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

REPLY BRIEF OF PETITIONER

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GLOSSARY

APA	Administrative Procedures Act
ATRA	American Tort Reform Association
GHS	Globally Harmonized System of Classification and Labeling of Chemicals
HCS	Hazard Communication Standard, and the revisions thereto in the final rule entitled "Hazard Communication," 77 Fed. Reg. 17,574 (Mar. 26, 2012)
OSHA	Occupational Safety and Health Administration
OSH Act	Occupational Safety and Health Act of 1970
SDS	Safety Data Sheets

SUMMARY OF ARGUMENT

The Occupational Safety and Health Administration (OSHA) does not suggest that it provided notice to the public that it intended to limit the scope of the Preemption Clause of the Hazard Communication Standard (HCS), which had been in effect for three decades. Its brief implicitly concedes that it provided no such notice. OSHA also does not suggest that this limitation is consistent with the purpose of the rulemaking, which was to adopt a globally harmonized system of hazard communication. Specifically, this rulemaking provides standardized, more specific requirements than the prior federal standard. OSHA's change to the Preemption Clause, 29 C.F.R. § 1910.1200(a)(2), which allows case-by-case labeling obligations, is the antithesis of harmonization.

Instead, OSHA contends it is exempt from considering public comment, attempting to characterize its limitation to the Preemption Clause as a mere "interpretive statement" or clarification. But, this characterization belies reality. OSHA's revision to the text of the Preemption Clause was intended to impact the rights and obligations of parties in litigation. It already has. Further, the agency purports a "longstanding" position on preemption of state tort law claims to allow it to evade review, but any such position is elusive: OSHA cites interpretative letters that do not address preemption, are limited to workers' compensation issues, or actually show the agency's inconsistent position on preemption of tort law

claims. If OSHA is to alter the scope of preemption under the HCS in a manner that departs from the text of Section 18 of the OSH Act and establish a new bright-line standard separating obligations imposed through state common law from statutory and regulatory obligations, then it must go through the notice and comment safeguards of the Administrative Procedure Act ("APA").

In defending its authority to create a bright-line rule, OSHA misconstrues the American Tort Reform Association's (ATRA) position. It is unnecessary for this Court to define the precise scope of preemption under the OSH Act and HCS. ATRA's position is that the OSH Act preempts state common law to the same extent it preempts state statutes or regulations imposing legal requirements. The HCS provides examples of types of state law obligations it preempts. ATRA also does not contend, as OSHA suggests, that the HCS precludes tort remedies when a product violates the HCS. Such claims would not establish a new state legal obligation; they are premised on noncompliance with an existing federal standard.

OSHA also misinterprets the OSH Act and overstates case law. The OSH Act does not create separate preemption standards for obligations imposed through state common law as compared with legislative and regulatory enactments. *Gade v. National Solid Waste Mgmt Ass'n*, 505 U.S. 88, 107-08 (1992), relied upon by OSHA, found that preemption under the OSH Act is based on whether a state law

requirement has a "direct and substantial effect" on the federal scheme, not whether it stems from a statute, regulation, or common law.

Also, rulings OSHA cites as the "great weight of authority" on preemption under the OSH Act fail to support its argument. The principal authority pre-dates significant Supreme Court precedent establishing that common law claims can establish state law obligations equivalent to statutes and regulations. Other cases involve federal jurisdiction to hear claims raising a preemption defense, which implicates a different, more stringent standard of a preemption defense itself. Several cases cited by OSHA recognize that preemption of state tort law is appropriate when a defendant has complied with an applicable federal standard.

This Court can, and should, reject OSHA's revision to the Preemption Clause because such a change to rights and obligations requires notice and an opportunity for comment. Should the Court elect to address directly OSHA's interpretation, ATRA respectfully requests that it find that the OSH Act does not support a bright-line distinction between labeling obligations imposed by state statutes and regulations from those arising out of court-made law. Otherwise, OSHA will have established binding law without any accountability to the public.

ARGUMENT

I. THE CHANGE TO THE PREEMPTION CLAUSE IS A SUBSTANTIVE AMENDMENT FOR WHICH NOTICE WAS REQUIRED, NOT A MERE INTERPRETIVE RULE.

OSHA does not dispute ATRA's claim that it failed to provide notice and comment to affected parties of its amendment to the HCS's Preemption Clause. Rather, OSHA hangs its APA defense on a single argument: the amendment to the HCS Preemption Clause was not a rule change at all, but is "nothing more than an interpretive statement." OSHA Br. at 50. Despite this characterization, OSHA's change to the Preemption Clause is substantive. As stated in its brief, OSHA intends its change to be the "controlling weight" of law in determining the rights and obligations of regulated companies and workers. *Id*. at 56 n. 21.

The substantive intent and impact of this rule change is illustrated by the circumstances under which OSHA changed the Preemption Clause. After a New Jersey state court did not embrace a mere "interpretive statement" in the form of a letter from the Solicitor of Labor, OSHA amended the regulation itself and the court followed the rule as controlling authority. *See* Initial Br. of Pet. at 9-11. Thus, this rule change has already has had the intended purpose and effect of binding courts and altering rights and obligations of employees and employers, as well as manufacturers of products used in their workplace.

A. OSHA Concedes that It Did Not Provide Notice for this Rule Change and that this Rule Change Is Not a Logical Outgrowth of the HCS Rulemaking

OSHA does not contend that it ever alerted the regulated community that it planned to shrink the scope of the HCS Preemption Clause from covering state and local "legal requirements" to only state and local "statutes and regulations," thereby permitting new state law obligations arising through common law. OSHA also does not argue that its limitation on preemption was a "logical outgrowth" of its notice. It is not.

The purpose of amending the HCS to adopt the Globally Harmonized System (GHS), as OSHA recognizes, was to move away from the flexibility previously provided to manufacturers in developing labeling and safety data sheets for hazardous materials to standardized, "much more specific" requirements. OSHA Br. at 10-11 ("Prior to the 2012 amendments, the HazCom standard stated in general terms the information to be included on labels and safety data sheets, but left many of the details up to the manufacturers."). As OSHA explains in its brief, the new rule "requires hazard information to be conveyed in a standardized manner" and "requires the use of certain signal words (either "Danger" or "Warning"), a pictogram (e.g., a skull and crossbones), a hazard statement (e.g., "Fatal if Swallowed) on a chemical's label and safety and datasheet." *Id*. at 11 (citing 77 Fed. Reg. 17,574, 17,580 (Mar. 26, 2012)). OSHA also recognizes that

the HCS now provides mandatory precautionary statements that must appear on the label and Safety Data Sheets (SDS), and a "standardized sixteen-section format for safety data sheets so that hazard information is presented in a consistent order." *Id.*

The change to the Preemption Clause will allow the imposition of state law labeling obligations enforced retroactively through warning-related tort claims. The result will be state-by-state variations in the substantive communication standards for hazardous information without any required notice and comment to the regulated communities and without any prior approval by OSHA. The rule change at issue in this case, therefore, is *not* a "logical outgrowth" of the rule-making; it is antithetical to its stated purpose, which is national and international harmonization. OSHA does not and cannot argue otherwise.

B. OSHA Intended Its Revision to Alter Legal Rights; It Accomplished that Objective

OSHA seeks to circumvent the APA's notice and comment rulemaking by repeatedly referring to its revision to the text of 29 C.F.R. § 1910.1200(a)(2) as "minor," "merely," or "non-substantive." *Id.* at 1, 2, 15, 16, 41 n.11, 46, 49, 51, 52, 56, 60. OSHA's own words elsewhere in the brief, though, undermine these characterizations. OSHA emphasizes that the new bounds this rule change places on the scope of preemption warrant "special consideration," *id.* at 43, "merit deference," *id.* at 44, and is entitled to "substantial judicial deference," *id.* at 56 n. 21. Far from being "merely interpretative," OSHA suggests that the revised rule is

the "controlling weight" of authority that courts are to follow when determining whether the HCS preempts state law. *Id.* A rule OSHA intends to be the *controlling weight* of authority on rights and obligations of the parties in a lawsuit cannot, as OSHA suggests, be downplayed to escape all scrutiny.

This Court has repeatedly held that an agency cannot mischaracterize a substantive change to a rule as merely an "interpretive rule" to avoid the APA's notice and comment requirements. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (*citing Paralyzed Veterans v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997); *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993)); *see also Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980). Under the APA, an agency can promulgate a "substantive" or "legislative" rule only after compliance with the rulemaking requirements of the APA, 5 U.S.C. § 553.

1. The Change to the Rule is Substantive

The amendment to the HCS is a substantive rule; it satisfies traditional factors courts have considered in determining whether a rule is substantive. A key consideration is whether it has the "force of law," meaning that the agency intends "to create new rights or duties." *Paralyzed Veterans*, 117 F.3d at 587-88 (citations omitted); *American Mining Cong.*, 995 F.2d at 1109. The intent to create new rights or duties can be "found with some confidence" where, as here the absence of

the rule proved to be inadequate to require compliance with the Agency's position. *See American Mining Cong.*, 995 F.2d at 1109. Publication in the Federal Register also indicates that an agency intends the rule to have legal effect, as federal law limits publication in the Code of Federal Regulations to rules "having general applicability and legal effect." *Id*. (citing 44 U.S.C. § 1510). In addition, a rule that repudiates a prior rule or is "an amendment to a legislative rule must itself be legislative." *Id.* (quoting *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992); *see also Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) ("[N]ew rules that work substantive changes in prior regulations are subject to the APA's procedures."); *Alaska Professional Hunters Ass'n, Inc. v. Federal Aviation Admin*., 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("'Rule making,' as defined in the APA, includes not only the agency's process of formulating a rule, but also the agency's process of modifying a rule.") (citing 5 U.S.C. § 551(5) and *Paralyzed Veterans*, 117 F.3d at 586).

The change to the Preemption Clause meets these criteria. It was intended to have the force of law; came after an interpretation letter proved not to have the desired effect of law; was published in the Federal Register; and fundamentally altered the plain language of the prior rule.

2. Nicastro Shows that OSHA's Revision Alters Rights and Obligations

OSHA's intent to substantively alter the rights and obligations of the regulated community in amending the Preemption Clause can be adduced from the circumstances under which the changes arose. As documented in ATRA's initial brief, a New Jersey trial court found in *Nicastro v. Aceto Corp*., No. L-3062-08 (N.J. Super. Ct., Law. Div., Monmouth County), that the HCS preempted a state tort claim where the manufacturer had demonstrated compliance with the federal standard. The plaintiff's attorney had sought an interpretative opinion from OSHA stating that OSHA did not intend for its regulations to preempt state failure to warn claims. Initial Br. of Pet. at 9-10. The Solicitor of Labor issued such a letter and the trial court granted reconsideration of its decision on preemption in light of the letter. But, the court still rejected OSHA's view as unpersuasive. *Id*. at 10-11. The court maintained its earlier view that the claim was preempted by the HCS, *see id.*, demonstrating that the Solicitor's letter did not have the force of law.

After the *Nicastro* court rejected the Solicitor's interpretation, OSHA changed the text of the regulation itself in an effort to "eliminate any confusion about the standard's preemptive effect." 77 Fed. Reg. at 17694. In doing so, OSHA stated nothing in the preamble or text of the final rule that it viewed its alteration of the HCS Preemption Clause as purely interpretive and without legal effect. Rather, because OSHA had already expressed its opinion through the

Solicitor's letter, the only rationale for codifying this position in the HCS was to enhance its authority, *i.e.*, to give it binding effect.

Indeed, after OSHA issued this final rule, the New Jersey trial court again granted reconsideration, but this time it ruled that it was bound to apply the HCS's new rule, which limited preemption to state statutes and regulations. Initial Br. of Pet. at 11. Thus, OSHA's change to the Preemption Clause has already impacted the rights and obligations of parties in litigation. Further, the change may lead to new substantive warning requirements absent any of the prescribed processes for OSHA or states to effectuate such requirements.[1]

C. OSHA's Change to the Preemption Clause Does Not Reflect Any Longstanding View of OSHA on Preemption, and Therefore Is a Substantive Change.

OSHA further argues that its limitation of the Preemption Clause is not subject to either notice and comment requirements or judicial scrutiny because its change is not a change at all, but a restatement of OSHA's "longstanding" position that the HCS preempts only state statutes and regulations. *See* OSHA Br. at 15, 51. The authority OSHA cites for this "longstanding" position, though, does not

[1] Since ATRA filed its initial brief, the Ninth Circuit rejected a district court approval of a consent decree between a private entity and a federal agency because the decree included an obligation that requires notice and comment rulemaking. *See Conservation Northwest v. Sherman*, No. 11-35729, – F.3d –2013 WL 1760807 (9th Cir. Apr. 25, 2013). Allowing individual state tort actions to arrive at the same types of obligations would be inconsistent with the policy set forth in this ruling.

demonstrate any such consistent policy on preemption. As discussed below, just the opposite is true. As a result, OSHA must follow the notice and comment requirements of the APA before making this substantive change to the HCS.

1. Since Its Inception, the Plain Language of the HCS Preemption Clause Incorporated Court-Made Law.

The plain language of the Preemption Clause, as initially adopted, stated that "[t]his occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt *any state law* pertaining to this subject." 48 Fed. Reg. 53,280, 53,340 (Nov. 25, 1983) (emphasis added). OSHA's 1987 expansion of the HCS to cover all employers, not just manufacturers, also revised the Preemption Clause to explicitly cover local hazardous communication obligations by "preempt[ing] *any legal requirements* of a state, or political subdivision of a state, pertaining to this subject." 52 Fed. Reg. 31,852, 31,860-61, 31,877 (Aug. 24, 1987) (emphasis added). In addition, the 1987 amendments explicitly recognized that state or local government requirements relating to the issue addressed by this Federal standard may not be adopted or enforced "through *any court* or agency," except pursuant to a Federally-approved state plan. *Id*. (emphasis added). In making this change, OSHA closely tracked the language of Section 18 of the OSH Act. *See* 29 U.S.C. § 667(a).

Since its inception, the plain language of the HCS has been clear: consistent with Section 18 of the OSH Act, it seeks to preempt *all state law* pertaining to issues addressed by the HCS, whether adopted or enforced through statute, regulation, or *court*.

OSHA now claims in hindsight that its adoption of the Preemption Clause was targeted to address only a "proliferation of state and local right-to-know laws," and therefore HCS preemption is limited to state statutes and regulations. OSHA Br. at 5. Nothing in the text or preamble of the 1983 adoption or 1987 amendments, however, indicates that OSHA intended the Preemption Clause to apply more narrowly than its plain language suggested.

2. The Authority OSHA Cites for Its "Longstanding" Position Is Either Inapplicable or Proves OSHA Wrong

OSHA contends that the Agency's "longstanding views on the preemptive effect of OSHA standards" have never wavered, but its authority demonstrates no such thing. OSHA Br. at 51. OSHA's primary support for this assertion is the Solicitor of Labor's letter issued at the request of the plaintiffs' lawyer in *Nicastro* less than six months before issuing the final rule.[2] *See* OSHA Br. at 51-54. To

[2] OSHA notes that Dr. David Michaels recused himself from acting as an expert witness in the *Nicastro* case after he was confirmed to lead OSHA in December 2009. OSHA Br. at 52 n. 16. ATRA does not dispute OSHA's assertion that Dr. Michaels recused himself and that, after such recusal, the court considered whether his videotaped deposition testimony would be admitted and played before the jury at trial.

demonstrate the positions on preemption under previous administrations, OSHA offers letters issued in other contexts. These letters are either inapplicable to this Petition or prove OSHA wrong.

The first three letters OSHA cites do not address preemption for claims against manufacturers at all. OSHA's first example is a 1992 letter addressing the tort liability of a crane operator whose employee is injured in the workplace as a result of the employer not properly maintaining certain equipment. OSHA Br. at 54 (citing http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20702). This case does not implicate preemption of claims against product manufacturers. ATRA recognized in its initial brief that the Savings Clause explicitly preserves available remedies of an injured worker through workers' compensation and related tort claims against his or her employer.

OSHA next cites the Agency's response to a Congressional inquiry on the effect of proposed workplace violence guidelines on the standard of care for personal injury or wrongful death suits. OSHA Br. at 54 (citing http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22281). This 1996 letter offers the Agency's view on the standard of care that a state may require in an existing tort suit. First, this guidance was "advisory in nature" and "voluntary." *Id.* (assuring Congressman Ballenger that there was no need for concern because "[t]he Guidelines cannot and will not be

enforced as though they were standards promulgated after notice-and-comment rulemaking"). Second, the Agency was simply offering its thoughts on an issue entirely of state law. By contrast, in the instant matter, OSHA altered the HCS to have the effect of law, and the issue is one solely of federal preemption, a principle of federal constitutional law rooted in the Supremacy Clause, not state tort law.

OSHA's third example is a 2007 interpretive letter noting that "OSHA cannot determine liability under tort law or state workers' compensation law." OSHA Br. at 55 (citing http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25893). This letter responded to an inquiry from an automotive repair shop regarding how it might protect itself from liability when a worker refuses to wear safety goggles. *See id.* The letter simply confirms that OSHA requires employers to provide, and mandate the use of, such protection. Again, ATRA does not dispute that workers' compensation and related tort claims against one's employer are carved out in the OSH Act's Savings Clause. Thus, none of these letters demonstrate any opinion, let alone a longstanding position, of OSHA with respect to preemption of state law requirements for manufacturers.

OSHA's final citation undermines OSHA's position. OSHA cites to a 2010 interpretive letter stating the agency's position on the preemptive effect of its respirator standards. It is the only one of the letters that is on point, but OSHA

fails to disclose in its brief that the letter reversed OSHA's previous position that tort claims challenging the design and labeling of NIOSH-approved, OSHA-mandated respirators are preempted. *See* Letter from Acting Assistant Secretary of Labor for Occupational Safety and Health Thomas M. Stohler to Daniel K. Shipp, President of the International Safety Equipment Association, Feb. 3, 2010 (Addendum R-1). The Letter further notes that the Agency has not taken a position on "whether the OSH Act savings clause applies to suits by employees against employers, or more generally to third-party suits. . . ." *Id.* at 2 n.5. This Administration's reversal on preemption and new position on the Savings Clause came, as with the Solicitor of Labor's letter, at the request of the plaintiffs' bar and after the President issued an Executive Memorandum disfavoring preemption.[3]

OSHA has shown no "longstanding agency position" that state tort claims are not preempted by the HCS.

D. Even if the Change Qualifies as an Interpretive Rule, Changing the Plain Language to this Extent Requires Notice and Comment

Even if the Court agrees with OSHA that its restriction of the Preemption Clause is merely interpretive, notice and comment rule-making is still required. This Court has found that when an agency modifies an interpretive rule construing

[3] OSHA seeks to support its limitation to the Preemption Clause by citing to the President's Executive Memorandum. *See* OSHA Br. at 13. The only relevance this Memorandum has to this Petition, though, is that it indicates a change, not continuation, of administrative policy.

its substantive regulation, which at the very least was done here, courts "will likely require notice and comment procedure." *Alaska Professional Hunters,* 177 F.3d at 1034 (quoting *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997)). "[T]he Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation 'adopt[s] a new position inconsistent with . . . existing regulations.'" *Paralyzed Veterans*, 117 F.3d at 586 (citing *Shalala v. Guernsey Memorial Hosp*., 514 U.S. 87, 100 (1995)).

Here, OSHA significantly limited the scope of a regulation that had been in effect without significant change for three decades. The original rule and 1987 revision to the Preemption Clause closely tracked the actual language of the OSH Act; the Clause applied to "legal requirements of a state" applied "through any court or agency" regarding an occupational safety or health issue for which there is an OSHA standard in effect. *See* 29 U.S.C. § 667(a).

The 2012 change is not a simple clarification. It draws a bright line that never existed before among the three sources of state law requirements, even though each source of law has the same effect on the regulated community. It also deletes "court," a word expressly included in the OSH Act itself. To the extent that OSHA is authorized to make these changes, the APA requires notice and the opportunity for affected parties to comment.

II. OSHA'S BRIGHT-LINE DISTINCTION BETWEEN OBLIGATIONS APPLIED THROUGH STATE STATUTES AND REGULATIONS, AND THOSE IMPOSED THROUGH STATE COMMON LAW IS CONTRARY TO LAW

In defending its decision to create a bright-line rule against preemption of state tort claims, OSHA misconstrues ATRA's position misreads the OSH Act, and overstates case law related to preemption.

A. OSHA Misconstrues ATRA's Position on When the HCS Preempts Obligations Imposed Through State Common Law

In its effort to re-define the scope of preemption of the HCS, OSHA misstates ATRA's position in ways that cannot be reconciled. OSHA suggests that only conflict preemption is at issue in this Petition, stating that "[b]oth ATRA and Employer *amici* agree that only [conflict] preemption is at issue in the case." OSHA Br. at 19. But, in suggesting that ATRA's preemption position is too broad, it mischaracterizes ATRA's argument the opposite way. It suggests, akin to field preemption, that "ATRA contend[s] that the HazCom standard preempts all state tort lawsuits arising from workplace exposure to hazardous chemicals." OSHA Brief at 34. Both statements fundamentally misrepresent ATRA's position. *See* Initial Brief of Pet. at 46 ("*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.") (emphasis added).

ATRA's position is that the OSH Act preempts state common law to the same extent that it preempts state statutes or regulations that impose legal requirements. The scope of preemption is limited to the scope of the HCS regulations, which is regulating "the issue of classifying the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees." 29 C.F.R. § 1910.1200(a)(2). The HCS provides that it preempts state legal requirements "pertaining to *this subject*." *Id.* (emphasis added). States cannot "adopt or enforce any requirement relating to the *issue addressed by this Federal standard*." *Id.* (emphasis added). The only exception is pursuant to a Federally-approved state plan. *See id.*

The regulation itself provides examples of areas that cannot be regulated absent a state plan:

> Classifying the potential hazards of chemicals and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not limited to, provisions for: developing and maintaining a written hazard communication program for the workplace, including lists of hazardous chemicals present; labeling of containers of chemicals in the workplace, as well as of containers of chemicals being shipped to other workplaces; preparation and distribution of safety data sheets to employees and downstream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures.

Id.; *see also* 52 Fed. Reg. at 31,861 (adding this text in 1987 to "enumerate[ ] the generic areas addressed by the standard for purposes of establishing the parameters of preemption"). Section 18 of the OSH Act, therefore, preempts any state law regardless of the source that imposes these types of prohibited obligations absent an approved state plan.

As a result, when court-made law, as with legislative and regulatory law, imposes obligations where OSHA has acted, preemption is not limited to direct conflicts. *See* 52 Fed. Reg. at 31,860. As OSHA observed in promulgating the 1987 revisions, "The express preemption provisions of the Act apply to all state or local laws which relate to an issue covered by a Federal standard, *without regard to whether the state law would conflict with, complement, or supplement the Federal standard*, and without regard to whether the state law appears to be 'at least as effective as' the Federal standard." *Id*. (emphasis added). It defies logic that requirements and duties imposed through a state legislative or regulatory process cannot apply prospectively without OSHA approval, but courts can instantaneously create and retroactively apply the same requirements without any consideration of the requirements' broader implications on those not before the court.

OSHA also misunderstands ATRA's position in claiming that this Petition seeks to preclude tort remedies "even if the product did not meet OSHA's requirements." OSHA Br. at 27; *see also id*. at 35 n.8 (arguing that the purposes

and objectives of the statute would not be undermined "if juries award damages when manufacturers fail to provide information required by the standard"). ATRA is not asking this Court to find that a claim of injury resulting from noncompliance with the federal standard is preempted; such a claim would not necessarily impose a state legal requirement.[4]

B. OSHA's Attempt to Preserve All Tort Claims Is Based on a Misconstruction of the OSH Act.

To get around this commonsense reading of the OSH Act, OSHA misconstrues the Act in several ways. First, OSHA suggests that, with statutory and regulatory state law requirements, Section 18 of the OSH Act preempts "state laws regulating the same *issue* as federal laws . . . even if they merely supplement the federal standard." OSHA Br. at 21 (quoting *Gade*, 505 U.S. at 100) (emphasis added). But, for court-made state law requirements, OSHA suggests that Section 18 limits preemption to *conflicting* "occupational safety and health *standards*." OSHA Br. at 18 (emphasis added). The Act's plain language does not support OSHA's view.

[4] In considering preemption in both the medical device and insecticide contexts, the Supreme Court has distinguished state common law claims that would impose "parallel requirements," claims that effectively seek to impose liability premised on a violation of a duty imposed by the federal law at issue from tort claims that would impose different or additional obligations on regulated entities. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 447-48 (2005) (citing *Medtronic v. Lohr*, 518 U.S. 470, 495 (1996)).

Nowhere in Section 18 does the OSH Act create separate preemption standards for court-made law than for legislative and regulatory enactments. To the contrary, the OSH Act uniformly precludes any "state law" regulating "any occupational or safety health *issue*" where there is a federal standard in effect. 29 U.S.C. § 667(a) (emphasis added). It also specifically prohibits any *court*, legislature or agency from asserting jurisdiction over such issues. OSHA acknowledges that Section 18 "says nothing about common law rules of tort liability." *Id*. at 22. OSHA should not be permitted to misconstrue the Act's silence to create a distinction that does not exist in the Act's text.

Gade, upon which OSHA relies, does not support OSHA's position. In *Gade*, the Supreme Court broadly held that "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." 505 U.S. at 100. Even if the state could supplement federal regulations without obtaining approval for a state plan, the Court held, "the burden on interstate commerce remains the same." *Id*. at 100-101. While *Gade* did not directly address preemption of tort law, as that issue was not before the Court, the policy the Court set forth applies equally to statutory, regulatory and court-made law. *Id*. at 102 ("Congress sought to promote occupational safety and health while at the same time avoiding duplicative, and

possibly counterproductive, regulation."). During the same Court term (one week later), the Supreme Court equated statutory, legislative and court-made law for preemption purposes. *See Cipollone v. Liggett Group*, 505 U.S. 504, 522 (1992).

Second, OSHA misconstrues *Gade* to assert that product liability claims alleging that a specific warning is inadequate are laws of general applicability, akin to police and fire codes. *See* OSHA Br. at 24-27. This is not true. Tort law, as a general body of law, can be applied to the general public, but not product-based claims related to the labeling of chemicals subject to the HCS. Allegations and resulting obligations imposed on product manufacturers from determinations that warnings are insufficient, are highly specific to a label's content and design.

In fact, *Gade*, undermines OSHA's claim. In *Gade*, the Court held that laws must be *entirely* of general applicability to not be preempted under Section 18. *See id.* at 104-08 (state laws of "dual impact" cannot avoid preemption because it also applies to the public). The Court then recognized that a state tort claim may be preempted if it has a "direct and substantial effect" on the federal scheme:

> In *English v. General Electric Co.*, *supra*, we held that a state tort claim brought by an employee of a nuclear-fuels production facility against her employer was not pre-empted by a federal whistleblower provision because the state law did not have a "direct and substantial effect" on the federal scheme. In the decision below, the Court of Appeals relied on *English* to hold that, in the absence of the approval of the Secretary, the OSH Act pre-empts all state law that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety."

> We agree that this is the appropriate standard for determining OSH Act pre-emption.

Id. at 107 (citing *English v. General Elec. Co.*, 496 U.S. 72, 85 (1990) (internal citations omitted). Thus, under *Gade*, the determining factor for whether a state requirement is preempted is whether it directly and substantially regulates worker safety, not whether it is from statutory, regulatory, or common law. *Id.* at 107-08.

Third, as discussed above, OSHA's contention that the OSH Act cannot preempt tort law because the agency cannot approve a tort law claim as a "state plan" proves ATRA's point. OSHA Br. at 22 ("It defies common sense that Congress would require a state to submit a plan for the 'development' of tort liability claims. . . ."). Congress provided a means for states to regulate occupational safety and health issues where there is already a federal standard – that process is through approval of a state plan. OSHA cannot approve obligations imposed through tort law precisely because these requirements vary from case-to-case, are imposed on a piecemeal basis, can be inconsistent, and are imposed retroactively without notice to manufacturers and other members of the public.

OSHA concedes that courts do not have the institutional tools to "assume responsibility for the development and enforcement of occupational safety and health standards." *See* OSHA Br. at 23 (quoting *Gade*, 505 U.S. at 99). This is the reason the Supreme Court has found that "tort law, applied by juries under a

negligence or strict-liability standard, is less deserving of protection" than statute or regulation. *Riegel v. Medtronic, Inc*., 552 U.S. 312, 325 (2008).

The OSH Act, therefore, envisions a system where a worker injured due to exposure to hazardous materials subject to the HCS can seek damages against his or her own employer, in accordance with the applicable state's workers' compensation program or other such remedy available against that employer. Any changes to aspects of the labels or SDSs that are addressed by federal standards, however, would need to be adopted by OSHA or approved by OSHA pursuant to a state plan. This process assures consistent and effective hazard communication, a result that is inconsistent with law made case-by-case.

C. OSHA Cites Cases that Are No Longer Viable, Inapplicable, or Not Supportive of OSHA's Position

OSHA cites to a list of cases that it asserts creates "great weight" of law that the OSH Act does not preempt "laws of general applicability such as state tort rights and remedies." OSHA Br. at 37-39. As indicated above, product liability claims alleging that specific product labels are inadequate do not result in laws of general applicability. Moreover, a closer look at the rulings OSHA cites reveals that they do not support, and some are contrary to, OSHA's position.

1. Preemption Law Has Evolved Significantly Since Pedraza

The foundational case OSHA cites to is *Pedraza v. Shell Oil Co*., 942 F.2d 48 (1st Cir. 1991).[5] *Pedraza*, however, preceded numerous Supreme Court rulings on preemption over the following twenty years, which collectively undercut many of the pillars upon which *Pedraza* stands. Further, *Pedraza's* expansive reading of the Savings Clause conflicts with the text of the OSH Act and other court rulings.

One year after *Pedraza*, the Supreme Court issued its landmark ruling in *Cipollone*, which found, for the first time, that federal law not only preempts state statutes and regulations, but may also preempt state common law claims. *See* 505 U.S. at 522. In 1965, the Federal Cigarette Labeling and Advertising Act initially "prohibited state and federal rulemaking bodies from mandating particular cautionary *statements* on cigarette labels or in cigarette advertisements," which the court limited to preempting statutory and regulatory statements. *Id*. at 518 (citations omitted and emphasis added). But, in 1969, Congress amended the Act to preempt all "requirement[s] or prohibition[s] . . . imposed under State law," not just statements. *id*. at 520. (quoting Pub. L. No. 91-222, 84 Stat. 87) (codified at 15 U.S.C. § 1334(b). This led the Court to hold:

[5] Several of the decisions cited by OSHA rely principally on *Pedraza* without evaluating its basis or continued viability. *See, e.g., Lopez v. Gem Gravure Co*., 858 N.Y.S.2d 226, 228 (N.Y. App. Div. 2008); *Anderson v. Airco, Inc*., No. C.A. 03-123-SLR, 2003 WL 21842085, at *2 (D. Del. July 28, 2003); *Sakellardis v. Polar Air Cargo, Inc.*, 104 F. Supp.2d 160, 163-64 (E.D.N.Y. 2000); *Jones v. Cincinnati, Inc*., 589 N.E.2d 335, 340 (Mass. App. Ct. 1992).

> The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

Id. at 521 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (alterations in original). As may have been the case with the OSH Act, the Court found that "[a]lthough portions of the legislative history indicated that Congress was primarily concerned with positive enactments by States and localities, the language of the Act plainly reaches beyond such enactments." *Id.*[6]

Since then, the Supreme Court has found that federal standards preempt state common law claims in several other contexts under applicable legislative text. For example, in *Bates*, the Court found that a provision of the Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts state fraud and negligent failure-to-warn claims when the claims would impose "requirements for labeling or packaging in addition to or different from those required" by FIFRA. 544 U.S. at 443 (reiterating the term "requirements" embraces both positive enactments and

[6] OSHA argued that *Cipollone's* 1992 holding that a "requirement" includes common law claims does not provide insight into OSHA's intent of the word "requirement" because OSHA used the word before then, in 1983. Yet, *Cipollone* interpreted the intent of this same word as used in a 1969 law. The fact that OSHA's use of the word "requirement" preceded *Cipollone* is of no consequence.

common-law duties). In *Riegel*, 552 U.S. at 323-25, the Court found that the Medical Device Act (MDA) necessarily preempts state tort duties that would impose any "legal requirement" that is "different from, or in addition to" federal requirements and "relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device," 21 U.S.C. § 360k(a). *Pedraza* is of questionable viability because it does not account for these and other later Supreme Court rulings that federal law can preempt state court-made obligations.[7]

In addition, *Pedraza*, as well as *Lindsey v. Caterpillar*, 480 F.3d 202 (3d Cir. 2007), and *In re Welding Fume Prods. Liab. Litig*., 364 F. Supp.2d 669, 687-88 (N.D. Ohio. 2005), rely on an expansive reading of the Savings Clause that is not consistent with the text of the OSH Act. The Savings Clause does not say that it preserves *all* common law claims, as these cases find. The Savings Clause must be constrained by its remaining text, which is focused solely on not interfering with the ability of an employee injured in the course of employment to seek an available remedy from his or her employer through workers' compensation or related tort

[7] For example, *York v. Union Carbide Corp*., 586 N.E.2d 861, 866 (Ind. Ct. App. 1992), which preceded *Cipollone* by four months, relied on *Pedraza* as showing a "solid consensus" that the OSH Act does not preempt common law claims. Despite this holding, the court found it "somewhat problematic that a judgment in a state tort action will have the effect of establishing, at least implicitly, a standard for a manufacturer to follow in preparing warnings and instructions for a product." *Id*. at 866 n.5.

claims. *See* 29 U.S.C. § 653(b)(4).[8] The Savings Clause does not nullify Section 18's prohibition that any state law – statutory, regulatory, or common law – cannot effectively impose a standard where a federal standard on that issue is in effect.

2. OSHA Cites Cases that Are Inapplicable Because They Did Not Address Standards for Preemption, But Standards for Establishing Federal Jurisdiction

Three cases OSHA cites to are inapplicable because they did not consider the scope of preemption as raised in this Petition, but whether the defense of preemption under the OSH Act provides federal question jurisdiction supporting removal to federal court. *See Anderson*, 2003 WL 21842085; *Fullen v. Philips Electronics North Am. Corp*., 266 F. Supp.2d 471 (N.D. W. Va. 2002); *Washington v. Falco, S & D, Inc*., No. Civ. A. 96-2066, 1996 WL 627999 (E.D. La. Oct. 29, 1996). Whether a preemption defense create federal jurisdiction is a different question than whether preemption exists at all. Removal based on a preemption defense is available only when there is absolute clarity that Congress intended to *completely* preempt all state law in any situation. *See Fullen* 266 F. Supp.2d at 474-75 ("[O]rdinarily, federal preemption is a defense and will not support removal" except where the "preemptive force of [a preemption clause] is so

[8] A few years prior to *Pedraza*, the First Circuit described the purpose of the OSH Act Savings Clause as "to protect worker's compensation acts from competition by a new private right of action and to keep OSHA regulations from having any effect on the operation of the worker's compensation scheme itself." *See Pratico v. Portland Terminal Co*., 783 F.2d 255, 266 (1st Cir. 1985) (citing *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1235-36 (D.C. Cir. 1981)).

powerful as to displace entirely any state cause of action," making such a suit "purely a creature of federal law.").

Since the OSH Act does not preempt *all* state law (as set forth in the Savings Clause, Section 18 of the OSH Act), removal based on a preemption defense may not be appropriate. *See id.* at 477-78; *see also Washington*, 1996 WL 627999, at *3-4 (finding that it was not the express intent of Congress to "completely supersede" or "completely preempt" state law). These decisions on a motion to remand are not rulings on the merits of a preemption defense and should not be construed as if they were.

3. Cases OSHA Cites Recognize that the OSH Act and HCS May Preempt State Tort Law

Fullen and *Wickham* actually support ATRA's position that the OSH Act and HCS preempt certain common law claims and do not require a direct conflict between the HCS and tort law obligations for preemption to apply. *See Fullen*, 266 F. Supp.2d at 478; *Wickham v. Am. Tokyo Kasei, Inc.*, 927 F. Supp. 293, 295-96 (N.D. Ill. 1996).

The *Fullen* court recognized that the HCS established a "uniform regulatory benchmark" and preempts claims seeking "to hold the defendant to a standard of conduct that will interfere with what federal law requires." 266 F. Supp.2d at 478 (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 865 (2000)). In explaining what is meant by "interfere," the court stated that conflict preemption is not

necessary: "If the state tort claim does not seek to hold the defendant to a higher standard of conduct than required by federal law, there can be no interference and the claim is not preempted." *Id*. Thus, the court implicitly recognized, as ATRA states above, that where a defendant has complied with the OSH Act, a tort claim on that issue is preempted.[9]

Similarly, in *Wickham*, the court recognized that the HCS may preempt tort law actions alleging that a manufacturer in compliance with an OSHA standard should have included different or additional warnings because, if successful, the claim would effectively impose regulatory obligations. *See Wickham*, 927 F. Supp. at 295-96. The *Wickham* court noted that courts interpreting acts with preemption provisions similar to the OSH Act have found that certain common law claims were preempted because they would have the effect of creating a state standard. *See id.* at 295 (citing *Moe v. MTD Prods*., 73 F.3d 179 (8th Cir. 1995); *King v. E.I. DuPont De Nemours & Co*., 996 F.2d 1346 (1st Cir. 1993)). A critical distinguishing factor leading the court to find the OSH Act did not preempt the claim before it was that, unlike in *Cipollone*, *Moe*, and *King*, the defendant had not

[9] OSHA acknowledges that while the HCS provides the "minimum information to be provided by manufacturers and importers," any information added by manufacturers and importers cannot "contradict, cast doubt on, or obscure the information required to be on the labels by the standard." *See* OSHA Br. at 33-34. This recognition that the HCS may preclude certain obligations on manufacturers, absent a direct conflict, is not reflected in the bright-line OSHA drew in revising the Preemption Clause.

complied with the federal standard. *See id.* at 295. For this reason, the court concluded that the plaintiff's suit, "if successful, would not have the effect of creating any state imposed modification of OSHA standards and, thus, would not amount to state regulation." *Id.*

This is precisely ATRA's position. A tort law claim that would effectively impose a different or new standard is preempted.

CONCLUSION

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

Respectfully submitted,

/s/ Thomas J. Grever

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Dated: June 6, 2013

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/s/ Thomas J. Grever
Attorney for Petitioner

Dated: June 6, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2013, the foregoing Docketing Statement 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.

Respectfully submitted,

/s/ Thomas J. Grever
Thomas J. Grever

ADDENDUM R-1

DEC 3 1 2008

Mr. Daniel K. Shipp, President
International Safety Equipment Association
1901 North Moore Street
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Dear Mr. Shipp:

This letter is in response to your May 19, 2008 letter in which you requested that the Occupational Health and Safety Administration (OSHA) address whether ordinary principles of conflict preemption preclude state courts from finding that OSHA-required, National Institute for Occupational Safety and Health (NIOSH) certified respirators have been defectively designed, labeled, or packaged when their design, packaging, and labeling comply with all applicable federal regulatory standards and conditions of certification.

OSHA believes that, under certain circumstances, conflict preemption does preclude such claims. OSHA has promulgated an occupational safety and health standard requiring that "[r]espirators shall be provided by the employer when such equipment is necessary to protect the health of the employee."[1] The OSHA standard also specifies that the "employer shall select a NIOSH-certified respirator. The respirator shall be used in compliance with the conditions of its certification."[2] Inconsistent state court decisions could cumulatively interfere with OSHA's federal regulatory scheme by disrupting the manufacture and ready supply of NIOSH-approved respirators. OSHA notes that State legislators and regulators in States with State OSH plans may adopt alternative respirator requirements that are at least as protective as federal standards. Such state plan requirements, however, are subject to federal OSHA approval to ensure they are required by compelling local conditions and do not unduly burden interstate commerce.[3]

Principles of conflict preemption are relevant whether the federal objective is expressed directly in a federal statute, or is embodied in regulations developed and issued by a federal agency directed by Congress to implement the program in question. For example, in *Geier v. American Honda Motor Co., Inc.*[4], the Supreme Court held that a state court tort judgment, essentially requiring all automobiles to be equipped with airbags, was preempted by U.S. Department of Transportation (DOT) regulations that had been

[1] 29 CFR §1910.134(a)(1).
[2] *Id*, §1910.134 (d)(1)(ii).
[3] See 29 U.S.C.§667(c)(2).
[4] 529 U.S. 861 (2000).

formulated by DOT to require some, but not all, 1987 autos to be so equipped. DOT regulations had been carefully devised to simultaneously ensure that safety problems and high production costs could be overcome, and driver acceptance gradually increased, over the relevant time period.

The Court reached this conclusion despite the fact that the Federal Motor Vehicle Safety Act (FMVSA) contained a broadly-worded savings clause which stated that "[c]ompliance with a federal safety standard does not exempt any person from any liability under common law."[5] The *Geier* Court declined to give this savings clause such broad effect as to save design defect claims of this nature from being preempted because doing so "would upset the careful regulatory scheme established by federal law."[6]

OSHA's ability to ensure worker protection depends on the availability of safe and effective respiratory protection devices for employees throughout the nation's workplaces. For this reason, the OSHA/NIOSH regulatory scheme requires manufacturers to obtain NIOSH approval of their respirators before they may be used in the workplace. Moreover, it is unlawful to change the characteristics of a respirator without further NIOSH approval. Because the NIOSH approval process can be quite lengthy, this has the legal effect of locking a manufacturer into a design for substantial periods of time.

A state tort suit in which a jury imposed a different design standard than that approved by NIOSH and required by OSHA would likely substantially interfere with the federal scheme of safety and health regulation, as manufacturers may well decline to produce NIOSH-approved respirators – that is, respirators manufactured in accordance with the designs required by OSHA and NIOSH – if the production of such respirators will subject them to substantial tort liability. Indeed, in some instances the judgments of state courts may be irreconcilable with the judgments of NIOSH. Because manufacturers are locked into an approved design once NIOSH has issued a certificate, such state court judgments could lead to the permanent withdrawal of these necessary, OSHA-required safety devices from the market.

OSHA requires the use of NIOSH-approved respirators because of NIOSH's considerable expertise in balancing the competing concerns at issue in respirator design -- for example, the need to filter out harmful particles while at the same time allowing a

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[5] *Geier*, 529 U.S. at 868 (quoting 15 U.S.C. § 1397(k)). The OSH Act includes a somewhat narrower "savings clause" that provides "[N]othing in this Act shall…enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 654 (b)(4). Whether the OSH Act savings clause applies only to suits by employees against employers, or more generally to third-party suits of the kind you reference in your letter, need not be resolved here. As *Geier* clearly demonstrates, conflict preemption principles will apply even if §4(b)(4) is viewed as applicable to third-party suits.

[6] *Geier* at 870.

sufficient inflow of breathable air. OSHA relies on NIOSH's design criteria to ensure "that respirators (are) reliable and that they perform in the manner and to the extent that the user and employer expect. If respirators fail to perform as expected, the user will be at greatly increased risk of suffering serious, sometimes fatal occupational disease or injury."[7]

NIOSH has carefully calculated the risks and benefits associated with various design specifications and labeling of respirators, and it has deliberately, after extensive testing and research, created requirements that respirator manufacturers must follow if they are to sell respirators to employers. OSHA has, pursuant to its authority under the OSH Act, mandated that employers provide only NIOSH-approved respirators. To allow juries to enforce their own views of respirator design specifications and labeling for which NIOSH, as an expert agency, has already created standards and requirements, would directly conflict with OSHA's mandate that employers only use respirators designed and manufactured in accordance with NIOSH requirements.

For these reasons, OSHA believes that the principles of conflict preemption preclude state courts from finding that OSHA-required, NIOSH-certified respirators are defective when such respirators comply with NIOSH requirements.

Sincerely,

Thomas M. Stohler

Thomas M. Stohler
Acting Assistant Secretary

[7] 60 FR 30353.