intent to be "inclusive rather than restrictive" and therefore to require a broad interpretation of the types of conduct that constitute unfair competition. (*Cal-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 ["the unfair competition law's scope is broad"; "Its coverage is 'sweeping, embracing *anything* that can properly be called a business practice and that at the same time is forbidden by law.'" (emphasis added; internal citations omitted)]; *People v. Nat'l Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 770-772 ["The very breadth of the terms used by the Legislature [in defining unfair competition] indicate, in our judgment, an intent to be inclusive rather than restrictive in the practices to be enjoined"]; *Barquis, supra,* 7 Cal.3d at p.111 ["The language of section 3369, however, does not limit its coverage"]; *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 927 ["the section 17200 proscription of 'unfair competition' is not restricted to deceptive or fraudulent conduct but extends to any Unlawful business practice"].)

Workplace safety violations are no exception. Indeed, as one commentator aptly explained in 1968 when evaluating alternative civil remedies to address the growing problem with unsafe working conditions in this state: "[t]he employer who violates the working condition laws competes unfairly with other growers and contractors in the business sense as well. By neglecting to provide the facilities required, the employer ... lowers his cost of production and thereby gains an advantage over his competitor who complies with the law." (Philip L. Judson, *Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition*, 19 Hastings L.J. 368, 411 (1968).) "Failing to provide the required facilities" for a safe workplace, therefore, is "clearly an unlawful method of competition" intended by the Legislature -- since the 1960s -- to be remedied under California's UCL. (*Id.*) This is precisely the type of unlawful

business conduct that is alleged in this case.

(People's Letter Brief at pp.2-3 [filed Aug. 22, 2014] [footnotes omitted].)

In its Opinion, the Fourth District simply brushes aside the long history of the UCL, concluding "*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." (Opinion at p.14 [emphasis added].) Under this logic, the Fourth District's holding is obviously still based on the incorrect notion that the UCL was virtually unheard of or unknown prior to the federal Act. The Fourth District Opinion is still in error and contrary to state and federal law as a result.

3. Defendants Do Not Dispute That The Opinion Fails To Separately Analyze The FAL Cause Of Action

In the Petition, the People also argued that the Opinion neglects to contain any analysis or legal authority, whatsoever, to support its holding that federal OSHA laws preempt California's FAL. In response, Defendants concede there is no such analysis in the Opinion, but defend the omission by claiming no analysis is necessary because the "same preemption analysis applies." (Answer at p.19.) Why? How? There is no reasoning or analysis to provide guidance on this issue at all. As the only published decision on this issue of first impression, this is not well-

reasoned precedent. Despite twice requesting further hearing to separately address the People's cause of action under Business and Professions Code Section 17500, the Fourth District declined to consider the issue further. [1] Review should be granted by this Court, therefore, to provide a reasoned precedent in relation to the People's 17500 cause of action. Upon a substantive review of the issue, the People submit that the 17500 cause of action is not preempted and the Opinion should be reversed in this regard as well.

4. The District Attorney's Action Does Not Interfere With Federal Law Or CalOSHA's Authority, But, Rather, Is Fully In Support

In the Petition, the People argued that review should be granted to address the novel "manner of enforcement" preemption argument Defendants raise. In response, Defendants argue that the manner of enforcement of a state law can be preempted "if it *interferes* with the methods by which the federal statute was designed." (Answer at p.12

---

1 Defendants contend it was "improper" for the People to request rehearing on this, and other, omissions in the Opinion because in so doing, the People suggested that the Fourth District "knew the law" and "deliberately" failed to follow it. (Answer at p.10.) First, the People made no such accusations. Second, Defendants are not correct. There is nothing "improper" about asserting legal error and omissions in a petition for rehearing or review, and *In re White*, says no such thing. The People have a right to due process, just like any individual, including a right to a fair hearing and review of *all* the legal issues presented. The right to challenge clear error through the appellate process is certainly part of those rights. That is precisely what the People are seeking here by asking this Court to further review and decide these legal issues.

[emphasis added].) The problem with this argument is simple: there is no express or implied *interference* with any means of enforcement of the federal Act or CalOSHA's authority presented in this case. Defendants have never argued that the District Attorney's action "interferes" with federal law or that it is in conflict with federal law in any way – because it is not. To the contrary, the District Attorney's enforcement action is fully consistent with the aims of both federal and state law -- to penalize and deter wrongdoing by employers.

Nothing in this action interferes with or usurps any authority of CalOSHA either. Indeed, CalOSHA referred this case to the District Attorney for action under Labor Code Section 6315. In their prior amicus briefing in this case, CalOSHA also expressly confirmed its support for this and other similar actions because they are consistent with the objectives CalOSHA seeks to achieve. Concurrent jurisdiction has existed between CalOSHA and the District Attorney to enforce California law since well before the federal Act was adopted. (*See People v. Pacific Bell* (2003) 31 Cal. 4th 1132, 1155.) There is thus no "interference" with federal law merely because CalOSHA has concurrent jurisdiction to seek other penalties and otherwise enforce workplace safety laws.

Moreover, contrary to the Fourth District's dicta suggesting that UCL penalties are excessive in this case, (Opinion at pp.18-19), under Business and Professions Code Sections 17200 and 17500, the legislature

declared that such penalties are meant to be cumulative of other penalties assessed, including any that have been or will be assessed by CalOSHA or under the other laws of the State in relation to the illegal conduct that caused the fatalities here. (Cal. Bus. & Prof. Code §§ 17205 & 17534.5 [stating that "[u]nless otherwise expressly provided," civil penalties under Business and Professions Code Sections 17200 and 17500 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.). There is nothing in the penalty provisions of the UCL or FAL that conflict or interfere with the federal worker safety Act so as to support the Fourth District's holding of preemption on these grounds.

In sum, the Fourth District Opinion is legally in error for numerous reasons. Each of these errors render the analysis and holding of the Fourth District Opinion bad precedent. For each of these reasons, review should be granted by this Court to provide for a more legally sound and well-reasoned analysis of the issues presented.

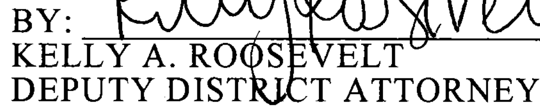
III. CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the People respectfully request that the Petition for Review be granted. The Opinion should be reversed.

Dated this 4th day of December, 2014.

Respectfully submitted,

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



BY: ____________________
KELLY A. ROOSEVELT
DEPUTY DISTRICT ATTORNEY

CERTIFICATE OF WORD COUNT

[California Rules of Court, Rule 8.204(c)]

The text of this Petition for Review (excluding tables and caption pages) consists of 3693 words as counted by the word-processing program used to generate this brief.

Dated this 4th day of December, 2014.

Respectfully submitted,

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

BY: ______________________
KELLY A. ROOSEVELT
DEPUTY DISTRICT ATTORNEY

PROOF OF SERVICE BY MAIL

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

On December 4, 2014, I served a copy of the following document(s):

REPLY TO ANSWER TO 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
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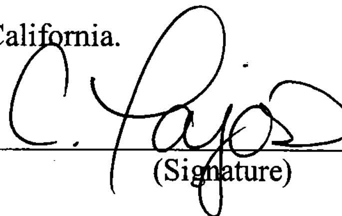
4th District Court of Appeal – Division 3
601 W. Santa Ana Blvd.
Santa Ana, California 92701

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

Executed on December 4, 2014, at Santa Ana, California.



Christina Lajos
(Type or print name)

(Signature)

1 **PROOF OF SERVICE BY OVERNIGHT MAIL SERVICE**

2 I, Christina Lajos, am employed in the Office of the District Attorney for the County of
3 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
4 92701.

5 On December 4, 2014, I served a copy of the following document(s):

6 **REPLY TO ANSWER TO PETITION FOR REVIEW**

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

9

10 Supreme Court of California
Clerk of the Court
11 350 McAllister Street
San Francisco, CA 94102-4797
12 (8 Copies, + 1 for Conforming and 1 Original)

13

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23

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

26 Executed on December 4, 2014, at Santa Ana, California.

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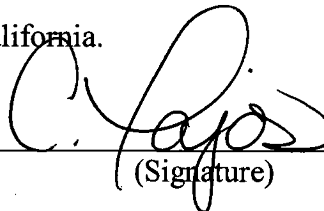

28 Christina Lajos
(Type or print name) (Signature)

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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 December 4, 2014, I served a copy of the following document(s):

REPLY TO ANSWER TO PETITION FOR REVIEW

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

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Frederick D. Friedman, Esq.
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555 South Flower Street, Fiftieth Floor
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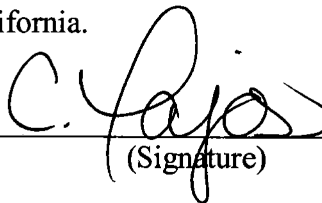
Attorney for SOLUS INDUSTRIAL INNOVATIONS, LLC; EMERSON POWER TRANSMISSION CORPORATION; and EMERSON ELECTRIC CO.

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

Executed on December 4 2014, at Santa Ana, California.

Christina Lajos
(Type or print name)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