No. S222314

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

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

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Real Parties in Interest.

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

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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

In their Answer Brief on the Merits (the "Answer"), Defendants neglect to point to any express or implied Congressional intentions to preempt California's UCL or FAL under the federal worker safety Act.[1] This is because there are none and express federal intentions are to the contrary. Defendants also do not, and cannot, dispute that California's UCL and FAL are State laws of general applicability that are subject to a presumption against preemption. Defendants simply ignore the relevant standards of preemption, congressional intentions, and legal presumptions in their Answer almost entirely.

Setting aside the relevant considerations, Defendants argue that California's consumer protection laws are preempted by the federal Act because the U.S. Secretary of Labor did not "approve them" for use as "enforcement mechanisms" of the worker safety laws. The premise of Defendants' argument is legally unsound and fatally flawed for a number of reasons.

First, as this Court recognizes, the consumer protection laws are not "mere enforcement mechanism[s]" of other laws. (*Rose v. Bank of America* (2013) 57 Cal.4th 390, 396-397 [explaining that the UCL "'borrows' violations of other laws and treats them as unlawful practices

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[1] Unless otherwise defined herein, all capitalized terms shall have the same meaning as defined in the Peoples' Opening Brief on the Merits (the "Opening Brief").

that the [UCL] makes *independently* actionable"]; *see also Farm Raised Salmon Cases* (2009) 42 Cal.4th 1077, 1095.) Neither the UCL nor the FAL are occupational safety laws or regulations, and they are not being used to "enforce" such laws in this case.

Second, the Act does not require "approval" of non-occupational safety laws such as these. Defendants cite no language in the Act to support such a requirement, because, of course, there is none. Not only that, but FedOSHA expressly confirmed it has no jurisdiction over non-occupational safety and health matters, including "consumer" protection concerns. (62 Fed. Reg. 31159, 31159 & 31163 [June 6, 1997] [confirming that federal OSHA "has no authority to address ... non-occupational applications" of California State law, including "consumer" protection laws, and that "laws of general applicability are not preempted"].)

There is thus no basis to find preemption of the UCL or FAL under any of the traditional principles of preemption or under Defendants' "approval" theory either. As such, and as further explained in the Opening Brief and below, the Fourth District's Opinion should be reversed and the matter remanded accordingly.

I. DEFENDANTS FAILED TO ESTABLISH ANY BASIS FOR EXPRESS PREEMPTION

In the Opening Brief, the People argued that there is no express Congressional intent to preempt California's consumer protection laws in

the Act. There is no reference to these laws of general applicability in the Act at all. Moreover, the Act expressly grants authority to the State to exercise its own sovereign jurisdiction over worker safety laws with only a few narrow express exceptions that are not applicable to the UCL and FAL claims alleged in this case. (Opening Brief at pp.24-39.)

A. The State Plan Approval Requirement Does Not Apply To Non-Worker Safety Laws Like The UCL Or FAL

In response to these arguments, Defendants contend the "express requirement that state plans for development and enforcement of workplace safety laws must be approved by the U.S. Secretary of Labor" establishes an intent to preempt laws of general applicability like the UCL and FAL, unless and until they are each separately approved by the U.S. Secretary of Labor. (Answer at p.12.) This is not so. On its face, the "approval" requirement applies only to regulate "occupational safety and health" laws and regulations, not laws of general applicability that govern other concerns like the UCL or FAL.[2] (29 U.S.C. §§ 651, 653(b)(4) & 667(b); 29 C.F.R. §§ 1952.170-1952.7-175; 62 Fed. Reg. 31159, 31159, 31163 [June 6, 1997].)

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[2] Under this "approval" theory, if correct, *all* of California's non-labor laws would be preempted by the OSHA Act if violations occur in a work place because they are not part of the State Plan. There is no congressional or other intent to support such an absurd federal reach under the Act.

Moreover, the "approval" argument is also negated by the express provisions of the Act, including the savings clause under the Act, which confirms that the approval requirement shall not "be construed to supersede or in any manner ... diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees *under any law* with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." (29 U.S.C. 653(b)(4).)

Furthermore, as this Court recognizes, the "approval" requirement is not intended to "confer federal power on a state – like California – that has adopted such a plan." (*United Airlines, Inc. v. Occupational Safety and Health Appeals Board* (1982) 32 Cal.3d 762, 772.) Rather, once a state plan is approved, "it merely removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health." (*Id.*)

B. The 9th Circuit's Unpublished *Kelly* Decision Is Off-Base And Unpersuasive To The Issues Presented

In support of their novel "approval" theory of preemption, Defendants cite to only one outdated, unpublished and non-binding decision of the 9th Circuit, *Kelly v. USS-OOSCO Industries* (9th Cir. 2003) 101 Fed.Appx. 182. (Answer Brief at pp.10-11.) In that case, the 9th Circuit held, with little to no analysis, that a private right of action under Section 17200 was preempted by the Act. The opinion has no bearing on

the District Attorney's express authority to pursue civil penalties under the Business and Professions Code here. Indeed, it says nothing about Section 17500 at all. The holding is further contradicted by more recent binding authority from this Court, confirming the "strong presumption against preemption" that applies to consumer protection actions. (*Farm Raised Salmon Cases*, *supra,* 42 Cal.4th at p.1088 [rejecting a selective preemption argument similar to that raised by Defendants in this case].)

As such, the *Kelly* decision is not relevant or persuasive authority regarding either of the issues presented.

C. Proposition 65 Is Nothing Like The UCL Or FAL

Defendants next cite to California's Proposition 65, enacted in 1986, (which required warnings with respect to toxic substances in workplaces, and elsewhere), and argue that because provisions of Proposition 65 were eventually incorporated into the State Plan and submitted for partial federal approval under the Act, so too must California's UCL and FAL. (Answer at pp.14-18 & 25-26 [citing *Cal. Labor Federation v. CalOSHA* (1990) 221 Cal.App.3d 1547].) This argument also fails. Proposition 65 is nothing like the UCL or FAL.

First, 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 have long been enforced under the historic

police powers of the State. Unlike Proposition 65, therefore, the UCL and FAL are laws protected by a presumption against preemption. (*Farm Raised Salmon Cases*, *supra,* 42 Cal.4th at p.1088.)

Second, there is no federal occupational and safety law in potential conflict with California's UCL or FAL, which prompted the need for federal review and approval of Proposition 65. (*See Cal. Labor Federation, supra,* 221 Cal.App.3d at pp.1553-54.) Indeed, unlike here, there was a "possibility of federal preemption" with respect to Proposition 65's warning requirements:

> because in August 1987 the Hazard Communication Standard (HCS) under Fed/OSHA was amended to require employers to warn employees of potential exposure to certain hazardous materials in the work place. (29 C.F.R. § 1910.1200.) Since the HCS covers the general subject area of employee warnings for exposure to hazardous substances, Proposition 65 might be deemed preempted by 29 United States Code section 667 unless it is included as a part of the state plan.

(*Cal. Labor Federation, supra,* 221 Cal.App.3d at pp.1553-54.)

Third, when reviewing the relevant portions of Proposition 65 following the mandate of *Cal. Labor Federation*, FedOSHA expressly confirmed that "non-occupational" laws are not intended to be preempted by the federal workplace safety Act. (62 Fed. Reg. 31159, 31163 [June 6, 1997]; *Cal. Labor Federation, supra,* 221 Cal.App.3d at p.1557 n.8 [same].) Because Business and Professions Code Sections 17200 and 17500 are wholly non-occupational laws of general applicability that in no

way interfere with or conflict with federal law, therefore, there is no requirement that they be submitted to the Secretary of Labor for approval as part of California's workplace safety plan.

Finally, the procedural posture and legal questions addressed by the court in *Cal. Labor Federation* with respect to Proposition 65 are not the same as those presented here. In *Cal. Labor Federation*, the First District was presented with a petition for a writ of mandate seeking to compel CalOSHA to: (a) incorporate the newly enacted portions of Proposition 65 "applicable to the workplace" into the State Plan; *and then* (b) submit the amendments to the Secretary for approval. (*Cal. Labor Federation, supra*, 221 Cal.App.3d at p.1559.)[3] The Petition was filed after the California Labor Federation, and others, demanded that CalOSHA amend the State Plan to incorporate the new law, but CalOSHA refused to do so. There is no new law, or change in law at issue here, and no party is seeking any similar type of relief from this Court that would warrant such a similar

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[3] Defendants' arguments regarding the "approval" requirement are not only legally unsupported but they are circular as well. On the one hand, they contend the Court should hold that the UCL and FAL are occupational safety laws that must be included in the state plan and approved before they can be enforced in the State. On the other hand, they contend "it is not the judiciary's role to decide whether the UCL and FAL should be include[d] in the State's workplace safety plan" and suggest the Court should defer to the "California Legislature." (Answer at p.28.) Neither argument addresses the *relevant* inquiry of *preemption*, however, which *is* the judiciary's role to determine here: whether there is any federal intent to preempt the UCL or FAL law under the Act. Defendants do not, and cannot, meet their burden to demonstrate an intent to preempt such laws.

mandate or holding. Thus, the applicable analysis of Proposition 65 in *Cal Labor Federation* is of little value to resolving the issues to be decided in this case.

D. None Of The Other Published Cases Cited By Defendants Support A Finding Of Preemption

Defendants argue "courts routinely hold that other federal laws completely preempt the UCL and/or FAL on specific areas of regulation." (Answer at p.15.) The cases cited by Defendants in support, however, involve express congressional intentions to regulate either the particular subject matter or the "entire field" of the law alleged in the consumer protection lawsuit. (*See, e.g., People v. Naegele Outdoor Advertising Co. of Cal., Inc.* (1985) 38 Cal.3d 509, 523 [holding federal law preempted state enforcement of any laws "on Indian reservations"]; *Washington Mutual Bank, F.A. v. Superior Court* (2002) 95 Cal.App.4th 606, 621 [holding "preemption of state law claims, premised on the theory that the charging of preclosing interest by a federal savings and loan association is unlawful is explicit" under federal law]; *Kodadek v. MTV Networks, Inc.* (9th Cir., 1998) 152 F.3d 1209, 1212-1213 [holding state law claims preempted because they covered the "subject matter" of copyrights which is expressly preempted under the federal Copyright Act]; *Silvas v. E*Trade Mortgage Corp.* (9th Cir. 2008) 514 F.3d 1001, 1007 & n.3 [holding claims preempted under express preemption provisions indicating that "federal law

preempts a field" because "it leaves 'no room for the States to supplement it'" (quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230)].)

Unlike the issues in these cases, Congress has declared neither an intent to preempt the "entire field," nor the general "subject matter" of workplace safety. In fact, the relevant Congressional intent here is directly to the contrary. (Opening Brief at pp.24-38.)

Moreover, in each of these cases, *state* enforcement was *entirely* preempted and reserved for federal enforcement. Yet, here, Defendants do not dispute that CalOSHA has the authority to enforce California's workplace safety laws and that the legal violations alleged in this case are federally approved parts of California's State Plan. Such violations are therefore within the power of the State (and not the federal government) to enforce. Without citing any federal intent in support, Defendants contend that somehow only the *District Attorney's* separate action, based on these same unpreempted laws, is selectively preempted.

This novel "time, place and manner," or "method of enforcement" preemption argument has never been recognized or adopted in this State, and none of the cases cited by Defendants support such a stretch. There is no such thing as a "time, place or manner" preemption like that urged by the Defendants. Such a theory was also expressly rejected by FedOSHA as well. (*See* Opening Brief at pp. 36-38 [noting FedOSHA leaves it to the states to decide what types of supplemental actions may be appropriate].)

The violations alleged are either entirely preempted from enforcement under California law, or they are not; and here, they are not.

E. Defendants Fail To Distinguish This Case From The Body Of Law Rejecting Preemption Under The OSHA Savings Clause

In the Opening Brief, the People cited numerous opinions from courts across the country rejecting preemption arguments with respect to supplementary prosecutions. (*See* Opening Brief at pp.35-36.) In these cases, courts upheld supplemental state enforcement actions against challenges of preemption under the "OSHA Savings Clause" which states that:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of or in the course of, employment.

(29 U.S.C. § 653(b)(4).) These authorities hold that there is no intent to preempt supplemental actions by prosecutors in the federal Act. As noted in these opinions, such actions do not conflict with the goals and purposes of the federal Act and "surely further OSHA's stated goal" to protect worker safety. (*See, e.g., State v. Far West Water & Sewer, Inc.* (2010) 224 Ariz. 173, 183 [quoting *People v Chicago Magnet Wire Corp.* (1989) 126 Ill.2d 356].)

In response, Defendants argue these cases are distinguishable because they involve criminal statutes, rather than civil penalty statutes. The distinction is without meaning. The federal Act states no intent to distinguish between civil and criminal supplementary actions. The Savings Clause protects "any law" whether civil or criminal against preemption. (29 U.S.C. § 653(b)(4); *see also* 62 Fed. Reg. 31159, 31167-31170 [June 6, 1997] [confirming "The OSH Act, therefore, does not bar the States from adopting supplemental enforcement mechanisms" without distinction between being criminal or civil in nature].)

F. Prosecutorial *Standing* To Seek Civil Penalties Under The State Plan Is Not Relevant To The Preemption Questions Presented

In response to a separate petition in this case involving different causes of action, the Fourth District held that the District Attorney did not have standing to seek the civil penalties authorized under Labor Code Sections 6428 and 6429 of the State Plan. (*People v. Superior Court (Solus I)* (2014) 224 Cal.App.4th 33.) The Fourth District did not hold that the action was preempted by federal law. Rather, as a question of California (not federal) law, the Fourth District determined that prosecutorial standing to seek civil penalties must be "expressly" stated in the relevant statute under this Court's "*Safer* rule" and held the Labor Code did not "expressly" grant the District Attorney standing to seek such penalties. (*Safer v.*

Superior Court (1975) 15 Cal.3d 230.)[4] Thus, the Court affirmed the trial court's order sustaining the Defendants' Demurrer to these two causes of action.

Defendants suggest that this holding renders the District Attorney's prosecution under the UCL and FAL preempted under the "law of the case." (Answer at pp.169-24.) This is not correct. First, unlike Labor Code Sections 6428 and 6429 there is no dispute the District Attorney is expressly authorized to seek civil penalties under the UCL and FAL. (Bus. & Prof. Code §§ 17206 & 17536; Answer at p.23 [admitting as such].) There is thus no question with respect to the District Attorney's standing to pursue the UCL and FAL causes of action at issue here.

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[4] Believing that the Fourth District improperly applied the *Safer* rule and ignored the applicable "*Simpson* rule" in this case, the People sought review of the opinion so as "to resolve conflicting interpretations of this Court's prior rulings in *Safer v. Superior Court* (1975) 15 Cal.3d 230, and *Board of Supervisors v. Simpson* (1951) 36 Cal.2d 671, with respect to prosecutorial standing to pursue civil actions on behalf of the People for public offenses. The People also argued that the Fourth District's published ruling and analysis regarding prosecutorial standing is in conflict with the express provisions of Government Code Section 26500 (which authorizes the district attorney to act as the public prosecutor for all public offenses "except as otherwise provided by law") and the opinions of the First and Third District Courts of Appeal in *Rauber v. Herman* (1991) 229 Cal.App.3d 942 and *People v. Parmar* (2001) 86 Cal.App.4th 781, which followed the *Simpson* rule recognizing (contrary to *Safer*) that a district attorney has the authority to participate in "noncriminal actions or proceedings that are in aid of or auxiliary to the district attorney's usual duties." Nevertheless, this Court denied the petition for review on June 18, 2014. (Supreme Court Case No. S217653.)

Second, the *Solus I* decision involved a matter of State law, not the scope of preemption under the federal workplace safety Act. Whether and to what extent California wishes to grant prosecutors standing to enforce civil penalties under Section 6428 and 6429, is a matter solely of state law concern. (62 Fed. Reg. 31159, 31170 [June 6, 1997] [noting whether the State wishes to use supplemental actions by prosecutors as "a useful or appropriate addition to State plan authority is a matter for the State to decide"].) The holding, thus, has no precedential value with respect to the issues of *federal* preemption involved here.

The fact remains that there is no federal intent to preempt the UCL or FAL. Even if the District Attorney lacks standing to seek other civil relief for the violations of law alleged under the State Plan, the State still has enforcement jurisdiction over such violations through CalOSHA. Hence, there is nothing preempting the District Attorney from asserting these un-preempted violations as a basis for relief under the consumer protection laws. UCL actions can be based on "any law, civil or criminal, statutory or judicially made[,] federal, state or local," regardless. (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1474.)

II. THE UCL AND FAL DO NOT INTERFERE WITH FEDERAL LAW UNDER THE ACT

In the Opening Brief, the People argued there is no basis to find the UCL or FAL preempted under any of the recognized theories of implied

preemption. (Opening Brief at pp.39-41.) Defendants do not dispute these arguments. Defendants simply cite *Gade* and note that state consumer protection laws may be preempted if the law "interferes with the methods by which the federal statute was designed" or if such laws "regulate an issue of worker safety for which a federal standard is in effect." (Answer at p.14; [citing *Gade v. Nat. Solid Wastes Management Assn.* (1995) 505 U.S. 88, 103-104].) While these may be accurate statements of the law, Defendants fail to explain how such legal provisions are applicable to the analysis required here. This is because they are not. There is no interference between the UCL or FAL and the federal OSHA Act. Defendants further fail to identify any competing federal standards or policies at issue, because there are none.[5] Accordingly, there is no basis to support an implied finding of preemption on either of these grounds.

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[5] This is not a case, for example, involving possible interference with interstate commerce. "[A]n attack based upon unduly burdening commerce" in relation to a state workplace safety law "is limited to those situations where the product standard applies." (62 Fed. Reg. 31159, 31164 [June 6, 1997] [quoting *Florida Citrus Packers v. Cal.*, (D.C. Cal., 1982) 549 F. Supp. 213, 215]; 29 U.S.C. § 667(c)(2)].) The "product standard" governs laws that apply to *products* that are shipped between states. There is no basis for asserting that California's workplace safety laws related to the safe operation of stationary machinery in the state of California, or its UCL, which are at issue here, fall under the "product standard" such that interstate commerce is in any way affected by the enforcement of California's UCL or FAL in this case.

III. CONCURRENT JURISDICTION OF CALOSHA AND PROSECUTORS DOES NOT VIOLATE PUBLIC POLICY

Although not articulated as such, Defendants also suggest that the UCL and FAL should impliedly be preempted because one of the purposes of the federal Act was to prevent "duplicative and possibly counterproductive regulation" and the District Attorney's consumer protection action is duplicative of CalOSHA's administrative authority and action. (Answer at p.26 [arguing public policy arguments weigh against "supplemental actions by prosecutors"].) There are a number of problems with this argument.

First, it is not true that "duplicative" actions are being taken by CalOSHA and the District Attorney in this case. CalOSHA cited one of the three Defendants here in an administrative proceeding for violating Title 8 of California's Code of Regulations regarding worker safety. Two of the three Defendants in this case were not even named in the CalOSHA administrative action. The citations by CalOSHA are litigated in an administrative forum, whereas the present action seeks penalties under a wholly separate set of laws (namely, the consumer protection laws under the Business and Professions Code) in a court of law. The parties, forum and enforcement actions being taken in the administrative action are quite different than those alleged in the present Complaint.

Second, penalties under Business and Professions Code Sections 17200 and 17500 are expressly meant to be "cumulative" of other penalties assessed, including any that have been or will be assessed by CalOSHA or under any other laws of the State. (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.).

Third, there is no "public policy" against the dual authority granted to state agencies and prosecutors under the worker safety and consumer protection laws to aid law enforcement efforts. Concurrent jurisdiction exists and is fully supported by public policy. 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].)

In *People v. Pacific Bell*, the trial court dismissed a public prosecution by district attorneys acting on behalf of the People against a telephone company that argued, similar to Defendants here, that the district attorneys could not prosecute a case related to violations that were also being charged in a related administrative proceeding by the Public Utilities Commission. This Court overruled the dismissal on this basis, holding that the trial court:

> erred in relying solely upon the circumstances that the allegations of the complaint in the present action were the same as the allegations in the PUC proceeding, rather than considering the extent to which the remedies in the two proceedings were likely to be inconsistent and thus were likely to undermine any ongoing authority or regulatory program of the PUC. Enforcement of the vast array of consumer protection laws to which public utilities are subject is a task that would be difficult to accomplish by a single regulatory agency, and the applicable statutes clearly contemplate that other public law enforcement officials, in addition to the PUC must be involved in the effort to enforce such laws. No actions by the district attorneys in the present case would interfere with the authority of the PUC; on the contrary, the proceedings they have instituted assist the enforcement efforts of the PUC by ensuring that public utilities to the same degrees as other types of businesses are subject to liability in actions initiated by public officials.

(*Pacific Bell*, *supra,* 31 Cal.4th at p.1155.) The same is true here: there is nothing about the District Attorney's action that interferes with CalOSHA's administrative jurisdiction or authority.

Fourth, contrary to Defendants' public policy concern, there is no risk of "conflicting" appellate decisions or regulations presented in this

case. (Answer at pp.26-27.) This case involves a single facility doing business in the County of Orange in violation of basic provisions of California law. There are no conflicting regulations at issue and only one set of appellate courts has jurisdiction to determine the legal issues presented. There is thus no possibility of obtaining "two contrary pronouncements from the very same court" that could supposedly confuse the Defendants here (or any other employers in the State for that matter).

For each of the foregoing reasons, the fact that CalOSHA has administrative authority to take its own actions, separate and apart from those taken by the District Attorney, does not interfere with federal law or violate public policy under the Act in any way so as to support a finding of preemption on these grounds.

IV. THE AMOUNT OF PENALTIES AUTHORIZED UNDER THE UCL AND FAL ARE NOT AGAINST PUBLIC POLICY

Citing to misplaced dicta from the Fourth District's Opinion, Defendants conclude their Answer arguing that the Court should affirm the holding of preemption because the amount of penalties could be significant in this case. (Answer at pp.27-28.) The amount of penalties demanded by way of the People's Complaint, however, is not relevant to the question of preemption and should not have been considered by the Fourth District in its analysis.

The People's prayer for civil penalties was the subject of a motion to strike that was not before the Fourth District to decide, and thus involves issues that were not properly briefed or heard in the Fourth District. As the People argued, and the trial court agreed, there is nothing wrong with the manner of *pleading* civil penalties in the People's Complaint. The prayer simply demands the maximum penalties -- "up to $2,500 per violation" -- as expressly authorized under the statutes. What the appropriate measure of penalties would be after trial in this case is subject to numerous considerations that are to be addressed and determined by the trial court under Business and Professions Code Section 17206 at the appropriate time. (Bus. & Prof. Code, § 17206(b) [listing numerous factors for trial courts to consider when assessing penalties under the UCL].) The Fourth District necessarily failed to consider any such factors (because the issue was not before them) when opining about the amount of penalties that may be assessed if the action proceeds.

More importantly, the Fourth District's discussion regarding the supposed "massive" amount of penalties materially misstates legislative intent with respect to the penalties intended for workplace safety violations. Public policy and legislative intentions are fully in favor of, not against, substantial fines and penalties when workplace violations cause employee deaths. (*See* Lab. Code, § 6423 *et seq.*; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 930 [confirming the intent of the federally approved 1999 increases in

civil and criminal penalties under California's Labor Code was to "*increase significantly* the sanctions available against those in control of workplace safety, with the goal of deterring unsafe practices and reducing the number and severity of future accidents." (emphasis added)]; *see also* Senate Rules Committee, A.B. 1127 Bill Analysis (Sept.3, 1999) [expressing dissatisfaction with a $70,000 penalty because "there are greater penalties under pollution laws for discharges that threaten wildlife than for safety violations [that] kill or maim workers" as a basis for authorizing increases in civil and criminal penalty amounts in 1999].)

To be sure, a criminal violation of Labor Code Section 6425(a) can subject an employer like Solus to a monetary fine of *$1.5 million per death*, plus all mandatory court fees and assessments, which could subject an employer like Solus to a criminal fine of *well over $10 million* for the alleged misconduct here if it were successfully prosecuted criminally. (Lab. Code, § 6425(a).)[6] Given the high penalties expressly set forth and undoubtedly approved under the criminal enforcement statutes, it is undisputed that both the California Legislature and the federal Secretary that approves and regularly audits California's State Plan intended penalties

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[6] Defendants do not challenge the District Attorney's standing or authority to seek such penalties in a criminal prosecution under Labor Code Section 6425(a). There is also no dispute that such an action is federally approved under the State Plan and not preempted. There is thus no dispute that the federal government supports substantial monetary fines and penalties when workplace violations cause death.

to be far in excess of the $98,000 administrative penalty that was assessed against Solus here. There is no reason to believe that the intent of the law is different whether monetary penalties are assessed in a criminal or civil forum, and no legislative history that supports drawing such an arbitrary distinction.

Finally, as noted above, it is the express intent of the California Legislature to treat penalties under the UCL and FAL as "cumulative" to penalties that may be assessed under "all other laws of this state," including any that may be assessed under California's workplace safety plan. (Bus. & Prof. Code, §§ 17205 & 17534.5.) The federal Act says nothing about limiting the amount of penalties that can be assessed in worker safety actions, let alone any other actions based on non-occupational safety laws like these.[7] Hence, the potential amount of penalties that could eventually

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[7] In practice, such penalties have been awarded in numerous UCL prosecutions that were referred by CalOSHA based on workplace violations causing employee deaths. All such prosecutions are public records that are reported annually by CalOSHA. Defendants claim that the fact that the UCL and FAL have been used -- for decades -- in such a way does not mean these prior actions were appropriate. Defendants miss the point. Under FedOSHA's oversight function, the Secretary of Labor is *required* to review reports, conduct investigation and continually monitor CA state plan related activities, which would naturally include all prosecutions related thereto. (29 U.S.C. § 667(f); 29 C.F.R. § 1952.172(c).) Yet, FedOSHA has said nothing to suggest an intent to preempt these actions or an intent to reassert federal jurisdiction over California's State Plan as a result. Instead, FedOSHA confirmed its intentions *not* to preempt such actions, and this interpretation is entitled to "presumptive value" with respect to the issues presented here. (62 Fed. Reg. 31159, 31159 & 31163 [June 6, 1997]; *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1,11.)

be assessed in this case under California law is not a basis to hold the UCL or FAL claims preempted under the federal Act.

CONCLUSION

There is no intent by the District Attorney to "bypass Legislative amendment of the California state workplace safety plan to create new and potentially larger fines under the UCL and FAL," as Defendants contend. (Answer at p.25.) The District Attorney's UCL and FAL actions are already expressly intended by the Legislature in the Business and Professions Code, and the penalties are expressly approved to be "cumulative" of "all other laws" of this State. These consumer protection statutes are laws of general applicability that the State has the power to enforce under the historical police powers of this State, and have been used for decades by State prosecutors, without interfering with federal law.

Moreover, there is no federal intent to include non-occupational laws within the reach of the federal Act and no intent, either express or implied, to preempt State consumer protection actions such as this. Rather, the federal intent under the Act is directly to the contrary. Thus, there is no basis to hold the People's UCL and FAL causes of action preempted in this case.

Accordingly, the Opinion is legally in error and should be reversed and the matter remanded to the Fourth District with instructions to enter a new order denying the Petition for Writ of Mandate and thereby affirming

the Respondent Court's Order overruling the Defendant's Demurrer to the Third and Fourth Causes of Action in the People's Complaint.

Dated this 27th day of April, 2015.

Respectfully submitted,

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

BY: Kelly Roosevelt
KELLY A. ROOSEVELT
DEPUTY DISTRICT ATTORNEY

CERTIFICATE OF W ORD COUNT

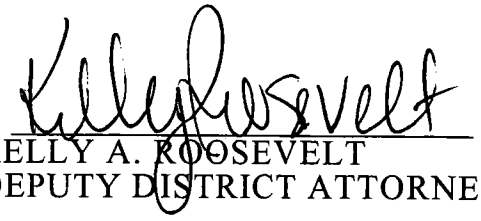
[California Rules of Court, Rules 8.520(b) and 8.204(c)]

The text of this Opening Brief on the Merits (excluding tables and caption pages) consists of 6328 words as counted by the word-processing program used to generate this brief.

Dated this 27th day of April, 2015.

Respectfully submitted,

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

BY: 

KELLY A. ROOSEVELT
DEPUTY DISTRICT ATTORNEY

PROOF OF SERVICE BY MAIL

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

On April 27, 2015, I served a copy of the following document(s):

REPLY BRIEF ON THE MERITS

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

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

The Honorable Kim G. Dunning
Orange County Superior Court
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 April 27, 2015, at Santa Ana, California.

Christina Lajos
(Type or print name)

C. Lajos
(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.

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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.

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Clerk of the Court
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(8 Copies and 1 for Conforming)

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

Executed on April 27, 2015, 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 April 27, 2015, I served a copy of the following document(s):

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

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

Executed on April 27, 2015, at Santa Ana, California.

Christina Lajos
(Type or print name)

C. Lajos
(Signature)