ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1229

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN TORT REFORM ASSOCIATION,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION and DEPARTMENT OF LABOR,

Respondents,

AMERICAN FEED INDUSTRY ASSOCIATION; UNITED STEEL WORKERS LOCAL UNION 4-227; CHANGE TO WIN; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION,

Intervenors for Respondents.

On Petition for Review of a Final Rule Issued By
the Occupational Safety and Health Administration

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS AND DISMISSAL

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici Curiae

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Respondents OSHA and the U.S. Department of Labor.

B. Ruling Under Review

All references to the ruling under review appear in Brief for Respondents OSHA and the U.S. Department of Labor.

C. Related Cases

All related cases appear in Brief for Respondents OSHA and the U.S. Department of Labor.

D. Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Amicus Curiae American Association for Justice states:

1. AAJ discloses that it is a non-profit corporation organized under the laws of the District of Columbia.

2. AAJ has no parent corporation and issues no stock.

Date: May 23, 2013

/s/Andre M. Mura
Andre M. Mura

Attorney for Amicus Curiae

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GLOSSARY OF TERMS

FDA	Food and Drug Administration
OSHA	Occupational Safety and Health Administration
OSH Act	Occupational Safety and Health Act of 1970
Globally Harmonized System	The United Nations Globally Harmonized System of Classification and Labeling Chemicals

STATUTES AND REGULATIONS

The text of all statutes and regulations relevant to this case are appended to the Brief for Petitioner.

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice is a voluntary national bar association whose trial-lawyer members primarily represent plaintiffs in civil suits, including personal injury actions, consumer and civil-rights lawsuits, and employment-related cases. Because our attorney members represent workers who are injured in an occupational setting, the Association has a strong interest in the potential preemptive effect of the Occupational Safety and Health Act and the Hazard Communication Standard on state tort suits. The Association is concerned that if tort remedies against chemical manufacturers are limited through improper application of preemption principles, injured workers will be left without compensation and chemical manufacturers will not have adequate incentive to

conduct a thorough hazardous material review, or to update labeling and safety data sheets when new hazards emerge.[1]

STATEMENT OF FACTS

Amicus curiae the American Association for Justice adopts Respondents the Occupational Safety and Health Administration's (OSHA's) and the U.S. Department of Labor's discussion of the Occupational Safety and Health Act of 1970 (hereinafter "OSH Act"), 84 Stat. 1590, 29 U.S.C. § 651 *et seq*., and the Hazard Communication Standard, 29 C.F.R. § 1910.1200 (2012). *See* OSHA Corrected Br. 2-14. Amicus writes separately, however, to emphasize two critical features of the Hazard Communication Standard, as promulgated in 1983 and amended, including in 2012. First, the federal Standard sets forth *minimum* requirements for labeling and (material) safety data sheets. Second, under this federal law, manufacturers (and importers), not OSHA, bear primary responsibility for the content of labeling and safety data sheets *at all times*.

To begin, the Hazard Communication Standard that OSHA promulgated in 1983 required chemical manufacturers to study the hazards of the chemicals they produce; and, if these chemicals were found to be hazardous, to warn American workers using these chemicals in the course of employment of possible health risks

[1] All parties consent to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel, or any person other than the amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

that may arise from exposure. 29 C.F.R. § 1910.1200(d), (f), (g) (1984). Manufacturers were required to warn workers through labeling and material safety data sheets. The former required summary information of chemical hazards and recommended safe handling techniques; the latter, more detailed information about hazards, storage and handling, and emergency procedures. *See* 77 Fed. Reg. 17, 574, 17,724, 17,729 (Mar. 26, 2012). In 1987, OSHA extended these informational requirements to all industries. 52 Fed. Reg. 31,852 (Aug. 24, 1987).

This Hazard Communication Standard required that labels identify the chemical name, "appropriate" hazard warnings, and the manufacturer's name and address. 29 C.F.R. § 1910.1200(f)(1)(i)-(iii) (1984). But it did not prescribe "set procedures" for labels or material safety data sheets. For example, it did not specify "a standard format or design elements for labels," 77 Fed. Reg. 17,574, 17,586 (Mar. 26, 2012); nor did it "specif[y] format or form" for material safety data sheets, 48 Fed. Reg. 53,280, 53,310 (Nov. 25, 1983).

What, then, was an "appropriate" hazard warning? This Hazard Communication Standard adopted a "performance-oriented" approach that gave chemical manufacturers wide berth in devising warnings for labels and material safety data sheets. Under this approach, manufacturers were required to conduct an "appropriate identification of the scientifically well-established data" concerning any hazards that could arise from chemical exposure. 48 Fed. Reg. at 53,296. "A

proper evaluation would result in generating the appropriate hazard information to complete the labels and material safety data sheets, . . .” *Id.*

Not all participants in the 1983 rulemaking supported the performance-oriented approach to hazard evaluation. A few predicted this approach would fail to provide adequate guidance to manufacturers, and suggested that manufacturers would issue inconsistent warnings, thereby denying workers equivalent protections in all workplaces. 48 Fed. Reg. at 53,297. But OSHA ultimately agreed with commentary by chemical manufacturers and their toxicologists that the “hazard determination process should remain performance oriented” because “[a]ttempting to create a precise step-by-step hazard determination procedure is difficult and most likely would not be flexible enough to address the variety of situations as effectively and as inexpensively as the existing proposal.” *Id.* (quoting written submission by Bausch and Lomb); *see id.* (quoting Gary Hancock, a toxicologist with the Bethlehem Steel Corporation, as stating that general guidance was preferable to specific guidance) (“I don’t feel that you can have—use a cookbook approach in performing that type of an exercise.”). OSHA thus deliberately eschewed “a ‘cookbook’ approach to determining the hazardous properties of a substance” in favor of a “hazard evaluation procedure involv[ing] a large degree of professional judgment in every situation.” *Id.* at 53,296.

In 2012, OSHA published a final rule updating the Hazard Communication Standard. 77 Fed. Reg. 17,574. The update changed the manner in which chemical hazards are evaluated, as well as how hazard information is conveyed on labeling and safety data sheets.[2] The entire process is now more standardized.[3] *Id.* at 17,580. The chemical evaluation process, for example, provides specific criteria for each health and physical hazard, as well as hazard classes and categories. *See* 29 C.F.R. § 1910.1200, App. A (Health Hazards), App. B (Physical Hazards) (2012). Also, labeling must include information for each hazard class and category, and must feature particular signal words, such as "Danger" or "Warning"; a pictogram, examples of which may be found at http://www.osha.gov/dsg/hazcom/hazcom-faq.html#5; and a precautionary statement, advising workers of measures to be taken in the event of exposure. 77 Fed. Reg. at 17,580, 17,701-02, 17,884. Lastly, information on safety data sheets

[2] The final rule eliminated the word "material" before "safety data sheet." 77 Fed. Reg. at 17,693.

[3] In updating the Standard, OSHA incorporated aspects of the United Nations Globally Harmonized System of Classification and Labeling Chemicals. 77 Fed. Reg. 17,574. The Globally Harmonized System "itself is not a regulation or a standard"; it is a best-practices guide for countries wanting "to develop or modify existing national programs that address classification of hazards and transmittal of information about those hazards and associated protective measures." U.S. Dep't of Labor, A Guide to *The Globally Harmonized System of Classification and Labeling of Chemicals (GHS)*, Sec. 1.1 ("What is the [Globally Harmonized System]"), *available at* http://www.osha.gov/dsg/hazcom/ghs.html#1.1 (last visited May 23, 2013).

must now use specific headings, and be presented in a specific order. *Id.* at 17,701-02, 17,884. But the information required on safety data sheets is largely unchanged.

Even though the process is more standardized, classification will still require the exercise of *substantial* judgment by the manufacturer. *See, e.g.*, 29 C.F.R. § 1910.1200, App. A.0.3, A.6.2, A.7.2.3; *see also* OSHA Corrected Br. 33-34 (noting that manufacturers retain considerable discretion in preparing these informational materials). Also, OSHA made clear in a preamble that the amended Standard's requirements remain "the *minimum* information to be provided by manufacturers and importers." 77 Fed. Reg. at 17,725 (emphasis added). The appendix to the rule confirms this understanding; it specifically advises manufacturers that they may include additional hazard information on a label if "it provides further detail and does not contradict or cast doubt on the validity of the standardized hazard information." 29 C.F.R. § 1910.1200, App. C.3.1. And as the title to Appendix D, Table D-1 indicates, this is equally true of safety data sheets. *See id.* App. D, Tbl. D-1 ("Minimum Information for" Safety Data Sheet).

Lastly, in the updated Standard, OSHA directed chemical manufacturers, importers, distributors, or employers who become newly aware of any significant information regarding the hazards of a chemical to revise the labels for the chemical within six months of learning about the new information. 29 C.F.R. §

1910.1200(f)(11). In addition, these entities must "ensure that labels on containers of hazardous chemicals shipped after that time contain the new information." *Id.* So, too, with safety data sheets; if these entities "become[] newly aware of any significant information regarding the hazards of a chemical, or ways to protect against the hazards, this new information shall be added to the safety data sheet within three months." § 1910.1200(g)(5).

SUMMARY OF ARGUMENT

Petitioner the American Tort Reform Association's contrary views notwithstanding, OSHA did not alter the Hazard Communication Standard's preemptive scope in 2012. The Standard's preemption language means today what it has always meant: state-law occupational safety and health standards addressing hazard communications are expressly superseded by the federal Hazard Communication Standard unless OSHA has approved of the state standard; but generally applicable state tort law is not expressly superseded by the federal Standard, because this law cannot fairly be characterized as establishing occupational hazard standards.

This understanding of the Standard's preemption language is consistent with Congress's intent in enacting the OSH Act. The OSH Act, according to the Supreme Court, only preempts state-law requirements that directly, substantially, and specifically regulate occupational safety and health within the meaning of the

Act. Accordingly, in lower federal courts, a strong consensus has emerged that state tort law, which is law of general applicability that applies equally to workers and non-workers, escapes preemption because this state law cannot fairly be characterized as establishing occupational standards. The OSH Act's savings clause buttresses this conclusion.

The American Tort Reform Association cites a preemption decision in the medical device context in support of its argument that the Standard's preemption clause in effect prior to 2012 swept indiscriminately to bar common-law duties. But this and other Supreme Court cases offer no support for the American Tort Reform Association's views. What is more, OSHA could not have authorized preemption on the scale the American Tort Reform Association suggests. Agencies cannot enact standards that have more preemptive effect than Congress intended. And Congress, in the OSH Act, never clearly and manifestly endorsed preemption on the scale imagined by the American Tort Reform Association.

Despite its best efforts, the American Tort Reform Association cannot show that OSHA's edits to the Standard's preemption language foreclose the possibility of conflict preemption. Conflict preemption does not depend on OSHA's express recognition of the possibility in a preemption clause. Even so, OSHA has acknowledged that if state tort law conflicts with the federal Standard, it is preempted.

The American Tort Reform Association invites this Court to imagine a conflict, but it should decline to speculate about the possibility of conflict preemption in some future situation. Amicus Curiae nevertheless explains that a conflict is unlikely. The case for an impossibility conflict will be exceedingly difficult to establish, for example, in failure-to-warn litigation, because the 2012 federal Standard establishes only minimum requirements, and under this Standard manufacturers must exercise substantial judgment in preparing hazard warnings. Given this federal framework, state-law liability for failure to warn will not require anything that federal law forbids (or vice versa); therefore, an impossibility conflict will not emerge in the mine run of failure-to-warn litigation.

Also, there is no reason to expect that courts will find obstacle preemption; state tort law advances rather than impedes Congress's purposes and objectives here. State tort law performs an important remedial role, which Congress clearly intended to preserve, according to the OSH Act's savings clause. And state tort law provides an important incentive for chemical manufacturers to conduct a thorough hazardous material review consistent with federal law, and to update hazard warnings promptly when new risks emerge.

ARGUMENT

I. OSHA DID NOT COMMIT AN ULTRA VIRES ACT WHEN IT EDITED PREEMPTION LANGUAGE IN THE HAZARD COMMUNICATION STANDARD BECAUSE THESE EDITS DID NOT ALTER THE SCOPE OF PREEMPTION.

Petitioner the American Tort Reform Association argues that when OSHA in 2012 edited preemption language in the Hazard Communication Standard—by replacing the phrase "legal requirements" with "legislative or regulatory enactments," and by deleting the phrase "through any court or agency"—it altered the Standard's preemptive scope. This argument is meritless. Contrary to the American Tort Reform Association's submission, OSHA's edits did not alter the scope of preemption. As Amicus will demonstrate, the Standard's preemption language means today what it has always meant: state-law occupational safety and health standards addressing hazard communications are expressly superseded by the federal Hazard Communication Standard unless OSHA has approved of the state standard; but generally applicable state tort law is not expressly superseded by the federal Standard, because this body of law cannot fairly be characterized as an occupational hazard standard.

Critically, only this understanding of the federal Standard's preemption provision aligns with the preemptive scope of the OSH Act itself. Congress's purpose in enacting the OSH Act is the ultimate touchstone in this preemption case. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). Preemption analysis must

begin "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). And that assumption applies with particular force when Congress, as in the case of workplace safety and health, has legislated in a field traditionally occupied by the States. *See Altria*, 555 U.S. at 77.

Careful attention to Congress's intent reveals no clear and manifest congressional purpose to preempt state tort law, which is law of general applicability that cannot fairly be characterized as an 'occupational' standard. OSHA, therefore, could not have declared in 1983 that common-law duties and liabilities that apply equally to workers and non-workers are invariably preempted by this federal Standard's minimum requirements pertaining to occupational health and safety. And, in any event, this was not OSHA's intention.

A. Consistent With The OSH Act, Which Expressly Preserves Common-Law Duties And Liabilities, The Hazard Communication Standard Has Never By Its Terms Expressly Preempted Common-Law Duties And Liabilities.

Workplace health and safety is a field traditionally occupied by the States. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992). Congress entered this field in 1970 when it enacted the Occupational Safety and Health Act with the goal of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29

U.S.C. § 651(b). But "federal entry was not uniform or comprehensive." *Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 206 (3d Cir. 2007). Even as Congress "authoriz[ed] the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce," 29 U.S.C. § 651(b)(3), it allowed States to submit their own occupational safety and health standards to the Secretary of Labor, which, if approved, would supplant federal standards, § 667(b). In addition, Congress made clear that, in areas not covered by federal standards, States remained free to enact occupational safety and health laws. § 667(a).

Congress took care to preserve state law in a third way: it included a savings clause cautioning that the OSH Act should not be understood "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." § 653(b)(4).

The OSH Act does not contain an express preemption provision. *Gade*, 505 U.S. at 104 n.2 (plurality opinion); *id.* at 116 (Souter, J., dissenting). Nevertheless, the Supreme Court in *Gade* read § 667 as evincing a congressional intent to preempt "any state regulation of an occupational safety or health issue with respect to which a federal standard has been established, unless a state plan has been

submitted and approved." *Id.* at 102 (plurality opinion); *see id.* at 114 (Kennedy, J., concurring in part and concurring in the judgment) ("Because this provision requires federal approval of state occupational safety and health standards alone, only state laws fitting within that description are preempted."). Whereas a plurality of the Court thought this intent to preempt implicit, Justice Kennedy thought it explicit. All five Justices, however, agreed that an Illinois licensing act that both protected workers and the general public was preempted because it was "a state law requirement that directly, substantially, and specifically regulate[d] occupational safety and health . . . within the meaning of the Act." *Id.* at 107 (plurality opinion); *id.* at 114 (Kennedy, J., concurring in part and concurring in the judgment). In addition, the plurality and Justice Kennedy agreed that state laws of general applicability are not preempted by the Act because, despite "hav[ing] 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.* at 107 (plurality opinion); *id.* at 114 (Kennedy, J., concurring in part and concurring in the judgment).

Before *Gade*, there existed a "solid consensus that [the OSH Act's savings clause] operates to save state tort rules from preemption." *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 53 (1st Cir. 1991) (collecting authorities); *see also York v. Union Carbide Corp.*, 586 N.E.2d 861, 865-66 (Ind. Ct. App. 1992). After *Gade*, this

consensus hardened. *Lindsey*, 480 F.3d at 209 (worker's design-defect claim against manufacturer of tractor not preempted by regulation promulgated under OSH Act setting forth requirements for rollover protective structures for such equipment); *Sakellaridis v. Polar Air Cargo, Inc.*, 104 F. Supp. 2d 160, 163-64 (E.D.N.Y. 2000). The conclusion that the OSH Act did not preempt state tort law did not, however, rest solely on an understanding of the Act's savings clause. Courts also recognized that state tort law, which is "law of general applicability that applies equally to workers and non-workers," is not a state-law requirement that directly, substantially, and specifically regulates occupational safety and health within the meaning of the Act. *See Lindsey*, 480 F.3d at 211.

A solid consensus also emerged regarding the preemptive scope of the Hazard Communication Standard, which, prior to its amendment in 2012, provided in relevant part:

> [t]his occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject.

29 C.F.R. § 1910.1200(a)(2) (2010). Courts interpreting this language read its terms, on the one hand, to preempt state-law occupational safety and health standards addressing hazard communications unless OSHA approved of the state

standard; and, on the other hand, to preserve laws of general applicability, such as state tort law. *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp. 2d 669, 693 (N.D. Ohio 2005) (welders' failure-to-warn claims neither expressly nor impliedly pre-empted by OSH Act or Hazard Communication Standard); *see also Anderson v. Airco, Inc.*, No. 03-123-SLR, 2003 WL 21842085 (D. Del. July 28, 2003) (remanding case to state court because Hazard Communication Standard did not preempt state-law tort claim for failure to warn); *Fullen v. Philips Elecs. N. Am. Corp.*, 266 F. Supp. 2d 471, 476 (N.D. W.Va. 2002) (same);[4] *Washington v. Falco S & D. Inc.*, No. 96-2066, 1996 WL 627999, at *3-*4 (E.D. La. Oct. 29, 1996) (same).[5] State tort law, as one court explained, is generally applicable law that

[4] Amicus does not agree with the *Fullen* court's statement that the Hazard Communication Standard sets both a floor and a ceiling, such that compliance with federal law immunizes chemical manufacturers from liability under state tort law. *See Fullen*, 266 F. Supp. 2d at 478. As discussed here, the Hazard Communication Standard establishes minimum standards only. Accordingly, compliance with the federal Standard is some evidence of due care, but does not preclude liability as a matter of law. *See Restatement (Third) of Torts* § 4 (1997). Even so, because OSHA does not pre-approve labeling and safety data sheets, and because an appropriate warning depends largely on an accurate analysis of scientific literature, injured plaintiffs with cognizable state-law tort claims are likely also to allege that labeling did not satisfy OSHA standards either.

[5] *In re Welding* is the strongest of the lot, not simply because of its reasoning, but also because the other cases cited here are jurisdictional decisions. In each of these jurisdictional decisions, however, the district courts discussed the merits of the preemption defense, even though it would have been sufficient to say "that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is

cannot fairly be characterized as an occupational hazard standard; thus, it is not, in § 1910.1200(a)(2)'s words, a "legal requirement of a state . . . pertaining to this subject"—occupational health and safety. *In re Welding*, 364 F. Supp. 2d at 692.

It was no accident that courts read the Hazard Communication Standard's preemption language to match the scope of preemption under the OSH Act. Preemption under the Hazard Communication Standard cannot exceed the OSH Act's terms, which expressly preserves common law rights and duties. *Id.* ("OSHA cannot pre-empt state tort law—neither expressly nor by implication—any more than the Congressional Act that enables OSHA in the first place").

B. Recent Supreme Court Preemption Rulings Do Not Suggest That The 2012 Edits Altered The Preemptive Scope Of The Hazard Communication Standard.

The American Tort Reform Association, citing a Supreme Court preemption decision in the medical device context, argues that when OSHA replaced the phrase "legal requirements" with "legislative or regulatory enactments," and deleted the phrase "through any court or agency," it narrowed the scope of preemption under the Hazard Communication Standard. But Supreme Court precedent does not support this revisionist reading of the federal Standard's prior preemption language.

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the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987).

1. *Riegel v. Medtronic* does not support the American Tort Reform Association's belief that the preemption provision of the Hazard Communication Standard in effect prior to 2012 expressly preempted common-law duties.

Riegel v. Medtronic, Inc., 552 U.S. 312 (2008), concerned "whether the pre-emption clause enacted in the Medical Device Amendments of 1976, 21 U.S.C. § 360k, bars common-law claims challenging the safety and effectiveness of a medical device given premarket approval by the Food and Drug Administration," *id.* at 315. According to the American Tort Reform Association, the Court's statement in *Riegel* that, "[a]bsent other indication," Congress's explicit "reference to a State's 'requirements' includes its common-law duties," *id.* at 324, indicates that the phrase "legal requirements" in the Hazard Communication Standard must also be understood as including common-law duties. But this argument proves too much.

Unlike in the Medical Device Amendments, Congress in the OSH Act made no explicit reference to any State's "requirements" in any express preemption provision in the Act. What Congress said evinced an intention, according to *Gade*, to preempt *only* state-law occupational standards—not laws that cannot fairly be characterized as such "because they regulate workers simply as members of the general public." 505 U.S. at 107 (plurality opinion). Common-law torts are "law[s] of general applicability that appl[y] equally to workers and non-workers" and thus are not expressly preempted by the OSH Act. *Lindsey*, 480 F.3d at 211. Buttressing

that conclusion is the OSH Act's savings clause, which explicitly references common-law duties, and which focuses not on a state's authority to regulate, but on preserving liability under the common law. *Id.* at 208 ("The savings clause prevents the Act from diminishing employees' common law rights and duties with respect to injury and death arising out of or in the course of employment.").

Indeed, the OSH Act's only reference to state judicial proceedings is in a provision explicitly authorizing States to act in the absence of a promulgated federal standard. 29 U.S.C. § 667(a) (recognizing the authority of "any State agency or court" to act in those circumstances). There is no such reference in the provision that limits state authority to regulate when a federal standard has been promulgated, absent federal approval of a state plan. *See* § 667(b).

All in all, the OSH Act reflects a "perfectly rational" congressional choice to preserve common-law liability while at the same time evincing Congress's intent to preempt certain specific state-law, occupational-safety-and-health requirements imposed by statute or regulation. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (reading the Federal Boat Safety Act of 1971, 46 U. S. C. §§ 4301-4311, to reflect a similar choice to preserve state common-law tort actions seeking damages from the manufacturer of an outboard motor, and to preempt only certain state regulations or requirements addressing safety standards for recreational vessel equipment).

For these reasons, lower federal courts have refused to interpret the Hazard Communication Standard's phrase "legal requirements of a state . . . pertaining to this subject" (occupational health and safety) to include common-law torts of general applicability that the OSH Act itself makes plain are not preempted. *In re Welding*, 364 F. Supp. 2d at 690. And rightly so: "Federal regulations have no less pre-emptive effect than federal statutes," *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), but neither can they have more preemptive effect than Congress intended, even if an agency believes its action "will best effectuate a federal policy," *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (And here, of course, the agency does not believe this.). "[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority." *Id.* It may not, however, "expand its power in the face of a congressional limitation on its jurisdiction." *Id.*

The American Tort Reform Association's interpretation of the phrase "legal requirements" in the prior Hazard Communication Standard is thus an *impermissible* reading—the agency could not have determined that common-law torts of general applicability are invariably preempted by this federal Standard's minimum requirements pertaining to occupational health and safety because Congress evinced no such intent in the Act itself. *See In re Welding*, 364 F. Supp. 2d at 692. What is more, the American Tort Reform Association's interpretation is

implausible, because it ignores the statutory context in which we find the phrase "legal requirements." A closer look at *Riegel* shows why.

Riegel concerned a Class III medical device governed by the Medical Device Amendments of 1976. This federal law expressly preempts only state requirements "different from, or in addition to, any requirement applicable . . . to the device" under federal law. 552 U.S. at 321 (quoting 21 U.S.C. § 360k(a)(1)). What federal requirements apply to these devices? Federal law "establishes a rigorous regime of premarket approval" for Class III devices that requires the Food and Drug Administration (FDA) to consider their safety and efficacy and the accuracy of labeling before any device may be sold. *Id.* at 317. All labeling proposed by device manufacturers must be approved by the FDA and cannot be altered or updated without FDA approval. *Id.* at 318-19. Given these strict federal requirements, the Court in *Riegel* concluded that it "would make little sense" to permit state tort law to interpose different or additional requirements on medical device manufacturers. *Id.* at 325.

By contrast, under the Hazard Communication Standard, the agency does not approve labeling or safety data sheets. Also, manufacturers, not the agency, bear primary responsibility for the accuracy of these materials at all times, and must exercise substantial judgment in preparing these materials. *See* 29 C.F.R. § 1910.1200, App. A.0.3, A.6.2, A.7.2.3; OSHA Corrected Br. 33-34. Equally

important, the federal Standard imposes minimum requirements; manufacturers may provide additional hazard information in labeling and safety data sheets. 77 Fed. Reg. at 17,725. The federal Standard thus does not support the American Tort Reform Association's belief that this federal law invariably bars, say, a state-law failure-to-warn claim alleging that a manufacturer that is or should be aware that its chemical poses a particular hazard has a duty to warn of such dangers. This state-law duty does not establish a specific occupational standard, and cannot be said invariably to interfere with any federal requirement established by the Hazard Communication Standard. Especially given that the OSH Act does not provide any remedies to persons injured or killed in the workplace by a chemical hazard, it would have been cavalier of OSHA to attempt to eliminate tort remedies under these circumstances. *See Bruesewitz v. Wyeth LLC*, --- U.S. ----, 131 S. Ct. 1068, 1080 (2011) (recognizing the Court's longstanding "doubt that Congress would quietly preempt product-liability claims without providing a federal substitute").

OSHA, of course, did no such thing. The preemption clause the agency drafted does not sweep indiscriminately to bar common-law duties. And, more critically, Congress never expressed such a broad preemptive purpose.

2. The American Tort Reform Association's conflict preemption arguments are not affected by OSHA's edits to the preemption provision. These arguments are also premature. Even so, no Supreme Court case law suggests that common-law duties will invariably conflict with the Hazard Communication Standard.

The American Tort Reform Association also argues that OSHA's edits to preemption language in the Hazard Communication Standard are ultra vires because somehow they foreclose any possibility of conflict preemption. *See* 29 C.F.R. § 1910.1200(a)(2) (2012). But because "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000), neither can the existence of conflict depend on OSHA's express recognition of the possibility in a preemption clause. OSHA's edits to preemption language are thus not material to this conflict analysis.[6]

OSHA's update to the manner in which chemical hazards are evaluated, as well as how hazard information is conveyed on labeling and safety data sheets—changes that the American Tort Reform Association does not challenge here—will be relevant to conflict analysis. But the Court should decline the American Tort

[6] There are two variants of conflict preemption. A conflict may exist when compliance with both state and federal law is "impossible," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Reform Association's invitation to engage in this analysis in the abstract. Conflict preemption requires consideration of federal and state law as it is "interpreted and applied" in a specific case. *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). Here, of course, there is no specific state law to be interpreted and applied. Particularly in view of the presumption against preemption, which dictates that the federal-state balance should "not be disturbed . . . unnecessarily by the courts," *id.* at 525, the Court should decline to speculate about the possibility of conflict preemption in some future situation.

In any event, OSHA's opinion on conflict preemption is in no sense improper. Even the American Tort Reform Association is forced to concede this point. It recognizes: "As the agency promulgating and implementing federal workplace health and safety regulations, OSHA may offer its perspective on its intentions for its standards to preempt or not preempt state law obligations generally." Pet'r's Br. 40. And lest the Court miss its concession, the American Tort Reform Association repeats it: "[A]bsent specific Congressional authority otherwise, agencies can offer only their opinions as to what they think the preemptive effect of its regulations should be." *Id.* at 40. This is precisely what OSHA has done—offered its opinion on the possibility of 'implied' conflict preemption under the Hazard Communication Standard.

OSHA's opinion, moreover, is far more nuanced than the no-conflict-preemption-ever opinion the American Tort Reform Association ascribes to the agency. OSHA has explained, "in general the [Standard] does not preempt state tort failure to warn lawsuits, and OSHA does not intend to change that position in the final rule." 77 Fed. Reg. at 17,694. At the same time, OSHA recognizes "a limited preemption might be possible to the extent a state tort rule directly conflicted with the requirements of the standard." *Id.* The American Tort Reform Association's assertion (Pet'r's Br. 39) that OSHA's articulated position is not truthful borders on an accusation of bad faith. This Court, however, must presume that an agency acts in good faith. *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008). In this case, there is no reason to conclude otherwise, as OSHA's views on preemption have been consistent over time. *See* OSHA Corrected Br. 54-55.

Finally, OSHA's views on preemption correctly describe the law. The American Tort Reform Association's contrary belief—that the Hazard Communication Standard, as updated in 2012, will invariably conflict with state tort law, such as a state-law claim for failure to warn, because the Standard now establishes more precise labeling requirements—is wrong.

Consider, first, the "demanding defense" of impossibility preemption. *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). To establish this defense, a defendant must

prove that "compliance with both federal and state [law] is a physical impossibility." *Florida Lime & Avocado Growers*, 373 U.S. at 142-43. Such 'impossibility' can only exist when two statutes impose "directly conflicting duties"—"as they would, for example, if the federal law said, 'you must sell insurance,' while the state law said, 'you may not.'" *Barnett Bank of Marion Cnty., NA v. Nelson*, 517 U.S. 25, 31 (1996). But "physical impossibility" does not exist where state law forbids conduct that is merely permitted, but not required, by federal law. *See Michigan Canners & Freezers Ass'n, Inc. v. Agric. Mkgt. & Bargaining Bd.*, 467 U.S. 461, 478 n.21 (1984).

A chemical manufacturer arguing that it is impossible for it to comply with a state-law duty to modify labeling or safety data sheets without violating federal law is unlikely to succeed, because (as discussed) under the updated federal Standard, manufacturers remain responsible for the content of their labeling and safety data sheets at all times; they retain considerable discretion in preparing labeling and safety data sheets, *supra* at p. 6; and they may provide additional hazard information on labeling if "it provides further detail and does not contradict or cast doubt on the validity of the standardized hazard information." 29 C.F.R. § 1910.1200, App. C.3.1. Of course, if all a plaintiff alleged was that labeling was inadequate under state law because it did not use the words "Danger" and "Warning" together, or because a pictogram did not use a black border but should

have, then the case for impossibility improves, as the federal Standard specifically says not to use the words "Danger" and "Warning" together, and it says that only the color red may be used for pictogram borders. *See* 29 C.F.R. § 1910.1200, App. C, §§ C.2.1, C.2.3.1. But these are contrived examples. More realistically, failure-to-warn suits will train on the adequacy of the hazard information conveyed, which under federal law is ultimately the manufacturer's responsibility. In the final analysis, the imposition of state tort liability on this basis would not require anything that federal law forbids, or vice-versa—the only circumstances in which compliance with state and federal law is physically impossible. *See Barnett Bank*, 517 U.S. at 31; *Michigan Canners*, 467 U.S. at 478 n.21.

PLIVA v. Mensing, --- U.S. ----, 131 S. Ct. 2567 (2011), which considered whether federal law preempted state tort-law claims based on generic drug manufacturers' alleged failure to provide adequate warning labels, supports this conclusion. The federal regulations at issue there required generic drug manufacturers to copy verbatim agency-approved labeling used for the bio-equivalent brand-name drug. *Id.* at 2574. In addition, the regulations did not allow generic drug manufacturers to "unilaterally" strengthen these warnings, *id.* at 2575, unlike the requirements applicable to manufacturers here. The federal requirements at issue in *Mensing* therefore preempted state-law claims for failure to warn

because it was "impossible" for generic drug manufacturers to comply with any state-law duty to provide additional or different warnings. *Id.* at 2581.

The Court in *Mensing* further stated that the reason the Court did not find an "impossibility" conflict in *Wyeth v. Levine*, 555 U.S. 555 (2009), a similar case involving a failure-to-warn suit against a brand-name drug manufacturer, was because the regulations authorized brand-name manufacturers to update their labels without first seeking FDA permission to do so, *Mensing*, 131 S. Ct. at 2581. This case law suggests it is not physically impossible for a chemical manufacturer to comply with the federal Hazard Communication Standard, which requires chemical manufacturers to update labeling, 29 C.F.R. § 1910.1200(f)(11), and also any state-law duty to provide adequate warnings.

Consider, next, whether recognition of tort liability, such as for failure to warn, creates an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. "Absent strong indications from the agency that it needs manufacturers to have options in order to achieve a 'significant. . . regulatory objective,' [ ] state tort suits are not 'obstacle[s] to the accomplishment . . . of the full purposes and objectives' of federal law." *Williamson v. Mazda Motor of Am., Inc.*, --- U.S. ----, 131 S. Ct. 1131, 1140 (2011) (Sotomayor, J., concurring) (quoting, alternately, *Williamson*, 131 S. Ct. at 1136 (majority opinion), and *Hines*, 312 U.S. at 67) (alternations in

original). The agency has not made that case here. Instead, it has indicated that the federal Standard's requirements remain "the minimum information to be provided by manufacturers and importers." 77 Fed. Reg. at 17,725; *see* OSHA Corrected Br. 11-12. The agency's view on this point is entitled to deference, because it is not "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted).[7]

The American Tort Reform Association's contrary views notwithstanding, state tort law does not impede Congress's purposes and objectives; it advances them. For one thing, state tort law performs an important remedial function, and the OSH Act's savings clause evinces Congress's intention to preserve this traditional state-law role, and to save "some significant number of common law liability cases." *See Sprietsma*, 537 U.S. at 63 (quoting *Geier v. Am. Honda Motor Corp.*, 529 U.S. 861, 868 (2000)). For another thing, state tort law provides an important incentive for manufacturers to conduct a thorough hazardous material

[7] Courts do not defer to an agency's ultimate conclusion that state law is preempted, but they may give "'some weight' to an agency's views about the impact of tort law on federal objectives when 'the subject matter is technica[l] and the relevant history and background are complex and extensive.'" *Levine*, 555 U.S. at 576 (quoting *Geier*, 529 U.S. at 883)) (alteration supplied by *Levine*). The parties disagree about whether OSHA's views about the impact of tort law on federal law's objectives are entitled to some weight. This disagreement is only relevant to obstacle preemption, which in this case is a purely hypothetical question the Court cannot definitively decide. Therefore, there is no reason for the Court to resolve this deference question either.

review consistent with federal law, and to update labeling and safety data sheets promptly when new risks emerge.[8] *See Levine*, 555 U.S. at 579 ("State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly.").

CONCLUSION

For the foregoing reasons, Amicus Curiae the American Association for Justice urges this Court to dismiss the American Tort Reform Association's petition.

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Respectfully submitted,

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[8] Although OSHA may issue citations or impose civil penalties for non-compliance with federal standards, 29 U.S.C. §§ 658, 666, it does not have the resources to review all hazard labeling and safety data sheets; nor does federal law require that it do so. Manufacturers, by contrast, have superior access to information about their chemicals, and are primarily responsible for the hazard information conveyed in labeling and safety data sheets.

CERTIFICATE OF COMPLIANCE

This brief was composed in Microsoft Word 2007 using Times New Roman 14-point typeface, and complies with the type-volume limitation prescribed in Circuit Rule 32(a)(2)(B) because it contains 6,695 words, excluding the sections referenced in Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May, 2013, a true and correct copy of the foregoing Brief of the American Association for Justice as Amicus Curiae in Support of Respondents and Dismissal was served via CM/ECF to all counsel of record.

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