IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOLUS INDUSTRIAL INNOVATIONS, LLC; EMERSON POWER TRANSMISSION CORPORATION; and EMERSON ELECTRIC CO, **Petitioners,**	**No. S222314**
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.**	

Fourth Appellate District, Division Three, No. 0047661
Orange County Superior Court No. 30-2012-00581868-CU-MC-CXC
The Honorable Kim G. Dunning, Judge

APPLICATION FOR REQUEST TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST THE PEOPLE OF THE STATE OF CALIFORNIA

California District Attorneys Association

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TO: THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

The California District Attorneys Association (CDAA) respectfully applies for leave to file a brief as *amicus curiae* in support of reversing the Court of Appeal's decision in this case. CDAA has approximately 2,500 members, including the elected District Attorneys and their employed prosecutors, the Attorney General's Office, and various elected City Attorneys and their employed prosecutors. CDAA has been in existence for more than 90 years and regularly presents the perspective of prosecutors on various matters affecting law enforcement and the administration of justice. The members of CDAA play a leading role in safeguarding and defending the rights of the public through civil law enforcement actions under a variety of statutes, including the unfair competition law, Business and Professions Code sections 17200 et seq. (UCL).

REASON FOR REQUEST FOR PERMISSION TO FILE BRIEF AMICUS CURIAE

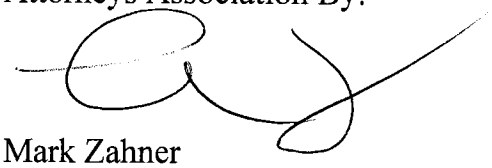
CDAA believes that additional arguments and authorities from prosecutors who regularly enforce the statute at issue in this case are necessary and would be helpful to the Court. CDAA's members are specifically authorized to enforce the UCL on behalf of the People. (Bus. & Prof. Code, §§ 17204.) Consequently, CDAA has a significant interest in the outcome of this case. It is of paramount importance to CDAA that California's consumer protection statutes are properly construed and applied. If the Court of Appeal's decision is permitted to remain law, it will potentially have profound ramifications for both the public and for

prosecutors who rely on these laws to combat a myriad of unfair, deceptive, and unlawful practices.

Thus, CDAA respectfully requests this Court grant leave to permit the filing of the accompanying brief as *amicus curiae*, so that CDAA can present its unique perspective as the representative of public prosecutors throughout California on the issues raised in this appeal.

Dated: May 27, 2015

Respectively submitted on behalf of the California District Attorneys Association By:



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I. INTRODUCTION

In *Solus Industrial Innovations, LLC v. Superior Court* (2014) 229 Cal.Ap.4th 1291, the Fourth District Court of Appeal held that the federal Occupational Safety and Health Act (the OSH Act) preempts a civil law enforcement action by a public prosecutor under California's Unfair Competition Law (the UCL) if the action relates to workplace safety. The Court of Appeal's preemption analysis would essentially render employers immune from unfair competition claims, but only if the unlawful conduct involves putting workers' health or safety at risk. That result is absurd. The question presented on appeal is whether the Court of Appeal's ruling was compelled by a "clear and manifest purpose" of Congress. It was not.

The test for preemption under the federal OSH Act was established by the United States Supreme Court in *Gade v. National Solid Wastes Management Association* (1992) 505 U.S. 88. When a state has its own plan for workplace safety regulation approved by the Secretary of Labor (as California does),[1] state laws control over federal laws unless each of the following is true: (1) the challenged law is an "occupational safety and health standard"; (2) the law is not included in the plan approved by the Secretary of Labor; (3) the law falls outside the scope of the Act's savings clause; and (4) the federal government has promulgated a standard "with respect to" the "same occupational safety or health issue." (*Id.* at p. 96.) The Court of Appeals failed to apply any element of this test.

The Court of Appeal mistakenly assumed that the UCL is an occupational safety and health standard simply because, in this case, the

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[1] The CDAA agrees with the Orange County District Attorney that California's approved state plan, by requiring "serious" and "willful" violations be referred to prosecutors for "appropriate action," does expressly authorize civil enforcement actions. (Orange County Opening Brief at p. 20-23, 32-33.)

defendants' "unlawful" conduct was a violation of state workplace safety laws. However, in making this assumption, the Court of Appeal made an "analytical error" that this Court has identified and rejected in at least two decisions: *Rose v. Bank of America* (2013) 57 Cal.4th 390, and *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570. In those decisions, this Court recognized that the UCL is not a mere enforcement mechanism for the law on which the unfair business practice is based. It is an independent cause of action for unfair competition.

Moreover, the UCL is not an "occupational" law at all; it is a law of general applicability. It targets all defendants who act unlawfully (not just employers) and it protects all victims and the public in general (not just employees) from acts of unfair competition (not dangerous workplace conditions). While its penalties will deter unlawful conduct and encourage compliance with the law (including workplace safety law), well-established United States Supreme Court precedent dictates that this type of "regulatory" impact is not sufficient to trigger preemption.[2] The *Gade* Court recognized that laws of general applicability are not preempted by the OSH Act.

Solus never identifies any federal standard with respect to the same "issue" regulated by the state in this case. And Solus never grapples with the Act's savings clause, which specifically preserves employers' statutory

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[2] See *Gade, supra*, 505 U.S. at p. 107 (while "laws of general applicability may have a 'direct and substantial' effect on worker safety, they cannot fairly be characterized as 'occupational' standards, because they regulate workers simply as members of the general public"); *English v. General Elec. Co.* (1990) 496 U.S. 72, 85 (the effect of tort claim on safety decisions "is neither direct nor substantial enough to place petitioner's claim in the pre-empted field" of nuclear energy); *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238 ("regulatory consequence" that awarding damages would have on nuclear power plants was not the type of "regulatory consequence" that Congress intended to preempt).

liabilities "under any law" arising out of an injury or death in the workplace. Rather than confront any of these fundamental issues, Solus and the Court of Appeal advanced an analysis that is unmoored from the intent of Congress and the elements laid out in *Gade*. According to this flawed analysis, rather than the relatively narrow scope of preemption defined in *Gade*, the OSH Act actually preempts any state law that relates to an occupational safety or health issue. The breath of this preemption advanced by Solus is unheard of and unsupported by any authority. In fact, Solus' analysis would preempt state tort laws if an injury occurs in the workplace, as well as criminal laws if the crime occurs in the workplace. Every court that has addressed the potential preemption of state tort and criminal laws has found that there is none. The UCL should be no different.

In preempting such a large body of law, the Court of Appeal also created a hole that cannot by filled as easily as it believed. The Court of Appeal opined that the State could simply add the UCL to its state plan and submit a supplemental plan to the Secretary of Labor for approval. Perhaps one could imagine the inclusion of all common law torts and criminal statutes into the state's workplace safety plan (as impractical as that might be). However, the same is not true for unfair competition and consumer protection laws. The Secretary of Labor has no authority under the OSH Act to address such issues. (62 Fed. Reg. 31159, 31163 (recognizing that OSHA "has no authority to address . . . non-occupational applications" of California state law, including consumer protection laws).)

The Court of Appeal's decision gives employers who violate workplace safety rules an advantage in the marketplace by allowing them to operate with less overhead than their law abiding competitors. This untoward advantage is exactly what the UCL is designed to prohibit. Because the Court of Appeal fundamentally misunderstood the UCL and

applied an erroneous preemption standard, the Court of Appeal's decision must be reversed.

II. INTEREST OF THE CALIFORNIA DISTRICT ATTORNEYS' ASSOCIATION AS AMICUS CURIAE

The California District Attorneys Association (CDAA) has approximately 2,500 members including the elected district attorneys and prosecutors employed by the district attorneys, the Attorney General, and various local law enforcement offices. CDAA has been in existence for more than 90 years and regularly presents the perspective of prosecutors on various matters affecting law enforcement and the administration of justice. CDAA members are responsible for enforcing California laws through the initiation of both criminal and civil law enforcement actions. Under California's UCL, Bus. & Prof. Code, section 17200 et seq.,[3] certain public prosecutors have the power to bring UCL actions on behalf of the People of the State of California.

Since CDAA represents the public prosecutors that enforce the UCL, it is of paramount importance to CDAA that California's consumer protection statutes are properly construed and applied. The Court of Appeal held, in essence, that if a case involves facts demonstrating a violation of a workplace safety law – state or federal – the federal OSH Act preempts every state law cause of action that was not included in a state plan approved by the Secretary of Labor. Federal law, however, simply does not displace state consumer protection laws or other laws of general applicability.

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[3] The district attorney also alleged a violation of Business & Professions Code section 17500 et seq. The lower court, without any analysis, determined that this claim was preempted. Since the court provided no analysis unique to the section 17500 claim, this brief will only address the UCL.

CDAA has reviewed the briefs submitted by the parties and does not repeat their arguments here. This brief will also not include a statement of facts as they have been fully presented by the parties in their briefs. Instead, the CDAA offers its unique perspective as the representative of public prosecutors throughout California on the issues raised in this appeal.

III. ARGUMENT

A. Whether The OSH Act Preempts The UCL Must Be Determined Against The Backdrop Of Longstanding Judicial Deference To State Sovereignty.

Federal law preempts state law only when Congress intends that result: the intent of Congress "'is the ultimate touchstone.'" (See *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485; *English v. General Electric Co., supra*, 496 U.S. at p. 79; *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949.) Thus, preemption analysis does not involve a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives"; such an endeavor "would undercut the principle that it is Congress rather than the courts that preempts state law." (*Gade v. National Solid Wastes Management Association, supra*, 505 U.S. at p. 111 (Kennedy, J., concurring in part and concurring in judgment); *see Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, 256.)

Federal preemption requires clear congressional intent. (*Fenning v. Glenfed, Inc.* (1995) 40 Cal.App.4th 1285, 1290-91.) "Congress does not cavalierly pre-empt state-law causes of action." (*Medtronic, supra,* 518 U.S. at p. 485.) The "starting presumption" of any preemption analysis is that Congress has *not* intended to preempt state law. (*Peatros v. Bank of America* (2000) 22 Cal.4th 147, p. 157, *citing New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995) 514 U.S. 645, 654-55.)

The presumption against preemption is particularly strong in areas within the state's police powers: "'Consideration of issues arising under the Supremacy Clause start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." (*Cipollone v. Liggett Group* (1992) 505 U.S. 504, p. 516 *quoting Rice v. Santa Fe Elevator Corp.* (1947) 331 U. S. 218, 230; *Jevne, supra*, 35 Cal.4th at p. 949.) "[B]ecause the [s]tates are independent sovereigns in our federal system," the Court "'assum[es] 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.'" (*Medtronic, supra*, at 485 quoting *Rice, supra*, 331 U.S. at p. 230.)

This Court has held that "consumer protection laws . . . are within the states' historic police powers and therefore are subject to the presumption against preemption." (*Farm Raised Salmon Cases* (2009) 42 Cal. 4th 1077, 1088; *California v. ARC America Corp.* (1989) 490 U.S. 93, 101.) This strong presumption against preemption therefore must guide the Court's analysis here.[4]

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[4] Solus' argument that the UCL is routinely preempted by federal law is simplistic and wrong. Solus cites four cases. One case dealt with the ability of California state authorities to enforce regulations on tribal land. (*People ex rel. Dep't of Trans. v. Naegele Outdoor Advertising Co.* (1985) 38 Cal.3d 509, 523.) The other cases simply illustrate that preemption is a question of congressional intent. In *Kodadek v. MTV Networks, Inc.*, the Ninth Circuit found preemption based on a competitor's violation of the Copyright Act. (*Kodadek* (9th Cir. 1998) 152 F.3d 1209, 1213.) The Copyright Act expressly preempts "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope." (17 U.S.C. § 301(a).) The other two cases involved private plaintiffs asserting UCL claims against defendants regulated by the Home Owner's Loan Act, even though the agency had expressly stated an intent to preempt the entire field of lending regulations for federal savings associations. (*Washington Mutual Bank v. Superior Court* (2002) 95 Cal. App. 4th 606, 621; *Silvas v.*

B. Under *Gade*, The OSH Act Only Preempts States From Enforcing "Occupational Safety and Health Standards" If (1) There Is A Federal Standard "With Respect" To The Same "Issue," (2) The State Standard Has Not Been Approved By The Secretary Of Labor, And (3) The OSH Act Savings Clause Does Not Apply.

In general, if a "federal standard" has been promulgated "with respect to any occupational safety or health issue," the OSH Act preempts all state "occupational safety and health standards" relating to that "issue" unless the Secretary of Labor has approved them. (*Gade*, *supra*, 505 U.S. at p. 102.) However, if a state submits a plan for the development and enforcement of state standards, and the plan is approved by the Secretary, then the state standards preempt federal regulation entirely. (*Ibid.*, quoting 29 U.S.C. § 667(b).) Whether or not there is an approved state plan, "Congress expressly saved two areas from federal preemption." (*Id.* at p. 96.) First, "Section 4(b)(4) of the OSH Act states that the Act does not 'supersede or in any manner affect any workmen's compensation law or . . . 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." (*Ibid.*, quoting 29 U.S.C. § 653(b)(4).) Second, "Section 18(a) provides that 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." (*Id.* at p. 97, quoting 29 U.S.C. § 667(a).)

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*E*Trade Mortgage Corp.* (9th Cir. 2008) 514 F.3d 101, 1008.) The standards for preemption under the Copyright Act and HOLA are very different from the standard for OSH Act preemption articulated in *Gade*.

1. The OSH Act Only Preempts State "Occupational Safety and Health Standards," Not Laws Of General Applicability.

Solus takes the position that the UCL is an "occupational safety and health standard" because, in this case, the "unlawful" conduct is a violation of state health and safety standards. In doing so, Solus repeats the same "analytical error" that this Court addressed in *Rose* and *Stop Youth Addiction*. Regardless of the nature of the law that serves as the predicate for a UCL claim, the UCL remains an independent cause of action based on unfair competition. Since the UCL is not an "occupational safety and health" law at all, it cannot be preempted by the OSH Act.

The OSH Act defines the term "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." (29 U.S.C. § 652(8).) "Any state law requirement designed to promote health and safety in the workplace falls neatly within the Act's definition of an 'occupational safety and health standard.'" (*Gade*, *supra*, 505 U.S. at p. 104.) However, "a state law requirement that directly, substantially, and specifically regulates occupational safety and health is [also] an occupational safety and health standard within the meaning of the Act." (*Id.* at p. 107.)

Critically, the Court in *Gade* recognized that state and local regulations that are of "general applicability" do not "directly, substantially, and specifically" regulate worker health and safety, and are therefore not "standards" within the meaning of the OSH Act:

> [S]tate laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike would generally not be preempted.

(*Gade*, *supra*, 505 U.S. at p. 107.) Even though laws of "general applicability may have a 'direct and substantial' effect on worker safety, they cannot fairly be characterized as 'occupational' standards, because they regulate workers simply as members of the general public.'" (*Id.*)

The Court established the standard for determining OSH Act preemption by borrowing from the standard used under the Atomic Energy Act. (*Gade*, *supra*, 505 U.S. at p. 107, citing *English v. General Elec. Co.* (1990) 496 U.S. 72, 84; *see also Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238 (conducting preemption analysis under Atomic Energy Act).) The Court discussed *English v. General Elec. Co.*, which involved a state tort claim for intentional infliction of emotional distress brought by an employee of a nuclear-fuels production facility against her employer. Despite the fact that the Atomic Energy Act had occupied the entire filed of nuclear safety concerns, and the fact that the Atomic Energy Act includes a whistleblower provision with protections, the Supreme Court determined that the plaintiff's claim would not be preempted because "the state law did not have a 'direct and substantial effect' on the federal scheme." (*Gade*, *supra*, 505 U.S. at p. 107 citing *English*, *supra*, 496 U.S. at pp. 84-85.) The Court in *English* acknowledged that the plaintiff's claim would have "some affect" on decisions concerning safety levels at nuclear facilities, but it found that "this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field." (*English*, *supra*, 496 U.S. at p. 85.)

Shedding even more light on the types of laws that are not preempted is *Silkwood v. Kerr-McGee Corp.*, which the Court discussed at length in *English*. The *Silkwood* Court held that a claim for punitive damages in a state tort action arising out of the escape of plutonium from a federally licensed nuclear facility did not fall within the preempted field of

the Atomic Energy Act. In so ruling, the Court acknowledged "'the tension between the conclusion that [radiological] safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages [including punitive damages] based on its own law of liability' governing unsafe working conditions." (*Silkwood, supra*, 464 U.S. at p. 256.) Moreover, the Court explained that "the prospect of compensatory and punitive damages for radiation-based injuries *will undoubtedly* affect nuclear employers' primary decisions about radiological safety in the construction and operation of nuclear power facilities." (*Id.*) Still, the *Silkwood* Court found no preemption because the "regulatory consequence" that awarding damages would have on nuclear power plants was not the type of "regulatory consequence" that Congress intended to preempt. (*Id.*)

Since *Gade* ruled that the standard employed in *English* and *Silkwood* is the appropriate standard for determining OSH Act preemption, it should come as no surprise that courts (before and after *Gade*) have determined that "a state criminal statute or tort liability rule would not be preempted [by the OSH Act]. Such state laws are not 'standards' within the meaning of 29 U.S.C. [S]ection 652(8)." (*National Solid Wastes Management Ass'n v. Killian* (7th Cir. 1990) 918 F.2d 671, 680 n.9 (comparing preemption in the contest of OSHA to the nuclear health and safety context as discussed in *English* and *Silkwood*).) In the tort context, this remains true even where OSHA regulations "prescribe standards of care." (*Pedraza v. Shell Oil Co.* (1st Cir. 1991) 942 F.2d 48, 52 ("[W]e find no warrant whatever for an interpretation [of OSHA's language] which would preempt enforcement in the workplace of private rights and remedies traditionally afforded by state laws of general application."); *Lindsey v. Caterpillar Inc.* (3d Cir. 2007) 480 F.3d 202, p. 210 (applying *Gade* and holding that the OSH Act did not result in preemption of a common law

tort); *In re Welding Fume Prods. Liab. Litig.* (N.D. Ohio 2005) 364 F.Supp.2d 669, 685 (same and collecting cases); *Startz v. Tom Martin Constr. Co.* (N.D. Ill. 1993) 823 F. Supp. 501, 505-506 (same result in case involving claim that employer negligently violated state workplace safety laws).) Similarly, a criminal law is not a "health and safety standard," even where the violation of a workplace standard is the predicate for a criminal charge and enforcement will have an effect on employers' compliance with workplace laws. (*See, e.g., People v. Chicago Magnet Wire* (Ill. 1989) 534 N.E.2d 962, 965 (determining that criminal laws are not "health and safety standards" even if there is a federal OSHA standard governing the same conduct); *People v. Hegedus* (Mich. 1989) 443 N.W.2d 127; *Sabine Consol., Inc. v. State* (Tex. Crim. App. Ct. 1991) 806 S.W.2d 553; *People v. Pymm* (N.Y. Sup. Ct. App. 1989) 151 A.D.2d 133, 139-40 (discussing definition of "health and safety standard"); *State ex rel. Cornellier v. Black* (Wis. Ct. App. 1988) 425 N.W.2d 21.)

In contrast to the laws of general applicability at issue in *English* and *Silkwood*, as well as the authorities discussing the potential for OSH Act preemption of state torts and criminal laws, the Court in *Gade* dealt with an Illinois statutory regime regulating the licensing and training of employees who work with hazardous waste. (*Gade*, *supra*, 505 U.S. at p. 91.) The issue was whether the Illinois regime was preempted by OSHA regulations on "Hazardous Waste Operations and Emergency Response," which included training requirements for hazardous waste workers. (*Id.* at p. 92.) The Court characterized the Illinois laws as "dual impact" statutes because they "protect[ed] both workers and the general public." (*Id.* at p. 91.) But the Court held that because the Illinois statutes were primarily "directed at workplace safety," they were not laws of general applicability and therefore succumbed to preemption. (*Id.* at pp. 107-08.) The question, then, is whether the UCL is more like the generally applicable tort and criminal

laws discussed in *English* and *Silkwood*, as well as in the many other cases cited above, or the "occupational safety and health standards" discussed in *Gade*. For the reasons discussed below, the UCL is the type of generally applicable law that the OSH Act does not preempt.

2. The UCL Is A Law Of General Applicability, Not An "Occupational Safety And Health Standard."

Solus assumes that the UCL is an "occupational safety and health standards," and relies on authority where neither party disputed the fact that the challenged law – namely, certain aspects of Proposition 65 – was an occupational standard. (*Industrial Truck Ass'n, supra*, 125 F.3d at p. 1314 ("[I]t is undisputed that the occupational warning requirements of Proposition 65 and the OEHHA Regs. are, like the Hazard Communication Standard, occupational safety and health standards within the meaning of the Occupational Safety and Health Act.").) However, well-established precedent of this Court dictates that the UCL claim at issue in this case is not a "safety and health standard" or an effort to enforce one. In arguing to the contrary, Solus "ignores the familiar principles on which the UCL operates." (*Rose, supra*, 57 Cal. 4th at p. 396.)

This Court has repeatedly held that a UCL claim is an "independent" cause of action. (*Rose, supra*, 57 Cal. 4th 30, 396; *Stop Youth Addiction, supra*, 17 Cal. 4th at p. 570; *Cal-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal. 4th 163.) "[A] UCL action does not 'enforce' the law on which a claim of unlawful business practice is based." (*Rose, supra*, 57 Cal. 4th 30, 396.) "By proscribing 'any unlawful' business practice, [Business and Professions Code] section 17200 'borrows' violations of other laws and treats them as unlawful practices that the [UCL] makes *independently* actionable." (*Ibid.*) In other words, this Court has "made it clear that by borrowing requirements from other statutes, the UCL does not serve as a mere enforcement mechanism. It

provides its own distinct and limited equitable remedies for unlawful business practices, using other laws only to define what is 'unlawful.'" (*Id.* at p. 397 *citing Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1150.)

Thus, where the defendants in *Rose* argued that the 17200 plaintiffs were "suing to enforce TISA," this Court disagreed: "Plaintiffs are not suing to enforce TISA, nor do they seek damages for TISA violations. Instead, they pursue the equitable remedies of restitution and injunctive relief, invoking the UCL's restraints against unfair competition." (*Ibid.*) In *Stop Youth Addiction*, where the defendants argued that the UCL plaintiff was enforcing Penal Code section 308, this Court disagreed, emphasizing that "the plaintiff was enforcing the UCL, not the statutes underlying their claim of unlawful business practice." (*Ibid.*, citing *Stop Youth Addiction, supra*, 17 Cal.4th at p. 560.) In each instance, regardless of the predicate legal violation, the plaintiff is prosecuting an unfair competition claim. (*Ibid.*, quoting *Stop Youth Addiction, supra*, 17 Cal.4th at p. 562.) When plaintiffs bring a UCL claim, they "seek[] relief from alleged unfair competition, not to enforce the [predicate law]." (*Stop Youth Addiction, supra*, 17 Cal. 4th at p. 566.) The power to seek relief comes from the UCL itself, "and not by virtue of particular predicate statutes." (*Stop Youth Addiction, supra*, 17 Cal. 4th at p. 562, quoting *People v. McKale* (1979) 25 Cal. 3d 626, 633.)

The UCL claim in this case is not an occupational health and safety standard or an attempt to enforce one. Clearly, the UCL is not a positive enactment requiring certain "conditions, . . . practices, means, methods operations, or processes" in the workplace. (Cf. 29 U.S.C. § 652(8).) In general, when courts enter judgments enforcing the UCL, the judgments punish anyone (not just employers) who engage in acts of unfair competition (not workplace malfeasance) in order to protect the general

public (not just employees). The UCL is therefore a law of general applicability. Moreover, the UCL borrows the state standards – which in this case have been approved by the Secretary – and converts them into an independent state law cause of action with independent state law remedies. The district attorney did not assert a claim under CalOSHA, the federal OSH Act, or the predicate workplace safety laws and regulations. Nor was his civil enforcement action under the UCL an action to enforce a workplace safety standard.

Since the UCL claim is not a "safety and health standard" or an effort to enforce one, the UCL claim cannot be preempted by the OSH Act. This remains true even though penalties under the UCL will have a deterrent effect on Solus and other employers, thereby encouraging lawful compliance with workplace safety standards. (*Gade*, *supra*, 505 U.S. at p. 107 (while "laws of general applicability may have a 'direct and substantial' effect on worker safety, they cannot fairly be characterized as 'occupational' standards, because they regulate workers simply as members of the general public"); *English*, *supra*, 496 U.S. at p. 85 (the effect of tort claim on safety decisions "is neither direct nor substantial enough to place petitioner's claim in the pre-empted field"); *Silkwood*, *supra*, 464 U.S. at p. 256 ("regulatory consequence" that awarding damages would have on nuclear power plants was not the type of "regulatory consequence" that Congress intended to preempt).)

C. The OSH Act Saves From Preemption Employers' Statutory Liabilities "Under Any Law," Including the UCL.

The OSH Act explicitly saves statutory liabilities of employers from preemption. Section 4(b)(4) states that "[n]othing in this Act shall . . . 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 arising out of, or in the course of, employment." (29 U.S.C. § 653(b)(4).) Under a plain reading of this provision, this Court need only ask if the district attorney's UCL claim presents a statutory liability of an employer under any law with respect to a death in the course of employment. Surely, it does. The Court of Appeal, however, did not address Section 4(b)(4) at all. And Solus ignores it. While we are aware of no case in California addressing this provision, the same courts that determined that common law torts[5] and criminal laws[6] are not "standards" have also determined that they fall within the scope of the OSH Act's savings clause. The same should be true for UCL claims, which are statutory liabilities of employers in California.

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[5] *Lindsey*, *supra*, 480 F.3d at p. 209 (recognizing a "solid consensus that [29 U.S.C. § 653(b)(4)] operates to save state tort rules from preemption."); *Pedraza*, *supra*, 942 F.2d at p. 53 (collecting authorities); *United Steelworkers of America, AFL-CIO v. Marshall*, 647 F.2d 1189, 1235-1236 (D.C. Cir. 1980) ("when a worker actually asserts a claim under workmen's compensation law or some other state law, neither the worker nor the party against whom the claim is made can assert that any OSHA regulation or the OSH Act itself preempts any element of the state law"); see also *Sakellaridis v. Polar Air Cargo, Inc.*, 104 F. Supp. 2d 160, 163-64 (E.D.N.Y. 2000) ("The savings clause plainly states that workers' statutory remedies for personal injuries are preserved. It is not consequential that the standard of care is prescribed by the common law, a separate statutory scheme, or an administrative scheme."); *York v. Union Carbide Corp.*, 586 N.E.2d 861, 865-66 (Ind. Ct. App. 1992) ("[W]e agree with the *Pedraza* court's holding that the savings clause operates to exempt tort law claims from preemption.").

[6] *Chicago Magnet Wire*, *supra*, 534 N.E.2d at p. 968 (citing savings clause to hold that state criminal statutes were not preempted by the OSH Act); *Hegedus*, *supra*, 443 N.W.2d 134 (same, despite the fact that the clause does not specifically list criminal laws); *State v. Far West Water & Sewer Inc.* (Ariz. App. 2010) 228 P.3d 909, 919 (where employer, its president, and one of its forepersons were indicted for manslaughter, which was not listed in the Arizona statutes or plan, the Arizona appellate court applied the Section 4(b)(4) savings clause).

D. Solus Has Not Established That There Are Any Federal Standards With Respect To The State Law Predicates For The UCL Claim, So There Can Be No Preemption.

The OSH Act has no preemptive effect unless a state law or regulation "establishes an occupational health and safety standard on an issue *for which OSHA has already promulgated a standard.*" (*Gade, supra,* 505 U.S. at p. 97 [citation omitted] (emphasis added).) Therefore, before conducting a preemption analysis, a court must identify a "federal standard" and determine whether the state enacted a law "with respect" to the "same issue." (*Industrial Truck Ass'n v. Henry* (9th Cir. 1997) 125 F.3d 1305, 1310, 1311-12 (conducting inquiry); *see, e.g., California Lab. Fed'n v. Occupational Safety & Health Stds. Bd.* (1990) 221 Cal. App. 3d 1547, 1553 (observing that the "possibility of preemption arises" only because there was a federal standard covering the same subject area as Proposition 65).)

What possible "federal health standard" could parallel the UCL? There could be none because the Secretary of Labor does not have the authority to promulgate unfair competition or consumer protection laws. The fact that this question has to be asked reveals the folly of the Court of Appeal's analysis in this case. If, however, it were possible to identify a federal standard operating on the same issue as any law relevant to this case, we would look first to the state workplace safety laws borrowed by the UCL. Solus has not made any effort to identify either the federal standard that preempts the district attorney's claim, or the "issue" preempted by that standard. So it is impossible to conduct any preemption analysis. In any event, there could be no such federal standard because the state standards are part of the California state plan, which was approved by the Secretary of Labor, and therefore preempt any federal standards that do exist. (29 U.S.C. § 18(b).)

To the extent the lower court addressed this critical failure at all, it faulted the district attorney for never claiming that "this case involves any such discrete issue." (*Solus*, *supra*, 229 Cal. App. 4th at 1304.) However, "[i]t is well established that the party who asserts that a state law is preempted bears the burden of so demonstrating." (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1089, fn. 10.) The burden is therefore on Solus. It has not carried its burden. The lower court effectively put the burden on the district attorney to prove the absence of preemption, and that was an error. This Court should not sanction the preemption of an entire body of state law when there is no parallel federal law.

E. The Lower Court's Ruling Immunizes Unfair Competition (And A Host Of Other Illegal Activities) By Employers Who Gain An Unfair Advantage Over Competitors.

By unmooring its preemption analysis from the actual "occupational safety and health standards" that Congress intended to preempt, the Court of Appeals rendered essentially every state law that touches upon workplace safety preempted. Preemption of the UCL is bad enough. But the opinion would result in the preemption of common law and statutory torts, as well as criminal laws, even if they are generally applicable laws, unless they are included in an approved state plan. If this Court upholds the lower court's decision, OSH Act preemption will be broader in this state than in any other state in the country. Workplaces will become the Wild West, unless each and every state law is included in the state plan and approved by the Secretary. And California's state plan will therefore become unwieldy at best.

The Court of Appeal expressed a concern that public prosecutor actions would "impos[e] truly massive penalties against" employers, in contrast to the relatively minor civil penalties imposed under CalOSHA,

and thus would have to be assessed by the Secretary for potential undue burden on interstate commerce. (*Solus*, *supra*, 229 Cal.Ap.4th at p. 1307.) In allowing this concern to motivate its decision, the Court of Appeal flipped OSHA on its head, turning what was intended to be a floor for the protection of workers into a (very low) ceiling on the liability of scofflaw employers who flout workplace safety rules, thus giving them an unfair advantage over competitors. And it did so based on speculative concerns regarding penalties imposed under the UCL and the burdens they might impose on employers. The Court of Appeal's unsubstantiated concerns are misplaced.

Eliminating UCL liability would actually frustrate the OSH Act's objective of stimulating business efforts to "perfect existing programs for providing safe and healthful working conditions" and encourage businesses to "build [] upon advances already made . . . for providing safe and healthful working conditions." (29 U.S.C. 651(b)(1), (b)(4).) The Court of Appeal entirely ignored the protection that civil enforcement offers to law abiding employers. This protection was summarized by Justice Baxter in *Stop Youth Addiction*. "An unlawful act in the business context is, by definition, an action of unfair competition." (*Supra*, 17 Cal. 4th at p. 579 (concurring opinion).) "Merchants who violate the law by selling tobacco products to minors obtain an unfair competitive advantage over their law-abiding counterparts . . . ." (*Id.* at p. 580) And remedies under the UCL "deter[] future violations of the law and level[] the playing field on which the business activity occurs." (*Ibid.*, citing *Fletcher v. Security Pacific National Bank* (1979) 23 Cal. 3d 442, 451.)

The same is true here. The imposition of penalties under the UCL on employers like Solus who violate state workplace safety laws will deter future violations of the law. Moreover, Solus obtained an unfair advantage over its competitors by ignoring the law; specifically, it used a cheaper

residential water heater and was able to avoid the downtime associated with commercial water heaters. By deterring such conduct, the UCL will help level the playing field for Solus' law abiding competitors. By holding that the UCL is preempted, the Court of Appeal created a hole that the Secretary of Labor cannot fill under the OSH Act, because it has no authority to address such issues. (62 Fed. Reg. 31159, 31163 (recognizing that OSHA "has no authority to address . . . non-occupational applications" of California state law, including consumer protection laws).)

As discussed above, every other court that has considered the incidental regulatory effect of damages or penalties under state tort and criminal laws on workplace safety has determined that this effect was not the type of effect that Congress intended to preempt. This reasoning has also been embraced by the Department of Labor. In fact, only a few years ago, the Secretary of Labor clarified the Department of Labor's position on the OSH Act's preemptive effect on certain state law torts. In finding that a specific OSHA standard did not preempt state law tort liability, the Department did not say anything about the torts having to be included in a state plan. The Department did state that it "is far from clear, that the threat of tort litigation may impose some undue burden on employers or interstate commerce." (OSHA Letter of Clarification (Feb. 3, 2010).)[7] It then continued: "It is at least equally possible that eliminating UCL liability would be a disincentive for employers to comply with workplace safety laws." (*Ibid.*, citing *Wyeth* at pp. 1199-1200 (Congress "may also have recognized that state-law remedies further consumer protection by motivating manufacturers to produce safe and effective drugs and to give adequate warnings.").)

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[7] Available at: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28049.

The Court of Appeal reached the opposite conclusion based on its concern with the potential "undue burden" that UCL penalties could impose on interstate commerce. However, this is a concern the Secretary will not recognize. In fact, such costs are not even relevant to the Secretary's analysis of a state regulation's burden on interstate commerce. The Approval of California's State Standard on Hazard Communication Incorporating Proposition 65 illustrates this point. (*Solus*, *supra*, 229 Ca.App.4th at p. 1307, citing 62 Fed. Reg. 31159, 31162 (June 6, 1997).) In this notice of approval, the Department of Labor noted that some commenters had voiced an (unsubstantiated) concern with private enforcement of Proposition 65 standards on *out-of-state manufacturers*. After explaining why state plans cannot regulate out-of-state manufacturers, the Department explained why litigation costs associated with the enforcement of workplace standards did not factor into its analysis. (62 Fed. Reg. 31159, 31162.) The Secretary specifically considered the award of attorneys' fees and punitive damages, and determined that they would not impose an undue burden on commerce. (*Ibid.* [citations omitted].) The Secretary further explained that "courts, in considering cases under the Commerce Clause, do not consider the enforcement provisions of particular laws." (*Ibid.* [citations omitted].) Courts instead focus on the substantive aspects of particular laws "because the burden of litigating a case is not a burden on 'commerce.'" (*Ibid.*)

Finally, the deterrent effect of UCL penalties is entirely consistent with the OSH Act's goal of protecting employees. (*United Airlines, Inc. v. Occupational Safety & Health Appeals Board* (1982) 32 Cal. 3d 762 ("The purpose underlying section 18 was to ensure that OSHA would create a nationwide floor of effective safety and health standards and provide for the enforcement of those standards."); 29 U.S.C. § 651(b) (where congress declared its purpose as "to assure so far as possible every working man and

woman in the Nation safe and healthful working conditions and to preserve our human resources").) However, although state and federal workplace safety laws prescribe "various criminal and civil penalties against employers who violate either the regulations or the general duty to provide a safe workplace, . . . the overriding purpose of OSHA is to *prevent* workplace injuries, not to impose penalties on employers who fail to provide their employees with safe working conditions." (*Pedraza*, *supra*, 942 F.2d at p. 53 n.7, citing *Whirlpool Corp. v. Marshall* (1980) 445 U.S. 1, 12 ("OSHA 'is prophylactic in nature. The Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards . . . in the hope that these will act to prevent deaths or injuries from every occurring.'")).) Thus, by providing punitive penalties, the UCL fills a much needed gap in the state and federal regulations.

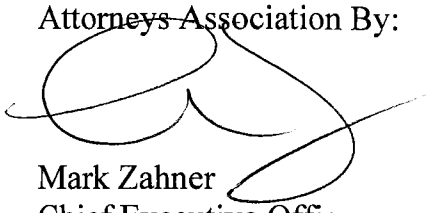
IV. CONCLUSION

The Court of Appeal held that the OSH Act barred a public prosecutor from enforcing a state unfair competition law against an employer whose violation of state workplace safety laws gained it an unfair advantage over its peers and resulted in the death of two employees. According to the court, the only civil penalties available against Solus are those set forth in the state's plan, which in this case are less than $100,000. The Court of Appeal was wrong. The OSH Act only preempts "occupational safety and health standards." It does not preempt state laws of general applicability like the UCL, even if they regulate workplace safety. The Court of Appeal, without any basis in the OSH Act or any legal precedent, employed a preemption analysis so broad that it would make workplaces virtually lawless, unless each and every state law that could be used against an employer is inserted in a state plan approved by the

Department of Labor. This result is absurd. It severely hampers the efforts of state prosecutors to enforce state laws. The decision should be overturned.

Dated: May 27, 2015

Respectively submitted on behalf of the California District Attorneys Association By:



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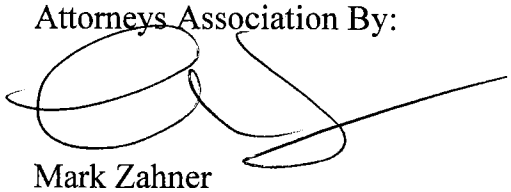
CERTIFICATE OF WORD COUNT
Case No. **S222314**

The text of the **APPLICATION FOR REQUEST TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF** consists of 7,083 words as counted by the Microsoft Word program used to generate the said **APPLICATION FOR REQUEST TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF**.

Executed on May 27, 2015.

Respectively submitted on behalf of the California District Attorneys Association By:



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DECLARATION OF SERVICE BY MAIL
Case No. S222314

I, Georgia Bozaich, the undersigned, declare:

I am employed by the California District Attorneys Association. I am over the age of 18 years and not a party to the within action. My business address is 921 11th Street, Suite 300, Sacramento, California. On May 27, 2015, I served a copy of the within, **APPLICATION FOR REQUEST TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF,** on the following, by placing a copy of same in postage prepaid envelopes addressed as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on May 27, 2015, at Sacramento, California.

Georgia Bozaich

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