ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED IN THIS MATTER

**No. 12-1229**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**American Tort Reform Association, et al.,**

Petitioners,

v.

**Occupational Safety and Health Administration**
and **U.S. Department of Labor,**

Respondents,

and

**United Steel Workers Local Union 4-227; Change To Win;**
**International Union, United Automobile, Aerospace**
**and Agricultural Implement Workers of America (UAW);**
and **United Steel, Paper and Forestry, Rubber, Manufacturing,**
**Energy, Allied Industrial and Service Workers International Union (USW),**

Intervenors for Respondents.

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

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# Brief of Intervenors Change To Win, UAW, and USW

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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.

Dated: May 23, 2013

/s/ Randy S. Rabinowitz
Randy S. Rabinowitz

/s/ Stephen A. Yokich
Stephen A. Yokich

**CERTIFICATE OF COUNSEL IN SUPPORT OF SEPARATE INTERVENOR BRIEFS**

The USW, UAW and international unions affiliated with Change to Win have been active participants in several OSHA rulemakings to develop and revise the Hazard Communication Standard. USW, in particular, has filed several lawsuits seeking to compel a stronger hazard communication for workers. Each union participated in the rulemaking which is at issue in this proceeding.

In compliance with Local Rule 28(d)(4), Counsel for the USW, UAW, and Change to Win made every effort to join in a brief with the other Intervenor in support of Respondent, USW Local 4-227. Despite our best efforts to reach agreement on a joint brief, we were not able to do so.

Dated: May 23, 2013

/s/ Randy S. Rabinowitz
Randy S. Rabinowitz

/s/ Stephen A. Yokich
Stephen A. Yokich

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# GLOSSARY

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|---|---|
| ATRA | American Tort Reform Association |
| HCS | Hazard Communication Standard, 29 C.F.R. § 1910.1200 |
| IARC | International Agency for Research on Cancer |
| NTP | National Toxicology Program |
| OSHA | Occupational Safety & Health Administration |
| OSH Act | Occupational Safety & Health Act of 1970, 29 U.S.C. § 651 |
| OSHA Br. | Brief for the Respondent, Occupational Safety and Health Administration |
| UAW | International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America |
| USW | United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union |

## INTRODUCTION

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and Change to Win (collectively referred to as the Unions or Union Intervenors) file this brief in support of the Occupational Safety and Health Administration (OSHA) and urge this Court to uphold OSHA's revisions to its Hazard Communication Standard. 29 C.F.R. § 1910.1200. 77 Fed. Reg. 17574 (Mar. 26, 2012) (HCS).

## JURISDICTIONAL STATEMENT

The Union Intervenors adopt OSHA's "Statement of Jurisdiction."

## PERTINENT STATUTES AND REGULATIONS

All applicable statutory and regulatory provisions are included in the Appendix to Petitioner's brief.

## STATEMENT OF ISSUES PRESENTED

The Union Intervenors adopt OSHA's "Statement of Issues Presented."

## STATEMENT OF FACTS

The Union Intervenors adopt OSHA's "Statement of Facts."

## SUMMARY OF ARGUMENT

OSHA's revised HCS, intended to implement a globally harmonized system of hazard communication, set a floor establishing minimal standards for hazard communication; OSHA specifically permitted manufacturers and importers to provide workers with additional warnings about hazards they would otherwise not be aware of. 77 Fed. Reg. 17725. The common-law duty to warn complements, but does not conflict with, the HCS. Accordingly, this Court should reject the American Tort Reform Association's (ATRA) challenge to the preemption provision of the HCS. 29 C.F.R. § 1910.1200(a)(2) (referred to as the preemption provision).

## ARGUMENT

The Union Intervenors file this separate brief to explain how HCS and tort law work together so workers have comprehensive information about job-related chemical hazards, can act to protect themselves from chemical-related illnesses, and, if they get sick, can recover compensation for their illness.

**Manufacturers Can Comply With HCS and the Demands of Tort Law, and Such Complementary Warnings Further OSHA's Goal of Providing Workers With Information on Chemical Hazards**

Unions have been pushing for a complementary system of hazard communication for more than three decades to ensure that workers are apprised of the chemical hazards to which they are exposed and are empowered to monitor their exposure to chemicals, bargain for reduced exposures, and obtain preventive medical care when they are at risk. At many steps, OSHA has been a reluctant regulator, often proposing to do less than what the unions believed necessary to protect workers. Tort law has supplemented HCS by providing added incentives for manufacturers comprehensively to warn workers about chemical hazards and to provide compensation when they fall ill from chemical risks about which they were not warned. Tort law furthers OSHA's goal of providing workers with "better information" about chemicals so "they will be able to make their own risk assessments, and choose appropriate risk management measures." 77 Fed. Reg. 17720.

Concern for the lack of information about chemical hazards available to workers began in the 1970s. The National Institute of Occupational Safety and Health and an OSHA advisory committee, as well as several committees of Congress, urged OSHA to promulgate an HCS. *See generally United Steelworkers v. Auchter,*

763 F.2d 728, 731-32 (3d Cir. 1985). When OSHA failed to act promptly, a number of states adopted what were then called "right to know" laws.

Among OSHA's goals when it first adopted the HCS in 1983 was to preempt existing state and local right-to-know laws and establish a uniform federal minimum standard for disclosure of chemical hazards. 48 Fed. Reg. 53284 (Nov. 1983). HCS required chemical manufacturers to "evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous." 29 C.F.R. § 1910.1200(d)(1)(1984). The 1983 standard applied only in the manufacturing sector and, among other provisions, did not require manufacturers to disclose the identity of chemicals used in the workplace if they designated such information "trade secrets." *Steelworkers v. Auchter*, 763 F.2d at 732-33.

Unions filed suit to compel OSHA to expand HCS and to limit the circumstances under which information about chemical identity and hazards could be withheld from workers as trade secrets. *Steelworkers v. Auchter*, 763 F.2d at 736. The Third Circuit agreed that HCS was too limited and ordered OSHA to expand the scope of HCS beyond the manufacturing sector. 763 F.2d at 739-40. And, when OSHA delayed responding to the Third Circuit's remand, unions obtained a court order requiring OSHA to move more expeditiously. *United Steelworkers v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987). Unions sued again when the Office of

Management and Budget, under the guise of the Paperwork Reduction Act, tried to limit disclosures by chemical manufacturers to workers. *See Dole v. Steelworkers*, 494 U.S. 26 (1990).

Unions fought vigorously – by participating in several HCS rulemakings, by seeking review when OSHA failed adequately to protect workers, and by participating in the negotiations for a globally harmonized system of hazard communication – to ensure HCS broadly protects workers so they have the necessary information to better protect their own health. The HCS in effect for the past three decades does so by establishing a regime – described in more detail in OSHA's brief (OSHA Br. at 9-11) – where chemical manufacturers have broad discretion about how to communicate warnings about chemical hazards. OSHA does not review or approve these warnings in advance.

Tort law complements HCS. It provides an important, and often the only, source of compensation for those made ill by chemical hazards about which they were unaware. There is no private right of action under the OSH Act, so it provides no basis for compensating ill workers. *United Steelworkers v. Marshall*, 647 F.2d 1189, 1235 (D.C. Cir. 1980). Workers' compensation is widely recognized as providing limited compensation to workers who develop chronic illnesses, such as cancer, long

after their workplace exposures end.[1] "It would thwart the overriding Congressional intent to promote worker safety if federal standards [such as HCS] preempted state law governing issues [like compensation for illness] that are not federally regulated." *New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (3d Cir. 1985).

Since HCS was promulgated in 1983, courts have recognized that there is no conflict between the common-law duty to warn about chemical hazards and HCS. See OSHA Br. at 26-27. To the extent that tort law induces chemical manufacturers to provide warnings beyond the minimum necessary to meet HCS, those added warnings further OSHA's goals of providing information about chemical hazards to workers. Nothing about the revised HCS suggests that Congress's intent to preserve tort law, recognized by every court to have considered the issue, should be upended.

The revised HCS, just like the 1983 HCS, permits manufacturers to add additional warnings beyond the minimum required to meet the standard. 77 Fed. Reg. 17725. While the revised HCS is more specific about the form of the warnings manufacturers must provide, it grants them greater discretion to determine which

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1 See, e.g., Spieler and Burton, "The Lack of Correspondence Between Work-Related Disability and Receipt of Workers' Compensation Benefits," 55 Am. J. Industrial Med. 487 (2012), http://workerscompresources.com/wp-content/uploads/2012/11/21034_ftp1.pdf. Workers' compensation benefits, which provide only partial wage replacement but not compensatory damages, are paid by employers. The common-law duty to warn is imposed on manufacturers. One remedy is not a substitute for the other.

hazards to warn about than they previously enjoyed. Under the 1983 HCS, a manufacturer was required to warn of a hazard if a single positive study in any species showed an adverse health effect, 77 Fed. Reg. 17706; manufacturers were also required to warn about a cancer hazard if either the National Toxicology Program (NTP) or the International Agency for Research on Cancer (IARC) designated the substance as a possible carcinogen. 77 Fed. Reg. 17706, 17718. The revised HCS allows manufacturers to rely on the "looser" weight-of-evidence standard (see USW Post-Hearing Comments Doc. ID #0647) when evaluating chemical hazards. OSHA permitted, but did not require, chemical manufacturers to warn about hazards, particularly cancer risks, when strict adherence to the "weight-of-evidence criteria" might not require such warnings to "maintain the protections of the current rule and provide information to downstream users so they can determine the appropriate protective measures to be taken" to reduce the risk. 77 Fed. Reg. 17719. See also 29 C.F.R. § 1910.1200 App. A at 6.4.1-2.

OSHA recognized that identifying a substance as a cause of cancer is often controversial, 77 Fed. Reg. 17706; manufacturers have challenged many OSHA standards because they question whether the weight of evidence shows a causal link

between workplace exposures and cancer.[2] Given discretion under HCS to weigh evidence and determine which hazards to warn about, some manufacturers might opt not to include cancer warning labels on their products. To the extent tort law creates added financial incentives for manufacturers to warn more broadly, it furthers the goal of HCS by providing workers with "better information . . . about the chemicals in their workplaces." 77 Fed. Reg. 17720.[3]

Styrene represents an example of how tort law might complement OSHA's HCS and provide workers with needed warnings about cancer risk. Styrene is a clear, liquid, volatile organic compound used predominantly in the manufacture of plastics

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2 *See, e.g., Synthetic Organic Chem. Mfrs. Ass'n v. Brennan*, 503 F.2d 1155, 2 OSH Cases 1159 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975) (rejecting industry challenge to the adequacy of OSHA's reliance on animal data); *Dry Color Mfrs. Ass'n v. Department of Labor*, 486 F.2d 98, 104, 1 OSH Cases 1331 (3d Cir. 1973) (same); *Society of Plastics Indus. v. OSHA*, 509 F.2d 1301, 2 OSH Cases 1496 (2d Cir.), *cert. denied sub nom. Firestone Plastics v. Department of Labor*, 421 U.S, 992 (1975) (finding vinyl chloride regulation proper where based on evidence of cancer in animals and in three employees); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1489, 12 OSH Cases 1905 (D.C. Cir. 1986) (inconclusive but suggestive evidence provides an adequate basis for OSHA regulation); *UAW v. Pendergrass*, 878 F.2d 389 (D.C. Cir. 1989) (OSHA reliance on animal data to extrapolate cancer risk is sound).

3 Under the weight-of-evidence standard, a manufacturer might conclude that a single positive study did not require it to label its product a carcinogen. The manufacturer would still be required to include information about the positive study in the "other considerations" section of its safety data sheet. 77 Fed. Reg. 17706.

and rubber.[4] Thousands of USW members are exposed to styrene on the job. (USW Post-Hearing Comments Doc. ID #0647). As far back as 1988, studies showed styrene caused cancer in laboratory mice. Human studies in the years since have suggested that occupational exposure to styrene can lead to increased risk of lymphomas, leukemia, and pancreatic or esophageal cancers. The IARC has listed styrene as "possibly carcinogenic to humans" since 2002. NTP recently listed styrene as "reasonably anticipated to cause cancer." *See Styrene Information and Research Center v. Sebelius*, 2013 U.S. Dist. LEXIS 68654 (D.D.C.), http://ntp.niehs.nih.gov/ntp/roc/twelfth/profiles/Styrene.pdf. Under the 1983 HCS, styrene manufacturers would have been required to label styrene as a carcinogen. (Transcript of March 3, 2010 Hearing Doc. ID #0494 at p. 138.)

But industry, relying on a weight-of-evidence analysis, vigorously denies that styrene is a carcinogen and is unlikely voluntarily to label it as a carcinogen, see *id.*, even though it is permitted to do so. Although the unions and OSHA might disagree with the result, it is the industry which makes the initial determination. If tort law induces the industry to provide warnings on the chemical label beyond the minimum required by HCS, there is no conflict with OSHA standards. Preemption would not

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4 12th Report on Carcinogens (NTP 2012), http://ntp.niehs.nih.gov/ntp/roc/twelfth/profiles/Styrene.pdf.

be warranted in such a case because the manufacturer could comply with the demands of both federal and state law. *See Wyeth v. Levine*, 555 U.S. 555, 573 (2009) (impossibility preemption not demonstrated unless it is impossible to comply with both federal and state requirements). What is more, stronger warnings for workers about the potential hazards of styrene exposure further, rather than obstruct, the purposes of the OSH Act and the HCS.

Congress did not intend that the OSH Act preempt tort law under these circumstances. In *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), the Supreme Court made clear that § 18 of the OSH Act generally does not preempt "state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and non-workers alike." 505 U.S. at 107. The common-law duty to warn is such a law of general applicability.

Congress further demonstrated its intent not to preempt tort law in § 4(b)(4) of the OSH Act. 29 U.S.C. § 653(b)(4). In *United Steelworkers v. Marshall*, 647 F.2d 1189, 1235-36 (D.C. Cir. 1980), this Court interpreted the OSH Act to mean that "when a worker actually asserts a claim under workers' compensation or some other state law, § 4(b)(4) intends neither the worker nor the party against whom the claim is made can assert that any OSHA regulation or the OSH Act itself preempts any

element of state law." The HCS preemption provision merely restates the command of § 4(b)(4). Preemption of the common-law duty to warn would "diminish . . . the common law or statutory rights of . . . employees" in violation of § 4(b)(4) of the OSH Act. 29 U.S.C. § 653(b)(4). This court should follow the lead of the Third Circuit and reject the broad reading of the preemptive effect of HCS suggested by ATRA. *Cf. New Jersey Chamber of Commerce v. Hughey*,774 F.2d at 592 (rejecting broad reading of preemptive effect of OSHA standards).

## CONCLUSION

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

Dated: May 23, 2013

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Union certifies that its brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,345 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface, using WordPerfect 12.

Dated: May 23, 2013

/s/ Randy S. Rabinowitz
Randy S. Rabinowitz

/s/ Stephen A. Yokich
Stephen A. Yokich

**CERTIFICATE OF SERVICE**

I hereby certify that on May 23, 2013, I caused the foregoing Brief of the Intervenor to be filed electronically with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia by using the appellate CM/ECF System. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 23, 2013

/s/ Stephen A. Yokich
Stephen A. Yokich