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 U.S. 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;
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 of The
Occupational Safety and Health Administration

BRIEF OF INTERVENOR UNITED STEEL WORKERS LOCAL UNION 4-227

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici Curiae*

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

B. Ruling Under Review

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

C. Related Cases

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

CERTIFICATE ON NECESSITY FOR SEPARATE BRIEF

Pursuant to Circuit Rule 28(d)(4), I hereby certify that this separate brief on behalf of Intervenor United Steel Workers Local Union 4-227 is required because agreement could not be reached with the counsel for the other three Union Intervenors as to which issues should be addressed and which arguments should be made, even though extensive personal efforts were made by all counsel to reach such an agreement.

/s/ Steven H. Wodka
Steven H. Wodka

Dated: May 21, 2013

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Other,

GLOSSARY OF TERMS

Abbreviation	Term
ATRA	American Tort Reform Association
Emp. Am. Br.	Amici Brief in support of Petitioner
HCS	OSHA Hazard Communication Standard, 29 C.F.R. §1910.1200, et seq.
NIOSH	National Institute for Occupational Safety and Health
OSH Act	Occupational Safety and Health Act
OSHA	Occupational Safety and Health Administration
OSHA Br.	Brief of Respondents OSHA and the U.S. Department of Labor
Pet. Br.	ATRA's Opening Brief

STATUTES AND REGULATIONS

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

INTRODUCTION

United Steel Workers Local Union 4-227[1] files this brief in support of the Occupational Safety and Health Administration (OSHA) and urges this Court to uphold OSHA's 2012 revision to the preemption provision of the Hazard Communication Standard (HCS) at 29 C.F.R. §1910.1200(a)(2), 77 Fed. Reg. 17786 (Mar. 26, 2012).

In its brief, OSHA has shown that §§ 4(b)(4) and 18 of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. §§653(b)(4), 667, demonstrate a clear Congressional intent to preempt only state regulation of occupational safety and health (in states without an approved OSHA state plan), but not common law claims. This Intervenor adopts all of the brief for OSHA and the U. S. Department of Labor.

United Steel Workers Local Union 4-227 primarily represents the hourly workers at The Goodyear Tire & Rubber Company plant in Niagara Falls, New

[1] The numerical designation for the local union is actually 4-277. In order to avoid any confusion, it will be continued to be referred to as 4-227. Counsel regrets the error.

York. This plant produces rubber chemicals which are used in the manufacturing of tires. Ortho-toluidine is a chemical substance and is one of the raw materials which has been used at this plant since 1957. In 2008, the International Agency for Research on Cancer classified ortho-toluidine as a Group 1 human carcinogen because "of studies of workers exposed to *o*-toluidine that reported increased risk of urinary-bladder cancer." *See* U.S. Department of Health and Human Services, Public Health Service, National Toxicology Program, Report on Carcinogens, Twelfth Edition at 416 (2011), *available at* http://ntp.niehs.nih.gov/go/roc12. In a study of the Goodyear plant conducted by the National Institute for Occupational Safety and Health (NIOSH), workers exposed to ortho-toluidine for more than 10 years had a greater than 27 fold increased incidence of bladder cancer, a result which was highly statistically significant. *See* National Institute for Occupational Safety and Health, Center for Disease Control and Prevention, Pub. No. 90-116, *Preventing Bladder Cancer from Exposure to o-Toluidine and Aniline* (1990), *available at* http://www.cdc.gov/niosh/docs/90-116/.

Since 1987, nine Goodyear workers have successfully prosecuted product liability claims against ortho-toluidine manufacturer E. I. DuPont de Nemours & Company due to its failure to warn of the risk of bladder cancer on its ortho-toluidine material safety data sheets, issued after November 25, 1985, the date

when the HCS became effective for manufacturers.

SUMMARY OF ARGUMENT

No evidence of a conflict between the Hazard Communication Standard, as revised, and any state's common law is presented by Petitioner, the American Tort Reform Association (ATRA) and its Amici. Rather, all suggestions of a potential conflict are purely speculative.

ARGUMENT

I. There is no evidence of an "inevitable collision" between the HCS and common law failure to warn claims.

Throughout their briefs, both ATRA and its Amici allude to potential, hypothetical conflicts between the HCS and tort law. "OSHA's revision of the Preemption Clause allows state common law to impose. . .potentially conflicting labeling obligations on manufacturers of chemicals used in the workplace." Pet. Br. 12. Not one case is cited as an example of a potential conflict with the 2012 revisions to the HCS. Their fears, unsupported by any actual cases of conflict in the 30 years since the HCS was promulgated, hardly justify a decision to invalidate the preemption provision of HCS on pre-enforcement review. "Impossibility preemption is a demanding defense" which the defendant in a product liability action must prove by showing "that it was impossible to comply with both federal

and state requirements." *Wyeth v. Levine,* 555 U.S. 555, 573 (2009). Neither ATRA nor its Amici come close to making such a showing.

When state and federal law conflict--*i.e.*, when "it is impossible for a private party to comply with both state and federal law" or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," federal law impliedly pre-empts state law. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000) (internal quotation marks omitted). The HCS recognizes that federal law is supreme. OSHA has advised that when "a state tort rule directly conflict[s] with the requirements of the standard," the common law claim will be preempted. 77 Fed. Reg. 17,694.

To establish the "demanding defense" of conflict preemption, defendants in a tort action must show an "inevitable collision" between federal and state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963). "The existence of a hypothetical or potential conflict is insufficient to warrant" pre-emption of state law. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); *See also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 110 (1992), (Kennedy, J., concurring in part and concurring in judgment) ("a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal act").

ATRA and its Amici complain that the 2012 HCS revisions so restrict a manufacturer's discretion to add additional, stronger warnings that conflicts will inevitably arise with common law claims. Pet. Br. 47. They are wrong. OSHA specifically allowed manufacturers to place additional information on the label if "it provides further detail and does not contradict or cast doubt on the validity of the standardized hazard information." 29 C.F.R. §1910.1200, App. C.3.1., 77 Fed. Reg. 17826. *See also* 2012 HCS Preamble, 77 Fed. Reg. 17725 ("In addition, the OSHA requirements are intended to be the minimum information to be provided by manufacturers and importers. Under the GHS, as well as the current HCS and the final rule, chemical manufacturers and importers are free to provide additional information regarding the hazardous chemical and precautions for safe handling and use.").

ATRA and its Amici have not cited any cases which demonstrate a potential conflict between the 2012 revisions to the HCS and any state's common law. Rather, adherence to the HCS requirements can provide a defense to such claims. One court granted summary judgment and dismissed a plaintiff's Illinois failure to warn claim because the manufacturer provided a label, including a pictogram and precautionary statement, nearly identical to that required for this product under the 2012 revisions to the HCS.

> Here, the label clearly procured the attention of consumers. In fact, not only did the label procure Plaintiff's attention, but it also contained attention grabbing fonts and symbols, like diagrams of skulls and crossbones as well as large text reading "DANGER POISON."

The court held that the manufacturer's warnings were adequate as a matter of law. *Hoffman v. Hercules Chemical Co.*, No. 03-C-5222, 2004 U.S. Dist. LEXIS 22505, at *17-19 (N.D. Ill. Nov. 3, 2004).

ATRA's Amici fear that the mandatory placement of first aid information at the fourth section of the safety data sheets (SDS) under the 2012 revisions may lead to a critical delays in treatment. *See* Emp. Am. Br. 23. However, labels and safety data sheets have different purposes. "SDSs are intended to provide detailed technical information on a hazardous chemical." 77 Fed. Reg. 17594. There is no requirement that a safety data sheet be kept immediately adjacent to the location where the chemical is being used. Rather, where a "rapid" first aid response is "crucial," such information is to appear on the label of the product. 29 C.F.R. §1910.1200 App. C.2.4.7, 77 Fed. Reg. 17826.

Since 1985 when the HCS became effective, there has been considerable litigation over the inadequacy of the information provided on material safety data sheets (MSDS) because the MSDSs failed to provide essential health and safety information which workers needed in order to protect themselves. This is the

remedy which is at stake in this litigation.

In *Fullen v. Philips Electronics North Am. Corp.*, 266 F.Supp.2d 471, 473-474 (N.D.W.Va. 2002), 1200 factory employees filed product liability claims alleging that exposure to 25 toxic substances caused them to develop eleven types of cancer and other diseases. No conflict was alleged between the plaintiffs' claims and the defendants' obligations under the HCS.

In *Bass v. Air Products & Chemicals, Inc.*, No. A-4542-03T3, 2006 N.J. Super. Unpub. LEXIS 2873 (App.Div., May 25, 2006), a case relied upon by both ATRA and its Amici, five former paint factory workers alleged that were exposed to chemical dust and fumes of "more than 400 different chemicals" and, as a result of such exposure, developed serious illnesses, including coronary artery disease and obstructive pulmonary disease. The plaintiffs specifically alleged that the material safety data sheets supplied by defendants failed to conform with the HCS at 29 C.F.R. § 1910.1200(g)(2) because the "defendants did not identify irreversible cardiac, pulmonary, hepatic, ophthalmological and dermatological injuries as potential health hazards." *Id.* at *23-24. While the *Bass* court preempted the plaintiffs' common law claims due to an erroneous interpretation of 29 C.F.R. §1910.1200(a)(2) (see OSHA Br. 40), none of ninety-seven defendant chemical manufacturers and distributors alleged that a conflict existed between the

plaintiffs' common law claims and the defendants' obligations under the HCS.

In *Nicastro v. Aceto Corp.*, No. L-3062-08 (N.J. Super. Ct. Monmouth Co.), a proceeding relied upon by ATRA and its Amici, the plaintiff alleged that defendant DuPont's material safety data sheets failed to provide information on studies which demonstrated a causal relationship between occupational exposure to ortho-toluidine and the development of bladder cancer, the disease which killed her husband. *See* Pet. Br. Addendum A-10, Exh. D; and A-12.

Under New Jersey law, "manufacturers have a duty to warn of dangers of which they know or should have known on the basis of reasonably obtainable or available knowledge." *Feldman v. Lederle Laboratories*, 479 A.2d 374, 376, 97 N.J. 429, 434 (1984). In New Jersey, "the duty to warn is triggered by early warning flags of danger from a product, so that people are not needlessly exposed to the possible dangers of a product during the time that extensive testing is being done." *Magistrini v. One Hour Martinizing Dry Cleaning*, 109 F.Supp.2d 306, 313-314 (D.N.J. 2000). DuPont never asserted that a conflict existed between New Jersey's common law and the HCS. Rather, DuPont's expert testified that the information sought by the Plaintiff was not required by the HCS. *See* Pet. Br.

Addendum A-10, Exh. D, Transcript of Oral Argument at 164-165[2].

Under the 2012 HCS revisions for safety data sheets at 29 C.F.R. § 1910.1200(g), manufacturers must include a Section 11 entitled "Toxicological Information." As a "minimum" requirement, Section 11 must include "delayed and immediate effects and also chronic effects from short- and long-term exposure." App. D, 77 Fed. Reg. 17784-5. "This requirement simply does not conflict with any general state law duty; if anything, OSHA's requirement of an 'adequate warning' is entirely contiguous with the general duty imposed by the common law to warn others of known hazards." *In re Welding Fume Prods. Liab. Litig.*, 364 F.Supp.2d 669, 697 (N.D. Ohio 2005). *See also Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960)* ("the teaching of this Court's decisions. . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists"). In sum, a manufacturer is free to add as much information as it deems necessary to the safety data sheet in order to both fully inform the user of the toxicological effects of the chemical substance and protect itself against

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[2] ATRA offers a factually inaccurate sequence of the events in the *Nicastro* case. Plaintiff's counsel Wodka never "sought the opinion" of OSHA "after" partial summary judgment was granted against his client." *See* Pet. Br. 10. Wodka sought OSHA's official interpretation of the HCS preemption provision on March 2, 2011. *See* Appendix to OSHA Br. Partial summary judgment was entered in favor of DuPont more than five months later on August 5, 2011. *See* ATRA Addendum A-10, Ex. C.

product liability claims.

II. Under ATRA's reasoning, all asbestos cancer claims since 1972 should have been preempted.

ATRA contends "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." Pet. Br. 39. Asbestos illustrates the fallacy of this argument. On June 7, 1972, OSHA issued a standard regulating occupational exposure to asbestos, pursuant to §6(b)(5) of the OSH Act. Although researchers at the time had already linked asbestos exposure to cancer, OSHA considered and rejected a proposal to require cancer warning labels in workplaces with asbestos exposure. Instead, the OSHA required warning label only stated: "Breathing Asbestos Dust May Cause Serious Bodily Harm." *See Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 484 (D.C. Cir. 1974). OSHA's weak, but mandatory labeling for asbestos products did not preempt the courts from imposing liability in tort upon asbestos manufacturers who failed to warn of mesothelioma and other cancers posed by the product. "[E]vidence that asbestos is a carcinogen was clearly probative of the nature and extent of the defendants' duty and corresponding breach." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1313, 1320-1321 (5th Cir. 1985).

Under ATRA's theory, OSHA's early asbestos standard, requiring labels which did not warn of cancer risks, should have preempted all asbestos cancer claims for exposures after June 1972. OSHA's standard, obviously, did not have that effect. In fact, there are no reported cases which hold that OSHA's 1972 standard preempts any personal injury claim.

CONCLUSION

For the foregoing reasons, and those offered by OSHA and the U.S. Department of Labor, ATRA's petition for review should be denied.

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CERTIFICATE OF COMPLIANCE

This brief was composed in Corel WordPerfect using Times New Roman 14-point typeface, and complies with the type-volume limitation prescribed in Circuit Rule 32(a)(2)(B) because it contains 2,309 words, excluding the sections referenced in Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ Steven H. Wodka
Steven H. Wodka

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2013, a copy of the foregoing Brief of Intervenor United Steel Workers Local Union 4-227 was filed electronically through the Court's CM/ECF filing system on the attorneys in Case No. 12-1229.

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