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,

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 Respondent.

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

FINAL BRIEF OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

The parties in this case are Petitioner, American Tort Reform Association (ATRA), and Respondents, Occupational Safety and Health Administration (OSHA) and the Department of Labor.

Intervenors for Respondent include 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.

The Chamber of Commerce of the United States of America, National Association of Manufacturers, American Petroleum Institute, and American Chemistry Council have filed a brief as *amici curiae* in support of ATRA. The American Association of Justice has filed a brief as *amicus curiae* in support of OSHA and the Department of Labor.

B. Rulings Under Review

The ruling under review is a final rule titled "Hazard Communication" (Docket No. OSHA-H022K-2006-0062), published in the *Federal Register* by OSHA on March 26, 2012, at 77 Fed. Reg. 17574 ("Final Rule"). (JA 296.) The Final Rule amends certain provisions of OSHA's Hazard Communication

Standard, 29 C.F.R. § 1900.1200 ("Hazard Communication Standard" or "HCS"). ATRA seeks review of OSHA's revision of 29 C.F.R. § 1910.1200(a)(2) regarding preemption of state law ("Preemption Clause").

C. Related Cases

The case on review was not previously before this Court or any other court.

Several other entities have petitioned this Court for review of the Final Rule, but have raised issues in addition to those raised by ATRA. These cases are *American Petroleum Inst. v. Sec'y of Labor*, No. 12-1227 ("*API*"), and *Nat'l Oilseed Processors Ass'n v. OSHA*, No. 12-1228 ("*NOPA*").

In *API*, the petitioner stated that it may raise issues related to certain provisions of the Hazard Communication Standard related to "complex mixtures" and "combustible dust." *See* API's Non-Binding Statement of Issues to be Raised (Docket No. 12-1227, July 5, 2012, #1382212).

In *NOPA*, the petitioners have stated that they may raise issues related to the combustible dust provisions and other provisions of the Hazard Communication Standard, including the preemption provision that ATRA challenges. *See* Non-Binding Statement of Issues to be Raised (Docket No. 12-1228, Sept. 10, 2012, #1393419).

On June 19, 2012, this Court consolidated ATRA's Petition in this case with *API* and *NOPA* (#1379623). On November 2, 2012, the Court severed ATRA's case from *API* and *NOPA* (#1402979).

D. Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rule of Appellate Procedure and Circuit Rule 26.1, ATRA states that it is a coalition of more than 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote a fair, balanced, and predictable civil justice system. ATRA has no parent corporation, and no publicly held corporation owns 10% or more of stock in ATRA.

/s/ Thomas J. Grever
Attorney for Petitioner

Dated: June 27, 2013

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GLOSSARY

APA	Administrative Procedure Act
ATRA	American Tort Reform Association
ANPR	Advanced Notice of Proposed Rulemaking
GHS	United Nations' Globally Harmonized System of Classification and Labeling of Chemicals
HCS	Hazard Communication Standard, and the revisions thereto in the final rule titled "Hazard Communication," 77 Fed. Reg. 17,574 (Mar. 26, 2012)
JA	Deferred Joint Appendix
NPRM	Notice of Proposed Rulemaking
OSHA	Occupational Safety and Health Administration
OSH Act	Occupational Safety and Health Act of 1970
SDS	Safety Data Sheets

JURISDICTIONAL STATEMENT

This Petition seeks review of a final rule of the Occupational Safety and Health Administration ("OSHA"), "Hazard Communication" (Docket No. OSHA-H022K-2006-0062), published in the *Federal Register* on March 26, 2012. 77 Fed. Reg. 17,574 ("Final Rule"). (JA000296.) OSHA promulgated the Final Rule to modify the Hazard Communication Standard ("HCS") pursuant to its authority under Section 6(b)(7) of the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 655(b)(7). *See id*. at 17,575. (JA 298.) The effective date of the Final Rule was May 25, 2012. *Id*. at 17,574. (JA 297.) ATRA filed a timely petition for review on May 24, 2012. (#1375989) This Court has jurisdiction under 29 U.S.C. § 655(f) to review the issuance or modification of an OSHA standard.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether OSHA violated the OSH Act and Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b), by failing to provide notice and an opportunity to comment to interested persons for revisions to the Preemption Clause that attempt to limit preemption by the HCS to only "legislative and regulatory enactment[s] of a state," and not to obligations under state common law.

2. Whether OSHA's amendments to the Preemption Clause were beyond the scope of OSHA's authority under the OSH Act and otherwise not in accordance with law.

PERTINENT STATUTES AND REGULATIONS

The text of relevant statutes and regulations is set forth in the separately-bound Addendum to this brief.

STATEMENT OF FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

1. The Hazard Communication Standard

The OSH Act requires employers to provide their employees with a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm" and to "comply with occupational safety and health standards" promulgated in accordance with the OSH Act. 29 U.S.C. § 654(a). Congress authorized the Secretary of Labor to promulgate federal occupational safety and health standards that require the "use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure." 29 U.S.C. § 655(b)(7). In 1983, OSHA, as delegated by the Secretary of Labor, promulgated the Hazard Communication Standard. 48 Fed. Reg. 53,280 (Nov. 25, 1983) (codified at 29 C.F.R. § 1910.1200). OSHA

promulgated the HCS "to ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated, and that information concerning their hazards is transmitted to affected employers and employees within the manufacturing sector." *Id*. at 53,340.

The HCS requires chemical manufacturers to communicate in specified fashion the potential hazards of their products sold to employers and used by employees in the workplace. 77 Fed. Reg. at 17,574 (JA 297) ("The HCS requires that chemical manufacturers and importers evaluate the chemicals they produce or import and provide hazard information to downstream employers and employees by putting labels on containers and preparing safety data sheets."). Chemical manufacturers must provide the required hazard information on labels and in a "Safety Data Sheet" ("SDS"). 29 C.F.R. § 1910.1200(g). Employers are required to ensure that the information from the chemical manufacturers is readily viewable and accessible in the workplace, and are required to train their employees regarding the health risks of workplace chemicals and measures to protect themselves from such risks. *See* 29 C.F.R. § 1910.1200(b), (h).

When OSHA promulgated the HCS in 1983, it declared that the purpose of creating such a national standard for hazard communication in the workplace is "to reduce the regulatory burden posed by multiple state laws" on this subject. 48 Fed. Reg. at 53,284. To implement that goal, OSHA included the Preemption Clause,

setting forth OSHA's views of the preemptive effect of the HCS on state laws. *Id*. From 1994 until March 26, 2012, the Preemption Clause stated that the HCS would preempt "any legal requirements of a state… pertaining to this subject," without regard to whether the source of such requirement is statutory, regulatory or common law:

> This occupational safety and health standard is intended to address *comprehensively* the issue of classifying the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt *any legal requirements of a state*, or political subdivision of a state, pertaining to this subject. . . . Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, *through any court* or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan.

59 Fed. Reg. 6126, 6170 (Feb. 9, 1994) (emphasis added).

2. OSHA's 2012 Revisions to the Preemption Clause

On September 12, 2006, OSHA published an Advanced Notice of Proposed Rulemaking ("ANPR") to amend the HCS to implement the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals ("GHS"). *See* 71 Fed. Reg. 53,617 (Sept. 12, 2006). (JA 1.) OSHA stated that modifying the HCS to implement the GHS would benefit employers and employees "through receipt of better, more standardized, and consistent information about chemicals in their workplaces." *Id*. at 53,620. (JA 4.) The

ANPR solicited comments on numerous questions relating to the scope of this potential rulemaking, but not the Preemption Clause. *See id.* at 53,625-26. (JA 9-10.) OSHA did not propose to alter the Preemption Clause in the ANPR. (*See id.*)

In response to the ANPR, a small number of commenters offered comments on the Preemption Clause while addressing "other technical concerns." 77 Fed. Reg. at 17,694. (JA000417.) These commenters noted generally that individual state labeling requirements would undermine the goal of global harmonization.[1] Only one commenter specifically raised the issue of preemption of labeling requirements imposed through common law, and stated that preemption of state common law obligations is necessary to effectively implement the international standards under the GHS.[2]

On September 30, 2009, OSHA published its proposed amendments to the HCS. Notice of Proposed Rulemaking, 74 Fed. Reg. 50,280 (Sept. 30, 2009)

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[1] The preamble to the Final Rule describes several comments as raising preemption issues. *See* 77 Fed. Reg. at 17,694 (JA 417) (citing record documents identified by OSHA as "Document ID" ("Doc. ID") #0036, 0048, 0056, 0080, 0123, 0135, 0178, and 0015, 0038, 0042, and 0072 (JA 621-94)). These comments, however, largely focused on the impact of the GHS on state statutes and regulations, not tort law. *See id.*

[2] *See* Comment of Alcoa Inc. at 2 (Nov. 8, 2006) (Doc. ID #0042) (JA 629.) ("Companies that fully comply with the requirements of the GHS should be protected from 'failure-to-warn' lawsuits. If the GHS is a comprehensive standard, then such lawsuits would be groundless. If the GHS is not and additional warnings are required, then there is limited value to the GHS.").

("NPRM"). (JA 13.) In the NPRM, OSHA continued to emphasize the benefits of standardization of labeling in communicating hazard information, but identified 30 specific issues on which it sought comment. *See id.* at 50,281-84. (JA 14-17.) As in the ANPR, OSHA did not suggest in the NPRM that OSHA was considering any change to the scope or application of the Preemption Clause, 29 C.F.R. § 1910.1200(a)(2). *See id*. at 50,381, 50,385-86, 50,439.[3] (JA000114, 000118-000119, 000172.) In the preamble to the proposed rule, OSHA emphasized the need for the HCS to preempt state law:

> There is a national, indeed international, marketplace for industrial chemicals, and thus chemical manufacturers and importers affect commerce within the meaning of the OSH Act and therefore fall under OSHA's jurisdiction. If a State or a political subdivision of a State, were to establish different requirements for labels and safety data sheets, such requirements would have an impact on chemical manufacturers and importers that are not located in that State. This is a burden that the HCS eliminates by establishing national requirements.

Id. at 50,386. (JA 119.) Similarly, in discussing the impact of the NPRM on federalism as required by Exec. Order 13132, 64 Fed. Reg. 43,255 (Aug. 10, 1999), OSHA recognized that the OSH Act "expresses Congress' clear intent to preempt State laws with respect to issues for which OSHA has promulgated an occupational safety and health standard under section 6 of the Act." *Id*. at 50,381

[3] The only modifications OSHA proposed to 29 C.F.R. § 1910.1200(a)(2) were to change certain terminology to conform to terms used in the GHS, e.g., changing "material safety data sheet" to "safety data sheet." *Id*. at 50,386. (JA 119.)

(citing *Gade v. Nat'l Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992)). (JA 114.)

OSHA did not report that any entity submitted a comment that OSHA narrow the scope of preemption under the HCS. *See* 77 Fed. Reg. at 17,694. (JA 417). Apparently, no comments asked OSHA to determine that requirements from state common law be treated differently than requirements from state statutes or regulations for preemption purposes.[4]

In March 2010, OSHA held three public hearings to take testimony from interested parties on the HCS revisions proposed in the NPRM. *See* 77 Fed Reg. at 17,578 (JA 301); *see also* 74 Fed. Reg. 68,756 (Dec. 29, 2009) (JA 288) (providing notice of informal public hearings); 75 Fed. Reg. 12,718 (Mar. 17, 2010) (JA 292) (rescheduling final hearing). In the opening statement inviting interested parties to supplement or enhance their written comments with oral testimony, OSHA staff emphasized its intent to "maintain those aspects of the HCS that are not directly impacted by the GHS." *See* Opening Statement: Hearing on Proposed Revisions to the Hazard Communication Standard, Dorothy Dougherty, Director, Directorate of Standards and Guidance, Mar. 2, 2010, at 6 (#0479) (JA 789.) Ms. Dougherty

[4] In their comments filed on December 28, 2009, Dow Chemical Company requested that OSHA amend the Preemption Clause to add the phrase "including personal injury lawsuits," due to the "severely limited" ability of manufacturers to supplement OSHA's required hazard warnings and precautionary statements under the proposed rule. (Doc. ID #0353) (JA 706.) The Industrial Minerals Association – North America submitted a similar comment. (Doc. ID #0394) (JA 764.)

recognized that "[t]his approach was supported by many commenters." *Id.* The transcripts reflect no discussion of preemption of state legal requirements under common law during any of these hearings.[5]

OSHA gave hearing participants an opportunity to provide additional information during a post-hearing comment period. OSHA did not seek comment on the Preemption Clause. *See* 77 Fed Reg. at 17,578. (JA 301.) The record does not show that any participant commented on the Preemption Clause during this post-hearing comment period.

On March 26, 2012, OSHA published the Final Rule. 77 Fed. Reg. 17,574 (Mar. 26, 2012). (JA 296.) In the Final Rule, OSHA substantively altered the scope of the Preemption Clause by eliminating state legal requirements under common law tort claims from a Preemption Clause:

> This occupational safety and health standard is intended to address comprehensively the issue of classifying the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any ~~legal requirements~~ legislative or regulatory enactments of

[5] The only general mention of preemption in approximately 800 pages of hearing transcripts occurred in testimony of Angus Crane, on behalf of the North American Insulation Manufacturers Association, on March 4, 2010. Mr. Crane stated that the association's members would be unable to "deal with conflicting rules and regulations and all these different jurisdictions," and that federal agencies should preempt such state regulations to prevent "California and others from creating conflicts that will diminish the benefits of a globally harmonized system." (JA 806.)

> a state, or political subdivision of a state, pertaining to this subject. . . . Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce~~,~~ ~~through any court or agency,~~ any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan.

77 Fed. Reg. at 17,786 (emphasis and strikethrough added). (JA 509.) OSHA continued to emphasize in the preamble to the Final Rule its intent to standardize hazard communication requirements and provide employees with consistent information on labels and SDSs. *See id*. at 17,605. (JA 328.)

There is no reference in the public record to any OSHA consideration of the scope of preemption, or impact of the HCS on state tort law during the five-and-a-half year period between publication of the ANPR on September 26, 2006 and the Final Rule on March 26, 2012. However, in the preamble to the Final Rule, OSHA referenced a legal interpretation of the Preemption Clause issued by the Solicitor of Labor ("Solicitor") in a letter dated October 18, 2011. Letter from M. Patricia Smith, Solicitor of Labor to Steven H. Wodka, Esq. (Oct. 18, 2011), *available at*: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=27746&p_table=INTERPRETATIONS (last visited on February 25, 2013) ("Solicitor Opinion"). The letter reflects OSHA's position that "the HCS 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. (JA 417.) The Solicitor issued this letter in response to a request from an attorney, Steven H. Wodka. *Id*.

Mr. Wodka had asked OSHA to state that 29 C.F.R. §1910.1200(a)(2) "was intended to preempt conflicting state regulatory actions, but not tort claims." *Id.* Mr. Wodka sought the opinion after the Superior Court of New Jersey granted partial summary judgment against his client, a plaintiff in a failure-to-warn lawsuit against certain chemical manufacturers, on the basis that the OSH Act and HCS preempted certain state common law claims, including failure-to-warn claims. *See* Bivins Decl. at ¶¶ 10, 11 (discussing *Nicastro v. Aceto Corp.*, No. L-3062-08 (N.J. Super. Ct., Law Div., Monmouth County). (Addendum A-10.)

The *Nicastro* court based its summary judgment ruling on *Bass v. Air Prods. & Chem., Inc.*, No. A-4542-03T, 2006 WL 1419375, at *4-7 (N.J. App. Div. May 26, 2006). *See* Tr. of Motion, Dec. 2, 2011, at 56. (Addendum A-10, Bivens Decl. at ¶ 11, Exh. E.) *Bass* found that federal law preempts any state legal requirement, including state failure-to-warn claims, regarding communication of chemical hazards, when the warnings are mandated by and comply with the HCS. *See id.*

The Solicitor Opinion asserted that the HCS does not bar state common law claims.[6] Solicitor Opinion, *supra*. Even after issuance of the Solicitor Opinion

[6] Dr. David Michaels, the Assistant Secretary of Labor for Occupational Safety and Health since December 2009, was retained as an expert witness by Mr. Wodka in the *Nicastro* litigation prior to his appointment to lead OSHA. *See, e.g.*, Deposition of David Michaels at 16-17, *Nicastro v. Aceto Corp.*, No. L-3062-08 (N.J. Super. Ct., Law Div., Monmouth County, Sept. 2, 2009). (Addendum A-11.) Dr. Michaels' involvement in the case continued throughout the litigation. *See, e.g.*, Tr. of Motion at 68-93, *Nicastro v. Aceto Corp.*, No. L-3062-08 (N.J.

letter, the New Jersey Superior Court denied the plaintiff's motion for reconsideration, rejecting OSHA's position as not deserving of deference and contrary to law. *See* Tr. of Motion, Dec. 2, 2011, at 61. (Addendum A-10, Bivins Decl. at ¶ 11, Exh. E.) After OSHA published the Final Rule, the *Nicastro* court deferred to the Final Rule and reinstated the plaintiff's failure-to-warn claims. Tr. of Motion, May 15, 2012, at 50. (Addendum A-10, Bivins Decl. at ¶ 11, Exh. F.) In vacating its prior summary judgment decision, the *Nicastro* court found that the question of whether OSHA overstepped its bounds in limiting preemption under the HCS to legislative and regulatory enactments, or properly followed the administrative procedure necessary to effectuate the Final Rule, were issues better left to the U.S. Court of Appeals. *Id*. at 50-51. Mr. Wodka's request and the Solicitor Opinion were not issued until after conclusion of the public comment period, and these documents are not included in the administrative record. *See* Hazard Communication Docket Folder Summary, *at* http://www.regulations.gov/#!docketDetail;D=OSHA-H022K-2006-0062 (last visited Feb. 25, 2013).

Super. Ct., Law Div., Monmouth County, Jan. 27, 2012) (decision on motion to exclude testimony of Dr. Michaels). (Addendum A-12.)

SUMMARY OF THE ARGUMENT

1. OSHA Violated the OSH Act and Administrative Procedure Act

OSHA violated the OSH Act and APA by substantively amending the HCS Preemption Clause without any prior notice or opportunity for comment by affected entities.

OSHA's revision of the Preemption Clause allows state common law to impose additional and potentially conflicting labeling obligations on manufacturers of chemicals used in the workplace. By making this change without notice, OSHA deprived regulated entities of any opportunity to comment on a new rule that attempts to define their rights and obligations in cases where the labeling of their products is challenged in court as inadequate, even if they follow the HCS's comprehensive, standardized requirements for communicating hazard information.

The Preemption Clause, before OSHA illegally revised it, provided that the HCS preempts all state and local "legal requirements" in the area of hazard communications. When Congress or an agency seeks to preempt state legal "requirements," the term requirements necessarily includes obligations imposed through common law as well as legislative and regulatory enactments. *See Riegel v. Medtronic, Inc*., 552 U.S. 312, 323-25 (2008); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005); *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 522 (1992). Therefore, before the Final Rule, the Preemption Clause was not limited to

the preemption of only legislative and regulatory enactments that address the same subjects as the HCS.

OSHA's stated goal in revising the HCS was to provide greater national and international standardization of labeling of chemical products and safety data sheets. *See* 77 Fed. Reg. at 17,605. (JA 328.) In the more than five years that OSHA developed the revised HCS, OSHA never indicated that it was considering limiting the preemptive scope of the HCS. To the contrary, OSHA repeatedly stated that it intended to adopt a standardized system for consistent, harmonized communication of chemical hazards, *see, e.g.*, 77 Fed. Reg. at 17,578 (JA 301), an approach that is directly contrary to state-by-state, case-by-case labeling standards imposed through tort law judgments.

OSHA's newly-revised Preemption Clause attempts to limit the preemptive effect of the HCS to only state and local legislative and regulatory enactments, thereby disclaiming preemption of common law claims. *See* 77 Fed. Reg. at 17,694. (JA 417.) No party could have reasonably anticipated such a change, a fact that is borne out by the administrative record. This substantively alters the preemptive scope of the HCS and will allow for unpredictable, jurisdiction-by-jurisdiction variations in hazard communication obligations.

The comments by the handful of parties that raised the subject of preemption noted that the goal of Global Harmonized System would be compromised by

inconsistent state legal requirements, but not a single commenter suggested that allowing more lawsuits to impose additional or different labeling obligations than those required by federal regulations would advance the purpose of the HCS. Thus, no comment opened the door for OSHA to address "confusion" regarding the scope of preemption, *id*., as there was no such "confusion" indicated in the administrative record. An agency "cannot bootstrap notice from a comment." *Fertilizer Inst. v. EPA*, 935 F.3d 1303, 1312 (D.C. Cir. 1991).

Interested parties had no reason to believe OSHA was considering limiting the scope of preemption under the HCS. It appears that OSHA's eleventh-hour alteration of the Preemption Clause was spurred by an interpretive opinion sought by a lawyer litigating a state failure-to-warn claim, after the comment period expired, and which was not included in the administrative record. The change to the Preemption Clause was not a logical outgrowth of OSHA's notice and is directly contrary to OSHA's stated goal of increasing standardization of labeling. The Court should vacate OSHA's amendment to the preemption language in the Preemption Clause due to OSHA's violation of the notice requirements of the OSH Act and the APA. *See* 5 U.S.C. § 706.

2. OSHA's Attempt to Exempt Common Law Obligations From Preemption Conflicts With the OSH Act and Is *Ultra Vires.*

OSHA's circumvention of the notice requirements of the OSH Act and APA by itself warrants vacature of the revised Preemption Clause. But even if OSHA

had properly followed the OSH Act and APA, its attempt to rewrite the Preemption Clause should be vaated because OSHA does not have the authority to limit unilaterally the circumstances by which its standards preempt state law. Specifically, the OSH Act does not empower OSHA to limit the scope of preemption established by Congress by dictating that certain state requirements (legislative and regulatory enactments) are preempted, but that other requirements (common law obligations) are not preempted. *See Wyeth v. Levine*, 555 U.S. 555, 577 (2009) ("agencies have no special authority to pronounce on pre-emption absent delegation by Congress").

The Final Rule's revised HCS labeling and hazard communication requirements reflect a judgment by an expert agency, after years of review, that conveying hazard information in a standardized manner better educates employers and their employees of the risks of harm from chemicals than labels that vary from jurisdiction to jurisdiction. *See* 77 Fed. Reg. at 17,579 (JA 302) ("OSHA believes that adopting the GHS will result in a clearer, more effective methodology for conveying information on hazardous chemicals to employers and employees."). But the same agency's attempt to limit the Preemption Clause undermines this goal because it purports to allow state common law obligations that may impose additional or different hazard communication requirements than those mandated by the HCS.

In allowing for common law obligations to impose different or additional requirements to the HCS, OSHA violates Congress' intent that standards such as the HCS are nationally-controlling law that preempt state law obligations. *See Gade v. Nat'l Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Section 18 of the OSH Act, requires preemption of any "State law" addressing a safety or health issue for which a federal health or safety standard is in effect, absent an OSHA-approved state plan. 29 U.S.C. § 667. This includes preemption of obligations imposed through common law, because common law obligations can conflict with and disrupt federal regulation in the same manner as state statutes or regulations. *See Riegel*, 552 U.S. at 323-25; *Bates*, 544 U.S. at 443; *Cipollone*, 505 U.S. at 516. At the very least, common law claims must be preempted when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gonzalez v. Ideal Tile Importing Co.*, 877 A.2d 1247, 1250 (N.J. 2005) (quoting *Gade*, 505 U.S. at 98).

Obligations imposed through tort law, such as failure-to-warn claims, can force manufacturers of products used in the workplace, who otherwise comply with the HCS, to undertake labeling or communication measures different than, or in conflict with, the HCS. These claims, which effectively impose state standards, should be preempted. *See Bass v. Air Prods. & Chem., Inc.*, 2006 WL 1419375 at

*4-7 (finding that the HCS Preemption Clause expressed a clear intent to preempt any state legal requirements, including failure-to-warn claims, that address the content of warnings of potential chemical hazards in the workplace). OSHA's attempt to foreclose preemption in such instances has no basis in the OSH Act.

To justify its revision to the Preemption Clause, OSHA misconstrued the OSH Act's "savings clause," Section 4(b)(4) of the OSH Act. 29 U.S.C. § 653(b)(4). The savings clause does not support OSHA's interpretation that common law obligations can be separated out as not being preempted. The savings clause does not distinguish between state statutes and common law as OSHA has, but saves rights under both equally. Moreover, the savings clause can be read only to save those rights that do not undermine Congress' intent to preempt "State law," as provided in Section 18 of the OSH Act, on any issue for which there is a federal health or safety standard issued under the OSH Act. The savings clause preserves only the rights of an employee to seek compensation for workplace injuries from his or her employer through workers' compensation and related claims. *See* 29 U.S.C. § 653(b)(4). OSHA's application of the savings clause attempts to override Congress' intent. OSHA should not be allowed to misread the savings clause to nullify Section 18 of the OSH Act.

Accordingly, OSHA's revision to the Preemption Clause is *ultra vires* and conflicts with the OSH Act. ATRA respectfully requests that the Court vacate

OSHA's revisions to the Preemption Clause that exclude state common law obligations from the scope of preemption by the HCS.

STANDING

ATRA is a coalition of more than 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote a fair, balanced, and predictable civil justice system. Its membership includes firms that manufacture chemicals widely distributed in manufacturing workplaces. These members have faced state tort claims alleging failure to provide adequate warnings, which directly implicate the scope of preemption of state tort law claims under the HCS. These members will face additional state labeling requirements, more lawsuits, higher defense costs, and increased liability exposure as a result of OSHA's revision of the HCS Preemption Clause. Thus, ATRA has standing to bring this action.

Standing to challenge an agency action exists where a petitioner can demonstrate "injury in fact" that is fairly traceable to the challenged action and is likely to be redressed by judicial relief. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). An association has standing to sue on its members' behalf if it can show that (1) "a member would have standing to sue in [its] own right," (2) "the interests the association seeks to protect are germane to its purpose," and (3) "neither the claim asserted not the relief requested requires that

an individual member of the association participate in the lawsuit." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

ATRA meets these requirements. Its membership includes several firms that manufacture chemicals that will be directly and adversely impacted by OSHA's alteration of the Preemption Clause. Joyce Decl. at ¶¶ 3-6. (Addendum at A-9.) This assertion of injury is based on the actual litigation experience of its members. *See, e.g.*, Bivins Decl. at ¶¶ 10-12. (Addendum A-10.)

For example, ATRA member E.I. du Pont de Nemours and Company ("DuPont") was among the chemical manufacturers named as defendants in *Nicastro v. Aceto Corp*., No. L-3062-08 (N.J. Super. Ct., Law Div., Monmouth County). In *Nicastro*, the New Jersey Superior Court initially granted partial summary judgment to DuPont on the basis that the OSH Act and HCS preempted state failure-to-warn claims. Bivins Decl. ¶ 10 (Addendum A-10, Exh. C, D.) After these rulings, the plaintiff's lawyer obtained the Solicitor Opinion. *Id*. ¶ 11 (Addendum A-10); Solicitor Opinion, *supra*. OSHA then promulgated the Final Rule. After publication of the Final Rule, the *Nicastro* court reconsidered its rulings. *Id*. ¶ 11 (citing Tr. of Motion Hearing, May 15, 2012, at 50). (Addendum A-10, Exh. F.) Therefore, not only is there "substantial probability" that OSHA's revision of the Preemption Clause "will harm the concrete and particularized interests of at least one of" ATRA's members, but the revision has *already* harmed

an ATRA member. *Am. Library Ass'n v. FCC*, 406 F.3d 689, 696 (D.C. Cir. 2005) (citations omitted).

Other members of ATRA have faced, or will likely face, state common law claims similar to those faced by DuPont in *Nicastro*. For instance, several ATRA members were defendants in a New Jersey Appellate Division case relied upon by the trial judge in *Nicastro* to find that the HCS preempts obligations imposed through state common law. Joyce Decl. ¶ 4 (citing *Bass v. Air Prods. & Chem., Inc.*, 2006 WL 1419375 at *4-7). (Addendum A-9.)

As this Court has recognized, a party has standing to challenge an agency's alteration of a litigation defense if that party has experience with that defense in previous lawsuits and is, therefore, likely to encounter it again. *See Biggerstaff v. FCC*, 511 F.3d 178, 183 (D.C. Cir. 2007). In *Biggerstaff*, this Court found that an individual had standing to challenge the Federal Communications Commission's (FCC) inclusion of an "Existing Business Relationship" (EBR) defense in a rule implementing the Junk Fax Prevention Act. The petitioner provided in sworn declarations that he had confronted the EBR defense in previous lawsuits and is therefore likely to encounter it in the future. *Id*. at 183. The Court recognized that the petitioner's "previous experience litigating his unsolicited facsimile claims indicates that his fears that future defendants will raise the EBR defense are not 'imaginary or speculative.'" *Id*.

It is "if not certain, definitely likely" that ATRA members will face litigation involving the adequacy of warnings on chemicals. *Id*. The change to the Preemption Clause directly implicates a primary legal defense in such litigation: preemption of state tort law claims related to the adequacy of labeling on chemical products in the workplace. Trial courts will consider and may defer to the Preemption Clause as the courts in *Nicastro* and *Bass* did. With the new Preemption Clause developed in violation of the OSH Act and APA, and apparently based on the Solicitor's erroneous interpretation of applicable law, ATRA members will face new and potentially conflicting case-by-case labeling obligations, increased defense costs, and higher risk of potential liability. Joyce Decl. at ¶ 6. (Addendum A-9.)

The interest that ATRA seeks to protect—rationally consistent hazard warning requirements—is germane to its purpose of promoting a fair, balanced, and predictable civil justice system. ATRA's membership includes numerous employers that make products that are subject to comprehensive federal safety standards under the OSH Act. *Id*. at ¶ 7. (Addendum A-9.) ATRA's Petition seeks to protect the interests of ATRA's broader membership, many of whom are concerned that they will be subject to varying labeling obligations and expensive state tort litigation even when they have fully complied with federal safety

standards, or received the approval of a federal agency, in developing warnings for their products. *Id.*

ATRA, therefore, has standing to file this Petition. Pursuant to *Sierra Club*, 292 F.3d at 900, and Rule 28(a)(7) of the Rules of this Court, Petitioner has included declarations and other evidence establishing standing in the Addendum to this Brief.

STANDARD OF REVIEW

Section 6(f) of the OSH Act requires that OSHA regulations be supported by "substantial evidence." 29 U.S.C. § 655(f) ("The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole."). A court reviewing a challenge to an OSHA standard must "ensure that the agency has (1) acted within the scope of its authority; (2) followed the procedures required by statute and by its own regulations; (3) explicated the bases for its decision; (and) (4) adduced substantial evidence in the record to support its determinations." *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1206 (D.C. Cir. 1980) (quoting *AFL-CIO v. Marshall*, 617 F.2d 636, 650 (D.C. Cir. 1979)).

The substantial evidence standard requires a "harder look" at OSHA's action than under the more deferential arbitrary and capricious standard. *See, e.g., Nat'l Grain & Feed Ass'n v. Occupational Safety & Health Admin.*, 866 F.2d 717, 728

(5th Cir. 1989). A court must "rigorously review the agency's interpretations of the substantive provisions of its statutory mandate" and "ensure that the agency has lived up to statutory and constitutional standards in its rulemaking procedure. . . ." *United Steelworkers*, 647 F.2d at 1206.

The substantial evidence standard applies to both OSHA's factual findings and to its essentially legislative policy decisions. *Nat'l Grain & Feed Ass'n*, 866 F.2d at 728 (citing *Texas Indep. Ginners Ass'n v. Marshall*, 630 F.2d 398, 404 (5th Cir. 1980)). When OSHA determines policy matters, OSHA must explain the relevant considerations on which it relied and its reasons for rejecting alternate views. *United Steelworkers*, 647 F.2d at 1253. A court's role is to "ensure public accountability by requiring the agency to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument." *Id*. at 1207 (internal quotations and citations omitted); *see also Indus. Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 472-76 (D.C. Cir. 1974) (considering application of the "substantial evidence" standard).

When an agency interprets a federal statute, where the intent of Congress is clear, the Court's "inquiry is at an end," and the agency's interpretation of the statute is due no deference. *See AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 755

(D.C. Cir. 2012) (holding that the Secretary's interpretation of the statute of limitations for issuing violations for recordkeeping deficiencies was contrary to the OSH Act) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)). In determining the level of deference due to the agency, or whether deference is appropriate at all, the court may consider whether the question is a technical one in which the court would benefit from an agency's special expertise, lending to greater agency deference, or a matter that courts commonly resolve, lending to less agency deference. *Id.* at 767 (Garland, J., concurring in the judgment); *see also Levine*, 555 U.S. at 576 (finding that an agency's legal conclusion that state law is preempted is due no deference).

ARGUMENT

I. OSHA VIOLATED THE OCCUPATIONAL SAFETY AND HEALTH ACT AND THE ADMINISTRATIVE PROCEDURE ACT BY NOT PROVIDING ANY NOTICE OF ITS INTENTION TO ALTER THE PREEMPTIVE SCOPE OF THE HAZARD COMMUNICATION STANDARD.

A. OSHA's Failure to Provide Notice and Opportunity for Comment Was Unlawful.

The Secretary must follow the OSH Act and the APA when promulgating or revising occupational safety standards under the OSH Act. The Hazard Communication Standard is a "standard" under the OSH Act, 77 Fed. Reg. at 17,603 (JA 326), and therefore may be promulgated or revised only by rule in accordance with the OSH Act and the APA. 29 U.S.C. § 655(b)(2).

The OSH Act requires: "The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments." 29 U.S.C. § 655(b)(2). The OSH Act requires that the revisions to the HCS be made by rulemaking pursuant to the APA. 29 U.S.C. § 655(b)(7) ("The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of title 5, United States Code, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning….").

The APA requires that the Secretary publish OSHA's proposed rules and give interested persons an opportunity to comment. 5 U.S.C. § 553. Section 553 provides:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> > **(1)** a statement of the time, place, and nature of public rule making proceedings;
> >
> > **(2)** reference to the legal authority under which the rule is proposed; and
> >
> > **(3)** ***either the terms or substance of the proposed rule or a description of the subjects and issues involved.***

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation….

5 U.S.C. § 553(b), (c) (emphasis added). OSHA concedes that APA § 553 applies to its revisions of the HCS. *See* 77 Fed. Reg. 17,763-64 ("[The Final Rule] is issued under the authority of… 5 U.S.C. 553…."). (JA 486-87.)

OSHA violated the requirements of both the OSH Act and APA when it revised the HCS Preemption Clause. First, OSHA did not provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). "If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration." *Envtl. Integrity Project v. EPA*, 425 F.3d 998, 996 (D.C. Cir. 2005) (emphasis in original) (citing *Fertilizer Inst. v. EPA*, 935 F.3d 1303, 1312 (D.C. Cir. 1991)).

OSHA did not raise the preemption of common law obligations among the 20 issues listed in the ANPR or the 30 issues listed in the NPRM as issues for which OSHA sought comment. *See* 74 Fed. Reg. at 50,281-84 (JA 14-17); 71 Fed. Reg. at 53,625 (JA 9). OSHA did not raise the scope of preemption in any of the hearing notices or any other document it submitted to the record. *See* 75 Fed. Reg.

12,718 (Mar. 17, 2010) (JA 292) (rescheduling final hearing); 74 Fed. Reg. 68,756 (Dec. 29, 2009) (JA 288) (providing notice of informal public hearings); 74 Fed. Reg. 57,278 (Nov. 5, 2009) (JA 284) (correcting proposed rule). OSHA did not indicate at any time during the five-and-a-half year process leading to the Final Rule that it was considering altering the scope of the Preemption Clause.

Second, OSHA's alteration of the Preemption Clause was not a "logical outgrowth" of its notice. *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006) (stating that a proposed rule and final rule need not be identical, but the final rule must be "a 'logical outgrowth' of its notice."). A final rule is a logical outgrowth of its notice only "if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)). This test is met "where the NPRM expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular change." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). "Interested parties cannot be expected to divine [an agency's] unspoken thoughts." *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1992).

As this Court has observed, "our cases finding that a rule was not a logical outgrowth have often involved situations where the proposed rule gave no indication that the agency was deciding a different approach, and the final rule revealed that the agency had completely changed its position." *CSX Transp.*, 584 F.3d at 1081. "The 'logical growth doctrine' does not extend to a final rule that has no roots in the agency's proposal because '[s]omething is not a logical outgrowth of nothing.'" *Envtl. Integrity Project*, 425 F.3d at 996 (quoting *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994)).

The stated purpose of the HCS amendments was to standardize labeling in accordance with the GHS. Allowing individual state common law obligations is not a "logical outgrowth" of, and instead directly contravenes, that stated goal because common law obligations can create unpredictable, jurisdiction-by-jurisdiction variations in hazard communication obligations.

In the ANPR and the NPRM, OSHA "nowhere even hinted" that the Final Rule would limit preemption of legal obligations imposed by state tort law regarding communication of hazard information. *See CSX Transp.*, 584 F.3d at 1081; *see also AFL-CIO v. Donovan*, 757 F.2d 330, 339 (D.C. Cir. 1985) (invalidating portion of final rule that included changes to a regulatory provision that the agency did not specifically discuss in the notice and where the notice gave the clear impression that other sections of the regulation would remain untouched).

OSHA did not propose to alter the Preemption Clause statement that the HCS "is intended to address *comprehensively* the issue of evaluating the potential hazards of chemicals,… and to *preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject*." 74 Fed. Reg. at 50,439 (emphasis added). (JA 172.) Nor did OSHA propose to alter the Preemption Clause's explicit instruction that, "[u]nder section 18 of the Act, no state or political subdivision of a state may adopt or enforce, *through any court* or agency, *any requirement* relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan." *Id*. (emphasis added).

Lacking such warning, a reasonable person following the rulemaking since the ANPR would conclude that OSHA had no intent to limit the Preemption Clause. *See, e.g.*, Bivins Decl. at ¶ 8. (Addendum A-10.) Statements in the NPRM that discussed the public policy supporting the HCS's preemption of "state law," and the continued importance of preemption under the proposed revisions to the HCS, *see* 74 Fed. Reg. at 50,386 (JA 119), would only reinforce one's confidence that no changes were being made.

Similarly, in the NPRM's discussion of State Plans, OSHA specifically recognized the importance of preemption of state law under the OSH Act. *See id.* at 50,381. (JA 114.) OSHA reaffirmed that it had no intention of altering the scope of preemption provided in the existing regulation, stating that the OSH Act

"expresses Congress' clear intent to preempt State laws with respect to issues for which OSHA has promulgated an occupational safety and health standard under section 6 of the Act." *Id*. OSHA then expressed its intent to "closely scrutinize State hazard communication standards submitted under current or future State plans to assure equal or greater effectiveness, *including assurance that any additional requirements do not conflict with, or adversely affect, the effectiveness of the national application of OSHA's standard*." *Id*. Those following this rulemaking would have had no indication that OSHA intended to later draw a distinction with common law obligations.

In addition, OSHA affirmatively expressed that the goal of the rulemaking was to provide for greater uniformity, consistency, and standardization of warning information. OSHA expressed its intent to "improve the quality and *consistency* in information provided to employers and employees related to chemical hazards" through requiring "*standardized* signal words, pictograms, hazard statements, and precautionary statements" and a "specified format for safety data sheets." 74 Fed. Reg. at 50,372 (emphasis added). (JA 105.)

These statements support continued preemption of all forms of state law requirements: statutory, regulatory, and common law. Affected parties, therefore, would have had no reason to believe that OSHA felt precisely the opposite with respect to additional or conflicting obligations imposed through state tort law.

The comments submitted during the rulemaking show that the public did not contemplate this change. According to OSHA, only two (2) of more than 100 comments filed in response to the proposed rule raised the subject of preemption of state tort law. 77 Fed. Reg. at 17,694. (JA 417.) Those comments asked OSHA to affirm that the description of preemption in 29 C.F.R. § 1910.1200(a)(2) apply to personal injury lawsuits. No individual or organization filed comments asking OSHA to *restrict* the scope of preemption to preserve state tort law failure-to-warn claims, or suggesting that different or additional labeling obligations imposed through state common law obligations would further the purposes of the Globally Harmonized System of Classification and Labeling of Chemicals.[7]

The lack of comments submitted during the rulemaking on such an important topic underscores that the change to the Preemption Clause was not a

[7] Intervenors United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and AFL-CIO filed comments both during the initial comment period and following OSHA's hearing on the proposed rule. *See* Comments of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO.CLC on OSHA's Proposed Revisions to the Hazard Communication Rule Docket No. H022K-2006-0062 (Dec. 29, 2009) (#0403) (JA 769) and Final Post-Hearing Comments of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO.CLC on OSHA's Proposed Revisions to the Hazard Communication Rule, Docket No. H022K-2006-0062 (June 1, 2010) (#0647). (JA 816.) While the Intervenors asked for improvements to several areas of the proposed rule, at neither stage did the Intervenors raise preemption of state tort law. (*See id*.)

"logical outgrowth" of OSHA's notice in this rulemaking. The expectation of the regulated community that no changes would be made to the Preemption Clause is underscored by the strength and depth of reaction whenever federal preemption affecting products liability and personal injury cases is at issue.

"Perhaps no area of the law has become so controversial in recent years as federal preemption of state tort law." Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety*, 84 Tulane L. Rev. 1203, 1204 (2010) (recognizing that the "personal injury bar, joined by consumer groups, is waging an all-out battle in the courts, Congress, the Executive Branch," while "[b]usiness groups decry the unfairness of complying with detailed federal regulations and having their products scrutinized and approved for safety and effectiveness by federal agencies, only to face unpredictable and potentially conflicting liability"). For example, in 2008, when the U.S. Supreme Court considered and ultimately invalidated the FDA's position on preemptive effect of it regulations, thirty *amicus* briefs were filed, some on behalf of multiple parties. *See* Docket, *Wyeth v. Levine*, No. 06-1249 (U.S.) *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/06-1249.htm (last visited Feb. 25, 2013). Had the preemption issue been properly disclosed by OSHA, many would have commented.

OSHA itself acknowledged in the preamble to the Final Rule that it would have considered comments considering potential conflict with common law obligations, but "no commenter has provided any evidence of such a conflict…. [T]he record contains no evidence that a manufacturer might be held liable under a State's tort law rules for complying with the GHS."[8] 77 Fed. Reg. 17,694. (JA 417.) OSHA was obligated to provide such notice and opportunity for comment.

The change from the NPRM to the Final Rule – from enhancing national standardization to allowing greater variation in labeling – is exactly the type of "surprise switcheroo" that this Court recognized as a violation of the APA. *See id.* at 996 (discussing *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005), invalidating an agency switch from a proposed minimum air velocity to adoption of maximum air velocity to ventilate underground coal mines). ATRA requests this Court find that OSHA

[8] This statement underscores OSHA's violation of the APA. The record contains no such evidence *because OSHA did not ask*. OSHA cannot expect interested parties to submit evidence of potential conflicts between state tort law and the Hazard Communication Standard when the agency never indicated that it was considering altering the scope of preemption to apply only to state statutes and regulations. The fact that OSHA would consider this type of evidence demonstrates the need for the Court to vacate the revisions to the Preemption Clause.

violated the APA here, too, and vacate the illegal revisions to the Preemption Clause.

B. Comments Submitted During the Rulemaking, and a Legal Opinion Provided Outside of the Rulemaking, Cannot Justify OSHA's Failure to Provide Notice and Opportunity for Comment.

OSHA suggests in the Final Rule preamble that its amendment to the Preemption Clause was spurred by comments from interested parties. 77 Fed. Reg. at 17,694 (JA 417) ("several commenters . . . noted what they believed to be the continued need to address the preemption of State standards" and that "the impact of GHS adoption on State and local laws should be considered in the process… and that differences between such laws and the revised HCS should be discouraged"). OSHA also suggested that it revised the Preemption Clause to "eliminate any confusion about the standard's preemptive effect," in reaction to Dow's and IMA's suggestion to clarify that the phrase "legal requirements" includes common law claims. *Id.*

The fact that a limited number of entities raised the issue of preemption does not cure OSHA's failure to provide notice that it was considering the issue. An agency "cannot bootstrap notice from a comment." *Fertilizer Inst. v. EPA*, 935 F.3d 1303, 1312 (D.C. Cir. 1991); *see also Int'l Union*, 407 F.3d at 1261 (demonstrating that even where some parties have made comments *supporting* the change made by the agency, this Court has invalidated regulations that lacked

adequate notice of the issue in the NPRM). Further, these comments did not support OSHA's change to the Preemption Clause. Each of these comments expressed concern that individual state labeling requirements for chemicals would *undermine* the goal of global harmonization. (JA 621-94.) None of them suggested the direction or approach ultimately taken by OSHA in the final rule.

Had these comments spurred OSHA's action, as it suggests, OSHA should have used its many opportunities after the comments were filed to signal to other affected parties that it was considering such a change and provide them with an opportunity to respond. It did not. OSHA's references to these comments appear as *post hoc* attempts to justify its changes to the Preemption Clause.

Similarly, OSHA's reference to the Solicitor Opinion cannot justify this "surprise switcheroo." 77 Fed. Reg. at 17,694. (JA 417.) That legal opinion was issued after the close of the comment period on the NPRM.[9] Neither the Solicitor Opinion nor any request for it is included in the administrative record. An agency violates the APA by "relying on materials not in the rulemaking record without affording an opportunity for the public to comment" to the prejudice of interested

[9] As discussed *supra*, after the Solicitor issued the legal opinion on the scope of preemption, the *Nicastro* trial court reconsidered and reaffirmed its decision to grant summary judgment dismissing the plaintiffs' failure-to-warn claim, and specifically rejected the DOL's reasoning. (Addendum at A-10, Exh. E.) Only after promulgation of the Final Rule, with the altered regulatory text, did the *Nicastro* court reinstate the plaintiffs' action. (Addendum at A-10, Exh. F.)

parties. *Chamber of Commerce of the United States v. Sec. & Exch. Comm'n*, 443 F.3d 890, 894 (D.C. Cir. 2006). OSHA's reliance on an extra-record legal opinion to counsel for a litigant in a private tort action does not provide any basis for OSHA's change to the Preemption Clause.

C. OSHA's Revision of the Preemption Clause Was a Substantive Change to Alter the Legal Rights of Regulated Entities, Requiring Prior Notice and Opportunity for Comment.

Amending the HCS Preemption Clause and preamble statements to preserve state common law obligations is not a ministerial clarification, but a major, substantive departure from the previous version of the HCS Preemption Clause.

From 1994 through March 26, 2012, the Preemption Clause provided:

> This 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 appropriate protective measures to employees, *and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject.*

Final Rule, Hazard Communication, 59 Fed. Reg. 6126 (Feb. 9, 1994) (codified at 29 C.F.R. § 1910.1200(a)(2) (2010)) (emphasis added).[10]

By preempting "any legal requirements of a state… pertaining to this subject," the previous Preemption Clause allowed for the preemption of common

[10] The version of the HCS Preemption Clause in effect prior to 1994 was virtually identical but did not expressly identify legal requirements of "a political subdivision of a state." Final Rule, Hazard Communication, 48 Fed. Reg. 53,280, 53,284 (Nov. 25, 1983).

law claims, and therefore was harmonious with, and did not undermine, the OSH Act preemption clauses and savings clause. *See, e.g., Bass*, 2006 WL 1419375, at *7 (upholding summary judgment against plaintiffs' failure-to-warn claims, finding that the "HCS expresses a clear intent to preempt *any* state legal requirements that address the content of warnings regarding potential chemical hazards"). Courts have also granted summary judgment to manufacturers on failure-to-warn claims when the labeling of their products complied with the HCS. *See, e.g., Torres-Rios v. LPS Labs., Inc.*, 152 F.3d 11, 13 (1st Cir. 1998) (finding that HCS is the national standard of warnings, and granting summary judgment against failure-to-warn claims because warnings complied with HCS).

While some courts have reached a different conclusion with respect to the scope of this Preemption Clause, OSHA's effort to align itself with some cases, but not others, marks a major statement of policy and law. *See Pedraza v. Shell Oil Co.*, 942 F.2d 48, 53 (1st Cir. 1991) (finding that the OSH Act savings clause preserves state tort claims against chemical manufacturers); *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp. 2d 669, 687-88 (N.D. Ohio 2005) (finding that the OSH Act savings clause preserves state tort claims from preemption). OSHA never articulated that, as part of this rulemaking, it was going to make such a substantial position statement and determine that common law obligations are not to be preempted by the HCS. Despite OSHA's characterization of the amendments

as a "small change," 77 Fed. Reg. 17,694 (JA 417), this change in law fundamentally alters the rights of parties in litigation. OSHA did not follow the required process for making such a major statement on this issue, and its changes to the Preemption Clause in the Final Rule must be vacated accordingly.

II. OSHA'S ATTEMPT TO EXEMPT STATE COMMON LAW OBLIGATIONS FROM PREEMPTION IS *ULTRA VIRES* AND OTHERWISE NOT IN ACCORDANCE WITH LAW.

An executive agency's authority to regulate is limited to that which Congress has specifically provided by statute. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (holding that a Department of Labor regulation limiting private rights of action under the Migrant and Seasonal Agricultural Worker Protection Act is entitled no deference, because the Secretary of Labor was authorized only to promulgate "standards" under the act, not "to regulate the scope of the judicial power vested by the statute") (citations omitted).

Congress has not provided OSHA the authority to define or limit the scope of preemption that Congress established in the OSH Act or to choose which types of state law requirements are and are not to be preempted.

Courts must set aside as unlawful any agency actions that exceed statutory jurisdiction, authority, or limitations. 5 U.S.C. § 706(2)(c). With respect to preemption of state law, determining whether federal law preempts state law requirements is within the purview of Congress and only Congress: "[t]he purpose

of Congress is the ultimate touchstone of the preemption analysis." *Cipollone*, 505 U.S. at 516 (internal quotations omitted).

Congress was clear in its intent that standards under the OSH Act be the controlling, national standards for workplace safety, as against *any* form of state law—statutory, common, or otherwise. Congress drew no distinctions among these sources of conflicting requirements in the OSH Act preemption provisions. State common law obligations, just as positive enactments, can impose duties that stand "'as an obstacle to the accomplishment and execution'" of the nationally (and internationally) standardized hazard communication system. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). While OSHA acknowledges the possibility that "limited preemption might be possible to the extent a state tort rule directly conflicted with the requirements of the standard," 77 Fed. Reg. 17,694 (JA 417), its amendment to the Preemption Clause signals that OSHA intends common law obligations to not be preempted in any case.

OSHA, though, has no authority to use its regulatory function to exempt any particular source of state law obligations from the scope of the OSH Act's preemption. Even if OSHA were authorized to address the issue through regulation, OSHA's interpretation of the OSH Act to carve out common law obligations from preemption is inconsistent with the OSH Act. Accordingly,

OSHA's revision to the Preemption Clause to limit preemption only to legislative and regulatory enactments, and to exclude common law obligations from possible preemption, is *ultra vires* and invalid.

A. OSHA Cannot Limit the Scope Of Preemption in Its Standards.

OSHA cannot use its regulations to limit the scope of preemption from that established by Congress. Courts should not "presume a delegation of power based solely on the fact that there is not an express withholding of such power." *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) (citing *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060-61 (D.C. Cir. 1995)). The OSH Act gives OSHA authority only to promulgate national workplace health and safety standards, not to dictate by regulation the scope of preemption. 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.

The Supreme Court has made clear that, absent specific Congressional authority otherwise, agencies can offer only their opinions as to what they think the preemptive effect of its regulations should be. "While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Levine*, 555 U.S. at 577.

"Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Adams Fruit*, 494 U.S. at 650 (citations omitted). In *Adams Fruit*, the Supreme Court recognized that Congress provided the Department of Labor with authority to promulgate standards establish minimum standards, licensing, and insurance requirements to help secure safe transportation for migrant and seasonal agricultural workers. *See id*. at 643. This delegation to issue standards on one particular matter, the Court found, "does not empower the Secretary to regulate the scope of the judicial power vested by the statute." *Id*. at 651 (rejecting the Secretary's conclusion that workers' compensation benefits, where available, provide the exclusive remedy for violations of the federal law at issue).

OSHA's authority for promulgating standards resides in Section 6 of the OSH Act. 29 U.S.C. § 655. Section 6 provides only that OSHA may promulgate safety standards "relating to the *use of labels* or *other forms of warning*, *monitoring* or *measuring*, and *medical examinations*, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard." 29 U.S.C. § 655(b)(7).

Section 6 does not give OSHA the authority to limit the scope of preemption in those standards or define liability for a class of potential defendants. *See Kelly v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994) (finding, that only courts, not EPA, can evaluate the scope of liability under CERCLA).

At most, OSHA's view of the scope of preemption under the OSH Act may warrant consideration by a court, similar to the arguments of *amicus curiae.* As the Supreme Court explained in *Levine*, while the Court has "given '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,' it has not deferred to an agency's *conclusion* that state law is pre-empted." 555 U.S. at 576 (quoting *Geier*, 529 U.S. at 883) (emphasis in original).

The Solicitor's letter to plaintiff's counsel in the *Nicastro* case may be the type of advisory, interpretive opinion that an agency can legally provide. *But see Kelley*, 15 F.3d at 1108 (finding that an EPA rule addressing liability issues facing a particular group, rather than interpreting technical statutory terms, was due no deference because "it bears little resemblance to what we have traditionally found to be an interpretative regulation"). However, OSHA's revision to the Preemption Clause is an example of the agency overreaching its authority by attempting to redefine preemption by regulation in a manner that conflicts with the OSH Act. In changing the Preemption Clause, OSHA is attempting to establish new law on the

preemptive effect of the HCS. The impact of OSHA's amendment on the *Nicastro* trial court demonstrates this point: the court interpreted the opinion letter as merely advisory, but yielded to the revised Preemption Clause in the Final Rule as binding law. In restricting the Preemption Clause as it has done, OSHA has overstepped its standard-making authority, and the changes to the Preemption Clause must be stricken. OSHA's attempt to limit the law of preemption by regulation must be rejected.

B. OSHA's Distinction Between Common Law Obligations and Positive Enactments Contradicts the OSH Act.

OSHA's distinction between common law obligations and positive enactments has no basis in the OSH Act. Such an interpretation undermines Congress' intent that OSHA standards be the controlling standard of conduct related to workplace safety. *Gade*, 505 U.S. at 99 ("Congress intended to subject employers and employees to only one set of regulations, be it federal or state.").

OSHA's distinction contradicts Congress' expression of its intention with respect to preemption in Section 18 of the OSH Act, 29 U.S.C. § 667 ("Section 18"). Section 18 preempts states from imposing their own regulatory obligations on any occupational safety or health issue where OSHA has promulgated standards. *Gade,* 505 U.S. at 100 ("[Section] 18(a)'s preservation of state authority in the absence of a federal standard presupposes a background pre-emption of all state occupational safety and health standards whenever a federal

standard governing the same issue is in effect."). In Section 18(a) of the OSH Act, Congress provides:

> Nothing in this Act shall prevent *any State or court* from asserting jurisdiction under *State law* over any occupational safety or health issue with respect to which no standard is in effect under section 6.

29 U.S.C. § 667(a) (emphasis added). Section 18(b) provides that a state may impose its own obligations under these circumstances only after submitting a "state plan" to, and obtaining approval for that plan, from the Secretary. *See id.* § 667(b).

Section 18 does not distinguish among the sources of "State law" requirements, whether statutes, regulations, or common law. Congress' reference in Section 18(a) to "State law" and "any… court" shows that Congress contemplated that both positive enactments and common law obligations can impose state law requirements in areas in which there is an applicable OSHA standard. *See* 29 U.S.C. § 667(a); *Cipollone*, 505 U.S. at 522 (where federal act preempts "requirements or prohibition[s]… imposed under State law," the scope of preemption includes common law as well as statutes and regulations).

OSHA's amendment to the Preemption Clause, however, attempts to redefine "State law" in Section 18 to mean only positive enactments, to the exclusion of common law obligations. This interpretation conflicts with Supreme Court precedent. *See Riegel*, 552 U.S. at 323-25. "[E]xcluding common-law duties from the scope of pre-emption would make little sense" because common

law claims may disrupt federal regulation no less than state regulatory law. *Id*. at 324-25 (holding that the Medical Device Act's preemption of any "legal requirement" that is "different from, or in addition to" federal requirements includes preemption of state tort duties); *see also Bates*, 544 U.S. at 443 (the Federal Insecticide, Fungicide, and Rodenticide Act preempts state common law fraud and negligent failure-to-warn claims when they impose "requirements for labeling or packaging in addition to or different from those required" by FIFRA regulations); *Medtronic v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J. concurring in part and concurring in the judgment) (disagreeing with four-judge plurality's finding that "requirement" did not include common law claims because "it is implausible that the MDA was meant to grant greater power to a single state jury than to state officials acting through state administrative or legislative lawmaking processes"); *Cipollone*, 505 U.S. at 522 (where federal act preempts "requirements or prohibition[s]… imposed under State law," the scope of preemption includes common law as well as statutes and regulations).[11]

[11] The U.S. Department of Transportation (DOT) recently applied this principle in the context of a federal hazardous material transportation law that, similar to the OSH Act, preempts state legal requirements on this issue absent DOT authorization. *See* Dep't of Transp., Notice of Administrative Determination of Preemption, Common Law Tort Claims Concerning Design and Marking of DOT Specification 39 Compressed Gas Cylinders, 77 Fed. Reg. 39,567 (July 3, 2012). DOT recognized that common law negligence and strict liability claims impose requirements that are subject to preemption under federal law. *Id*. at 39,568 (citing *Riegel*, 552 U.S. at 323). DOT concluded that, in light of the

Congress has thus provided no basis for OSHA to choose which among those forms of state law requirements its regulations are intended to preempt. If OSHA is to allow a state to regulate on a matter that falls within the scope of this preemption provision, Congress provides only one mechanism: OSHA must approve a specific state plan. 29 U.S.C. § 667(b). Absent approval of a state plan, a state's common law requirements on an issue for which an OSHA standard is in effect are preempted to the same degree that a state's positive enactments are preempted.

At the very minimum, OSHA's reinterpretation of the OSH Act cannot be sustained, for example, where there is a direct conflict between OSHA regulations and a state court-driven obligation. A determination of conflict preemption must be made on a case-by-case basis, by a court. Whether or not federal law preempts a state law claim "turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent." *Geier*, 529 U.S. at 884 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990)). A court must determine in each particular case whether there is an applicable federal safety standard and whether a

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importance of uniformity of requirements in the transportation of hazardous materials, tort law claims that seek to create or establish requirements applicable to the design, manufacture, or marking of a packaging . . . that would not be substantively the same as the requirements" of the federal rule are preempted. *Id.* at 39,570. DOT distinguished tort claims alleging a failure to meet federal standards, which would not be preempted. *See id.*

state requirement, such as a common law obligation, makes it impossible for parties to comply with both state and federal law. *See Gonzalez v. Ideal Tile Importing Co.*, 877 A.2d 1247, 1252-53 (N.J. 2005) (finding a claim alleging that a forklift manufacturer should have installed additional warnings on the machine to make its operation safe conflicted with OSHA standards allowing for alternative warnings, and was preempted "as an obstacle to the accomplishment and execution of the federal regulation") (quoting *Geier*, 529 U.S. at 881).

The potential for a conflict between a common law requirement and an OSHA requirement is plainly possible, despite OSHA's statement that no commenter presented any evidence of such a conflict. 77 Fed. Reg. at 17,694. (JA000417.) For example, the HCS requires manufacturers to use standardized label elements—signal words, pictograms, hazard statements and precautionary statements—to warn workers of the hazards of their products. *See id*. at 17,824-83. (JA000547-000606.) If a state's common law, through a jury's verdict, finds that these standardized core label elements did not adequately warn of a particular hazard, and required a textual warning instead of the standard signal words, pictogram, or precautionary statement, the defendant could not comply with both the OSHA regulations and the new state tort law obligations. The court would have to find that there is a conflict between the two and the OSHA regulation preempts the state tort claim.

Similarly, the HCS now requires manufacturers to use a specific format for safety data sheets ("SDSs"). *See* 77 Fed. Reg. at 17,884-85. (JA 607-08.) OSHA found that "standardized headings and a consistent order of information will improve the utility of SDSs." *Id.* at 17,585. (JA 308.) If a tort claim results in a requirement that a manufacturer emphasize or reorganize warning information contained on an SDS in a manner inconsistent with the HCS-specified format, the manufacturer could not comply with both obligations. Again, the court would have to rule that the claim is preempted by OSHA's regulations.

OSHA's amendments to the HCS stating that its regulations do not preempt state tort claims cannot be the rule of law.

C. The Savings Clause of the OSH Act Does Not Justify OSHA's Attempt to Exempt Common Law Obligations From Preemption.

As a foundation for its authority to amend the HCS Preemption Clause, OSHA wrongly asserts that common law obligations are exempt from preemption by virtue of the OSH Act "saving clause," Section 4(b)(4) of the OSH Act. *See* 77 Fed. Reg. 17,694. (JA 417.) Section 4(b)(4) of the OSH Act, states:

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

29 U.S.C. § 653(b)(4) (emphasis added).

First, the savings clause does not distinguish between common law and statutory obligations; it treats them exactly the same. Therefore, the savings clause provides no basis upon which OSHA can make a distinction between the two. Until the final rule, this uniform approach to all sources of state law requirements was consistent in the OSH Act's preemption provision, the OSH Act's savings clause, and the HCS Preemption Clause. *See* Section 18(a) (applying to "any State or court"); Section 4(b)(4) (affecting certain "common law or statutory" rights, duties, or liabilities); 59 Fed. Reg. 6126 (Feb. 9, 1994) (stating the HCS preempts "any legal requirements of a state" and that no state may adopt or enforce a preempted obligation "through any court or agency."). OSHA's interpretation of these provisions ignores their symmetry and that they apply equally to all state law requirements. OSHA's change to the Preemption Clause is not saved by Section 4(b)(4) of the OSH Act.

Second, Section 4(b)(4) does not provide a basis for excluding all tort claims from the reach of the OSH Act's preemption provision. Section 4(b)(4) must be read *in pari materia* with Section 18 to preserve only those "State law" rights that are not otherwise preempted under Section 18. *See Riegel*, 552 U.S. at 321, 325 n.4 (finding that a savings clause cannot be read to nullify Congress's preemption of state law). As discussed above, Congress intended for OSHA standards to be the national law (unless a state has otherwise implemented an OSHA-approved

program) and for Section 18(a) to apply to "courts." Therefore, reading the OSH Act savings clause to preserve all common law claims and the state obligations that arise from them irreconcilably conflicts with Congress's intent. A similar situation arose in *Riegel*, where the "savings provision" under consideration provided that compliance with certain agency orders "shall not relieve any person from liability under Federal or State law." *Id*. (citing 21 U.S.C. § 360h(d)). The Supreme Court found that the savings clause "indicates that some state-law claims are not pre-empted, . . . [b]ut could not possibly mean that all state-law claims are not pre-empted, since that would deprive the MDA pre-emption clause of all content." *Id*.

As the Supreme Court has held, savings clauses purporting to reserve certain common law rights and liabilities do not evidence Congressional intent to foreclose all preemption. *See Geier*, 529 U.S. at 869-74; *see also PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 n.5 (2011) (recognizing that "the absence of express pre-emption is not a reason to find no conflict preemption"). In *Geier*, the Court held that tort claims asserting that an automobile manufacturer should have equipped the vehicle with a driver-side airbag were preempted because the claims posed an obstacle to achieving the objectives of the federal standard. *Geier*, 529 U.S. at 881-82. The Court found that savings clause in the National Traffic and Motor Vehicle Safety Act of 1966 ("NTMVSA"), which provided that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability

under common law," did "not bar the ordinary working of conflict pre-emption principles," and did not preclude preemption of common law obligations. *Id.* at 868 (quoting 15 U.S.C. § 1397(k)).

The Supreme Court has "repeatedly declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." *Id.* at 869, 870 (internal quotations and citations omitted). Otherwise, the savings clause would allow "state law [to] impose legal duties that would conflict directly with federal regulatory mandates," resulting in a law that "destroys itself." *Id.* at 871-72 (citations and internal quotations omitted).

Here, OSHA's interpretation that common law claims are preserved, *see* 77 Fed. Reg. at 17,694 (JA 417), would cause the savings clause to overtake the preemption provision. Section 18(a) would no longer apply to "any State or *court*." *Id*. Rather, courts and juries in every state would be permitted to second-guess OSHA's regulations, looking solely at the case of an injured individual, and establish conflictive or additional hazard communication obligations. Further, unlike additional statutory or regulatory requirements (which might result from a balanced assessment of all of the factors and stakeholders involved), such

requirements are not the subject of any study, debate or thoughtful state plan submitted to and approved by OSHA.[12] *Gade*, 505 U.S. at 100.

D. The OSH Act Savings Clause Saves Only Claims Between Employers and Employees, Not All Tort Claims.

OSHA interpretation of the savings clause to preserve any and all tort claims is contrary to law because the OSH Act's savings clause seeks only to preserve the rights, duties or liabilities that arise between "employers and employees." As this Court has recognized, the savings clause assures that OSHA regulations "leave[ ] the state [workmen's compensation] schemes wholly intact as a legal matter." *See United Steelworkers*, 647 F.2d at 1234-36. The remainder of the clause is similarly limited to only those state law requirements affecting the employer-employee relationship. There is indeed a significant number of state law requirements preserved under this savings clause. *See Geier*, 529 U.S. at 861 ("a saving clause assumes that there are some significant number of common-law liability cases to save").

For example, some state workers compensation laws allow employees to pursue an employer under state tort law if the employer engaged in an intentional

[12] This highlights a major flaw in the reasoning of court rulings that distinguish between "positive" state standards and regulations from state tort law under the OSH Act. *See, e.g., Pedraza v. Shell Oil Co.*, 942 F.2d 48, 53 (1st Cir. 1991) (citing cases finding that the savings clause preserves state tort claims from preemption); *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp.2d 669, 687-88 (N.D. 2005) (focusing on savings clause language with respect to common law).

tort in harming the employee. *See* James A. Reiter & James J. Ranta, *The Exclusive Remedy Provision State-by-State Survey*, *at* http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/2009_err_020.authcheckdam.pdf (last visited Feb. 25, 2013). Without this part of the savings clause, there would be a perverse result: an employee could collect on a workers' compensation claim for an act of negligence, but have a tort claim for an intentional act preempted by the OSH Act.[13] Other remedies the savings clause preserves may include those arising under a state family medical leave act, state disability protections, or state-based discrimination actions.

By contrast, failure-to-warn claims against manufacturers of chemicals used in a workplace by individuals who are not employees of the product manufacturer, whether based on state statutory or common law, do not implicate the employer-employee relationship. These claims are not preserved under the savings clause and, therefore, are preempted when a manufacturer's product or labeling conforms to an applicable OSHA safety standard. *But see Lindsey v. Caterpillar, Inc.*, 480

[13] *Compare Van Dunk v. Reckson Assocs. Realty*, 45 A.3d 965, 978-79 (N.J. 2012) (finding exclusivity of workers' compensation system applied where supervisor's decision to send employee into trench deeper than five feet to complete a brief task, in clear violation of OSHA safety requirements, was not substantially certain to result in injury or death) *with Crippen v. Cent. Jersey Concrete Pipe Co.*, 823 A.2d 789, 797 (N.J. 2003) (allowing tort claim where "a jury reasonably could conclude that defendant had knowledge that its deliberate failure to cure the OSHA violations would result in a substantial certainty of injury or death to one of its employees").

F.3d 202 (3d Cir. 2007) (finding the OSH Act did not preempt a common law design defect claim against an equipment manufacturer, but the rollover protection regulation adopted by OSHA specifically exempted the product at issue from the federal standard).

As discussed above, any other reading of the savings clause could result in a chemical manufacturer being told by a jury in a state tort case that its warnings are not adequate and need to be changed even if those warnings are in full compliance with OSHA's exacting HCS that is specifically intended by OSHA to establish comprehensive, national standards in conformance with international hazard communication protocols.

CONCLUSION

For the foregoing reasons, ATRA respectfully requests that this Court vacate the Final Rule amendments to 29 C.F.R. § 1910.1200(a)(2) that exclude common law obligations from the scope of preemption by the HCS.

Respectfully submitted,

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I hereby certify that on this 27th day of June, 2013, the foregoing Final Brief was served by the Court's CM/ECF System on all counsel of record in this matter who have registered with the CM/ECF System.

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