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 & 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, AFL-CIO,

Intervenors for Respondent.

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

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF MANUFACTURERS; AMERICAN PETROLEUM INSTITUTE; AND AMERICAN CHEMISTRY COUNCIL
IN SUPPORT OF PETITIONER AND VACATUR

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), I hereby certify that:

A. Parties And *Amici*. Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioner:

1. *Amicus curiae* the Chamber of Commerce of the United States of America;
2. *Amicus curiae* the National Association of Manufacturers;
3. *Amicus curiae* the American Petroleum Institute; and
4. *Amicus curiae* the American Chemistry Council.

The required corporate disclosure statement pursuant to Circuit Rule 26.1 follows this certificate.

B. Rulings Under Review. References to the rulings at issue appear in the Brief for Petitioner.

C. Related Cases.

References to related cases appear in the Brief for Petitioner.

Dated: March 15, 2013

s/ Jacqueline M. Holmes
Jacqueline M. Holmes

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for *amici* states the following:

1. No *amicus curiae* has outstanding shares or debt securities in the hands of the public, and none has a parent company. No publicly held company has a 10% or greater ownership interest in any *amicus curiae*.

2. The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country.

3. The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

4. The American Petroleum Institute is a nationwide, not-for-profit association representing over 500 member companies engaged in all aspects of the oil and gas industry, including: science and research; exploration for and production of oil and natural gas; transportation; refining of crude oil; and marketing of oil and gas products.

5. The American Chemistry Council is a not-for-profit trade organization representing the companies that make the products that make modern life possible, while working to protect the environment, public health, and security of our nation.

Dated: March 15, 2013

s/ Jacqueline M. Holmes
Jacqueline M. Holmes

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

RULE 26.1 CORPORATE DISCLOSURE STATEMENT.................................... ii

TABLE OF AUTHORITIES vi

GLOSSARY OF TERMS xi

STATUTES AND REGULATIONS 1

STATEMENT OF INTEREST 1

REGULATORY BACKGROUND 3

I. OSHA'S 1983 HAZARD COMMUNICATION STANDARD AND 1994 AMENDMENTS 4

II. THE 2012 REVISIONS TO THE HAZARD COMMUNICATION STANDARD 6

SUMMARY OF ARGUMENT 10

ARGUMENT 11

I. OSHA'S AMENDMENTS TO THE HCS'S PREEMPTION PROVISION ARE INVALID FOR LACK OF PROPER NOTICE 11

II. OSHA'S STATEMENTS ON PREEMPTION ARE CONTRARY TO LAW 15

A. OSHA's View Contradicts Firmly Established Conflict Preemption Principles 15

1. The OSH Act And HCS Aim To Establish Uniform Occupational Safety And Health Requirements 18

2. State Tort Claims May Conflict With The Important Federal Goal Of Achieving Uniformity In Hazard Communications 19

3. The Saving Clause Does Not Save Tort Claims From Conflict Preemption 25

B. OSHA's Views On Preemption Are Not Entitled to Deference 25

TABLE OF CONTENTS
(continued)

Page

1. *Chevron* Does Not Apply 26

2. *Skidmore* Deference Is Not Warranted 27

CONCLUSION 32

CERTIFICATE OF COMPLIANCE ....

CERTIFICATE OF SERVICE ....

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Petroleum Inst. v. Cooper,
835 F. Supp. 2d 63 (E.D.N.C. 2011) 14

Auer v. Robbins,
519 U.S. 452 (1997) 27

Bass v. Air Prods. & Chems., Inc.,
No. ESX-L-694-99, 2006 WL 1419375 (N.J. Super. Ct. May 25, 2006)
(per curiam) 20

Chamber of Commerce v. Brown,
554 U.S. 60 (2008) 13

Chamber of Commerce v. Edmondson,
594 F.3d 742 (10th Cir. 2010) 14

Chamber of Commerce v. EPA,
642 F.3d 192 (D.C. Cir. 2011) 14

Chamber of Commerce v. Whiting,
131 S. Ct. 1968 (2011) 13, 14

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 25, 26, 31

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 16

Covad Commc'ns Co. v. FCC,
450 F.3d 528 (D.C. Cir. 2006) 12

Envtl. Integrity Project v. EPA,
425 F.3d 992 (D.C. Cir. 2005) 12

Gade v. Nat'l Solid Waste Mgmt. Ass'n,
505 U.S. 88 (1992) 16, 17, 18

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES
(continued)

Page(s)

**Geier v. Am. Honda Motor Co.*,
529 U.S. 861 (2000).................................... 17, 18, 19, 20, 21, 22, 23, 25, 27, 29

Healthcare Ass'n of N.Y. State v. Cuomo,
No. 1:03-cv-0413, 2011 U.S. Dist. Lexis 155141
(N.D.N.Y. Sept. 7, 2011) 14

In re Welding Fume Prods. Liab. Litig.,
364 F. Supp. 2d 669 (N.D. Ohio 2005) 25

Kasten v. Saint-Gobain Performance Plastics Corp.,
131 S. Ct. 1325 (2011)..27

Kurns v. RR. Friction Prods. Corp.,
132 S. Ct. 1261 (2012)..14

La. Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986)..26

Maryland v. Louisiana,
451 U.S. 725 (1981)..15

McCulloch v. Maryland,
17 U.S. 316 (1819)..15

Motion Picture Ass'n of Am., Inc. v. FCC,
309 F.3d 796 (D.C. Cir. 2002)..27

Mulhall v. Hannafin,
841 N.Y.S.2d 282 (N.Y. App. Div. 2007)..20

New Mexico v. Gen. Elec. Co.,
467 F.3d 1223 (10th Cir. 2006) 14

Pedraza v. Shell Oil Co.,
942 F.2d 48 (1st Cir. 1991)...25

**Pliva, Inc. v. Mensing*,
131 S. Ct. 2567 (2011)...21, 23, 26, 27

TABLE OF AUTHORITIES
(continued)

Page(s)

Riegel v. Medtronic, Inc.,
552 U.S. 312 (2008).....16

Salley v. Option One Mortgage Corp.,
925 A.2d 115 (Pa. 2007).....14

**Skidmore v. Swift & Co.*,
323 U.S. 134 (1944)..... 11, 26, 27, 28, 29, 30, 31

United States v. Mead Corp.,
533 U.S. 218 (2001).....26

Worm v. Am. Cyanamid Co.,
970 F.2d 1301 (4th Cir. 1992).....17, 21

**Wyeth v. Levine*,
555 U.S. 555 (2009)..... 12, 26, 27, 28, 29, 30

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. art. VI, cl. 2.....15

5 U.S.C. § 553.....12

21 U.S.C. § 360k.....26

29 U.S.C. § 653.....25

29 U.S.C. § 655.....12, 18

National Traffic and Motor Vehicle Safety Act of 1966,
15 U.S.C. § 1831 *et seq.*.....17

OTHER AUTHORITIES

29 C.F.R. § 1910.1200(a) (1984).....4

29 C.F.R. § 1910.1200(a) (2011).....29

29 C.F.R. § 1910.1200(a).....9

TABLE OF AUTHORITIES
(continued)

Page(s)

29 C.F.R. § 1910.1200(c)....................21

29 C.F.R. § 1910.1200(d)....................4, 8

29 C.F.R. § 1910.1200(e)....................5

29 C.F.R. § 1910.1200(f) (1984)....................5

29 C.F.R. § 1910.1200(f)....................5

29 C.F.R. § 1910.1200(g) (1984)....................6

*29 C.F.R. § 1910.1200(g)....................5, 7, 22, 23

29 C.F.R. § 1910.1200(h)....................5

29 C.F.R. § 1910.1200 app. A....................8

29 C.F.R. § 1910.1200 app. B....................8

29 C.F.R. § 1910.1200 app. C....................8, 9, 21

29 C.F.R. § 1910.1200 app. D....................7, 23

*48 Fed. Reg. 53,280 (Nov. 25, 1983)....................4, 5, 6, 18

59 Fed. Reg. 6126 (Feb. 9, 1994)....................6

71 Fed. Reg. 53,617, (Sept. 12, 2006)....................19

*77 Fed. Reg. 17,574 (Mar. 26, 2012) 5, 6, 7, 8, 9, 13, 15, 21, 22, 23, 24, 27, 28, 29

Comment Letter from Leslie Berry, American Chemistry Council, Hydrocarbon Solvents Panel (Dec. 29, 2009) *available at* http://www.regulations.gov/#!documentDetail;D=OSHA-H022K-2006-0062-0398....................3

Comment Letter from Randel K. Johnson & Marc Freedman, U.S. Chamber of Commerce (Dec. 29, 2009) *available at* http://www.regulations.gov/#!documentDetail;D=OSHA-H022K-2006-0062-0397....................2

TABLE OF AUTHORITIES
(continued)

Page(s)

Comment Letter from Robert J. Kiefer, American Chemistry Council (Apr. 30, 2010) *available at* http://www.regulations.gov/#!documentDetail;D= OSHA-H022K-2006-0062-0530 3

Comment from Hasmukh C. Shah, Ph.D., American Chemistry Council, Biocides Panel (Dec. 29, 2009) *available at* http://www.regulations.gov/#!documentDetail;D=OSHA-H022K-2006-0062-0385 3

Comment Letter from Derek D. Swick, American Petroleum Institute (Dec. 29, 2009) *available at* http://www.regulations.gov/#!documentDetail;D= OSHA-H022K-2006-0062-0376 3

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National Chamber Litigation Center: Federal Preemption Cases, *available at* http://www.chamberlitigation.com/cases/issue/federal-preemption. 13

*OSHA, "Side-by-Side Comparison of OSHA's Existing Hazard Communication Standard (HCS 1994) vs. the Revised Hazard Communication Standard (HCS 2012)" *available at* http://www.osha.gov/dsg/hazcom/side-by-side.html. 6, 7, 20, 22

GLOSSARY OF TERMS

ACC	American Chemistry Council
APA	Administrative Procedure Act
API	American Petroleum Institute
Chamber	The Chamber of Commerce of the United States of America
GHS	United Nations Globally Harmonized System of Classification and Labeling of Chemicals
HCS	Hazard Communication Standard, and the revisions thereto in the final rule titled "Hazard Communication," 77 Fed. Reg. 17,574 (Mar. 26, 2012)
NAM	The National Association of Manufacturers
OSHA	Occupational Safety and Health Administration
OSH Act	Occupational Safety and Health Act of 1970

STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the Petitioner's Brief.

STATEMENT OF INTEREST[1]

This case presents important federal preemption questions involving the Occupational Safety and Health Act ("OSH Act") and the Hazard Communication Standard ("HCS") promulgated thereunder. *Amici* have a strong interest in the preemptive effect of these laws on state law.

As the world's largest business federation, the Chamber of Commerce of the United States of America (the "Chamber") represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. Many of the Chamber's members are employers and chemical manufacturers subject to regulation under the OSH Act and HCS. The Chamber thus has a significant interest in legal developments concerning these laws, as demonstrated by the extensive comments the Chamber submitted during

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

the rulemaking for the HCS amendments. *See* Comment Letter from Randel K. Johnson & Marc Freedman, U.S. Chamber of Commerce (Dec. 29, 2009).[2]

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. As manufacturers and employers, many of the NAM's members are subject to HCS. The NAM supports uniform national standards for occupational health and safety to reduce its members' burden of complying with varied and inconsistent state standards.

The American Petroleum Institute ("API") represents over 500 member companies engaged in all aspects of the oil and gas industry. API regularly advocates for its members' interests concerning various regulatory programs before administrative agencies, Congress, and the courts. API submitted lengthy

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[2] *Available at* http://www.regulations.gov/#!documentDetail;D=OSHA-H022K-2006-0062-0397.

comments on the HCS amendments. *See* Comment Letter from Derek D. Swick, American Petroleum Institute (Dec. 29, 2009).[3]

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry, many of which manufacture products that are regulated by the Occupational Safety and Health Administration ("OSHA") and HCS. Accordingly, ACC has a strong interest in the application of HCS, and it submitted several comments on the 2012 amendments. *See* Comment Letter from Leslie Berry, American Chemistry Council, Hydrocarbon Solvents Panel (Dec. 29, 2009)[4]; Comment from Hasmukh C. Shah, Ph.D., American Chemistry Council, Biocides Panel (Dec. 29, 2009)[5]; Comment Letter from Robert J. Kiefer, American Chemistry Council (Apr. 30, 2010).[6]

REGULATORY BACKGROUND

Amici endorse Petitioner's Statement of Facts, including its thorough discussion of OSHA's failure to provide notice that it would alter its interpretation

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[3] *Available at* http://www.regulations.gov/#!documentDetail;D=OSHA-H022K-2006-0062-0376.

[4] *Available at* http://www.regulations.gov/#!documentDetail;D=OSHA-H022K-2006-0062-0398.

[5] *Available at* http://www.regulations.gov/#!documentDetail;D=OSHA-H022K-2006-0062-0385.

[6] *Available at* http://www.regulations.gov/#!documentDetail;D=OSHA-H022K-2006-0062-0530.

of HCS's preemptive effect. *Amici* include this section to elaborate on OSHA's original HCS, and the pertinent revisions thereto.

I. OSHA'S 1983 HAZARD COMMUNICATION STANDARD AND 1994 AMENDMENTS

On November 25, 1983, OSHA promulgated HCS, 29 C.F.R. § 1910.1200, so that information about chemical hazards would be provided to "employers and employees . . . by means of comprehensive hazard communication programs." 29 C.F.R. § 1910.1200(a) (1984).[7] In promulgating HCS, OSHA announced its intention to "establish uniform requirements for hazard communication . . . ." 48 Fed. Reg. 53,280, 53,281 (Nov. 25, 1983). OSHA intended that HCS would "reduce the regulatory burden posed by multiple State laws" because of the "immense" "potential for conflicting or cumulatively burdensome State and local laws." *Id*. at 53,284. Commenters warned of "the threat of 50 different chemical hazard warning systems mandating conflicting, overlapping, and duplicative requirements for hazard warnings" absent a uniform federal standard. *Id*.

HCS establishes a three-step system to identify and communicate chemical hazards to exposed employees. First, chemical manufacturers must identify and evaluate the hazards of the chemicals that they produce. 29 C.F.R. § 1910.1200(d). Manufacturers must then prepare warning labels that identify chemical hazards,

[7] This brief refers to the 1983 version of HCS, as amended in 1994, as the "original HCS." It refers to OSHA's final rule amending HCS in 2012 as the "amended HCS." It uses "HCS" to refer to HCS in general.

and more detailed safety data sheets that provide technical information about the chemicals, their health risks, and other information relevant to employees. *Id.* § 1910.1200(f), (g). Finally, chemical manufacturers must provide this information to their customers, who must in turn convey it to employees who may be exposed to the chemicals through a written hazard communication program and employee training. *See id.* § 1910.1200(e)(1), (f)(5), (g)(8), (h).

Despite OSHA's desire for a uniform standard, the labeling and safety data sheet provisions of the original HCS were written using "broad, performance-oriented" language that gave chemical manufacturers wide latitude in developing these materials. 48 Fed. Reg. at 53,301; *see also id.* at 53,327. The standard specified certain "minimal information requirements" for labels, but allowed any label satisfying those requirements to be used "regardless of the format [the information] was presented in." *Id.* at 53,301. OSHA rejected comments advocating "a standardized labeling format." *Id.*; *see* 29 C.F.R. § 1910.1200(f)(1)(i)-(iii) (1984) (requiring labels identifying the chemical name, "[a]ppropriate" hazard warnings, and the manufacturer's name and address); 77 Fed. Reg. 17,574, 17,586 (Mar. 26, 2012) ("The [original] HCS does not specify a standard format or design elements for labels"). Similarly, OSHA rejected requests that the safety data sheets contain a "specified format or form," choosing instead to retain "the performance nature of th[e] standard . . . as long as the

necessary information is provided." 48 Fed. Reg. at 53,310; *see* 29 C.F.R. § 1910.1200(g)(2) (1984); 77 Fed. Reg. at 17,593 ("Prior to this final standard, the information [on the safety data sheet] was not required to be presented in any particular order or to follow a specific format").

OSHA made minor changes to HCS in 1994, but did not materially change the labeling or safety data sheet requirements. 59 Fed. Reg. 6126, 6126 (Feb. 9, 1994).

II. THE 2012 REVISIONS TO THE HAZARD COMMUNICATION STANDARD

OSHA believed that the original HCS failed to achieve its goal to "establish uniform requirements for hazard communication," 48 Fed. Reg. at 53,281, largely because of the rule's performance-based requirements for labels and safety data sheets. Because the "labeling provisions of the [original] HCS exemplify the overall performance orientation of the rule," 77 Fed. Reg. at 17,724, that approach resulted in "labels that are different" and "did not lend itself to harmonization." *Id.* at 17,725. Similarly, OSHA noted that the original HCS allowed manufacturers "to use whatever format they choose [for safety data sheets], as long as the information is provided." *Id.* at 17,728. Because it concluded that a consistent format would better protect employees, OSHA sought to standardize these requirements to conform with the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals, or GHS. *Id.* at 17,574; *see also* OSHA,

"Side-by-Side Comparison of OSHA's Existing Hazard Communication Standard (HCS 1994) vs. the Revised Hazard Communication Standard (HCS 2012)" ("Side-by-Side Comparison of HCS Amendments") (emphasizing the "*uniformity-oriented* approach" of the HCS amendments) (emphasis in original).[8] These changes "primarily affect[] manufacturers and importers of hazardous chemicals." 77 Fed. Reg. at 17,581.

The amended HCS imposed on chemical manufacturers far more specific requirements for safety data sheets and labeling. With respect to safety data sheets, the original standard simply required manufacturers to include certain "minimum information;" it did not "provide specific language to convey the information or a format in which to provide it." *Id.* at 17,580. The amended standard, however, prescribes a standardized format for safety data sheets from which a manufacturer may not deviate. *See id.* at 17,788 (codified at 29 C.F.R. § 1910.1200(g)(2)) (safety data sheet must "include[] at least the following section numbers and headings, and associated information under each heading, in the order listed"). The amended HCS also requires the manufacturer to provide specific information under each sub-heading. *See id.* at 17,884-85 (codified at 29 C.F.R. § 1910.1200 app. D). For example, the section on First-Aid measures must appear fourth, and describe "necessary measures, subdivided according to the different routes of

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[8] *Available at* http://www.osha.gov/dsg/hazcom/side-by-side.html.

exposure," specify the "[m]ost important symptoms/effects," and indicate any need for "immediate medical attention and special treatment." *Id*. In OSHA's view, this "standardized format will improve the effectiveness of" the safety data sheets. *Id.* at 17,596.

The amended HCS chemical classification and labeling requirements are even more precise. They require chemical manufacturers to classify hazardous chemicals into one of about thirty categories and assign one of several "hazard ratings." *Id.* at 17,787, 17,790-824 (codified at 29 C.F.R. § 1910.1200(d) & apps. A-B). Once classified, the amended HCS designates the precise language that the manufacturer must use to identify the hazard, the particular symbol (or "pictogram") that the label must contain, and the precise words that the manufacturer must use in its precautionary statements. *See id.* at 17,827-83 (codified at 29 C.F.R. § 1910.1200 app. C); *see also id.* at 17,725 (HCS "specifies the signal word, hazard statement, pictogram, and precautionary statements for each hazard class and category"). The manufacturer must comply exactly with these labeling requirements, and cannot alter them. *See id.* at 17,725 ("[O]nce a chemical is classified as to its hazard classes and corresponding categories, the GHS specifies exactly what information is to appear on a label for that chemical."). Supplements to the information are permitted if they are "accurate and do[] not conflict with the required label elements." *Id.* However, the ability to supplement

is limited by certain rules that the amended HCS imposes. For example, the amended HCS does not permit use of the word “Danger” and the word “Warning” on the same label. *Id.* at 17,824 (codified at 29 C.F.R. § 1910.1200 app. C, § C.2.1). Moreover, it prescribes which pictograms must be used on a particular label, and prevents the use of others in certain situations. *Id.* OSHA concluded that “these standardized label elements better convey critically important hazard warnings . . . that will serve to better protect employees than the performance-oriented approach” of the original HCS. *Id.* at 17,586.

The amended HCS also purports to establish a broad rule that, “in general[,] the HCS does not preempt state tort failure to warn lawsuits” and other state law tort claims. *Id.* at 17,694; *see also* 29 C.F.R. § 1910.1200(a)(2). While OSHA concedes in the preamble to the final rule that “a limited preemption might be possible to the extent a state tort rule directly conflicted with the requirements of the standard,” it quickly dismissed this idea because “no commenter has provided any evidence of such a conflict.” 77 Fed. Reg. at 17,694. Therefore, the text of the final rule reflects no exception for state tort claims that conflict with federal claims. *See id.* at 17,786 (codified at 29 C.F.R. § 1910.1200(a)(2)). OSHA thus established a general rule that state tort claims are not preempted.

SUMMARY OF ARGUMENT

When OSHA amended HCS in 2012, it imposed far stricter, more specific hazard communication requirements on manufacturers and employers, virtually ensuring that these requirements would conflict with differing state standards. OSHA simultaneously—without providing notice and an opportunity to comment—pronounced that HCS no longer preempted state tort claims. OSHA's pronouncement is procedurally defective, contradicts established conflict preemption principles, and exceeds OSHA's congressionally delegated authority.

OSHA violated the procedural requirements of the OSH Act and the Administrative Procedure Act ("APA") by failing to provide notice of its intent to amend HCS's preemption provision. This procedural defect deprived *amici* and other interested parties of the right to comment regarding the serious potential for state tort claims to conflict with the amended HCS.

Conflict preemption principles establish that many state tort claims will be preempted because they conflict with the far-stricter requirements of the amended HCS. For example, it is likely that failure-to-warn claims will conflict, because these claims challenge the adequacy of a manufacturer's labels and warnings even when the manufacturer has complied with the amended HCS's highly specific requirements. Subjecting manufacturers to varying state standards poses a

significant obstacle to the federal purpose of establishing national uniformity in hazard communications. These conflicting claims must be preempted.

OSHA's pronouncement that such claims are not preempted overlooks conflict preemption principles, and it does not merit deference under any standard. Congress did not delegate authority to OSHA to limit the preemptive force of the OSH Act or its regulations, and absent such delegation federal courts refuse to defer to an agency's ultimate conclusions on preemption. Nor do OSHA's statements reflect the thorough consideration, valid reasoning or consistency that *Skidmore* deference requires.

This Court should vacate OSHA's preemption amendments as procedurally improper and contrary to law.

ARGUMENT

I. OSHA'S AMENDMENTS TO THE HCS'S PREEMPTION PROVISION ARE INVALID FOR LACK OF PROPER NOTICE

By failing to provide notice of the possibility that it would modify HCS's preemption provision, OSHA violated the OSH Act's and the APA's procedural requirements. OSHA's failure improperly deprived *amici* and other interested parties of the opportunity to comment on this important issue, or to participate at all in OSHA's formulation of its preemption position.

Both the OSH Act and the APA require that OSHA provide notice and an opportunity to comment before promulgating or modifying regulations or standards

such as HCS. OSHA must "afford interested persons a period of thirty days after publication [of a proposed standard] to submit written data or comments," 29 U.S.C. § 655(b)(2), and use APA rulemaking procedures to modify standards like HCS, *id.* § 655(b)(7). The APA requires that notice of a proposed rule include "the terms or substance of the proposed rule or a description of the subjects and issues involved," and that interested parties have the opportunity to comment. 5 U.S.C. § 553(b)(3), (c). It is "procedural failure" for an agency to "finalize[] [a] rule . . . without offering States or other interested parties notice or opportunity for comment." *Wyeth v. Levine*, 555 U.S. 555, 577 (2009).

As discussed further in Petitioner's brief (at 24-38), OSHA's notice failed to satisfy these requirements because it did not mention the possibility that the proposed rule would amend HCS's preemption provision. OSHA did not provide notice "about *which particular* aspects of its proposal are open for consideration," *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (emphasis in original), nor was its alteration of the preemption provision a "logical outgrowth" of OSHA's notice of amendments to standardize labeling in accordance with the GHS, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006); *see also* Petr Br. at 26-30. Because OSHA failed to provide adequate notice, *amici* and other interested parties were deprived of the opportunity to comment on the preemption provision. This opportunity to comment was critical, because OSHA

paradoxically relied on the absence of preemption-related comments to support its amendment to the preemption provision, asserting that "no commenter has provided any evidence of . . . a conflict" between a state tort rule and HCS. 77 Fed. Reg. at 17,694.

Had OSHA given *amici* notice of a proposed amendment to the preemption provision, *amici* would have had an opportunity to comment on its practical impact. Indeed, several *amici* submitted extensive comments on the proposed HCS amendments. *See supra* at 1-3. Not surprisingly, *amici*'s comments did not mention preemption, because *amici* had no notice that preemption was an issue in the rulemaking.

There is ample evidence that if *amici* had notice of the amendments to HCS's preemption provision, they would have commented on the subject. As national organizations with many members doing business throughout the United States, *amici* have a strong interest in preemption issues, which they actively litigate. The Chamber has litigated preemption issues as a party or *amicus* in at least 45 actions since 2003,[9] including in cases before the Supreme Court,[10] the

[9] *See* National Chamber Litigation Center: Federal Preemption Cases, *available at* http://www.chamberlitigation.com/cases/issue/federal-preemption.

[10] *See, e.g.*, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011); *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

federal Courts of Appeals,[11] federal district courts,[12] and state courts.[13] API has filed lawsuits in federal court arguing that state laws are preempted.[14] As *amicus curiae*, the NAM and ACC have actively participated in numerous preemption cases.[15] These organizations would have benefited from the opportunity to comment on the amendments to HCS's preemption provision, and they could have provided valuable insights into the direct conflict between many state tort claims and HCS, which OSHA's final rule suggested did not exist.

In sum, OSHA's amendments to HCS's preemption provision were procedurally defective for failure to comply with notice-and-comment requirements. This procedural defect deprived *amici* and other interested parties of the opportunity to comment on the amendments to the preemption provision. OSHA capitalized on the absence of comments by claiming that "no commenter has provided any evidence of . . . a conflict" between state tort claims and HCS.

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[11] *See, e.g.*, *Chamber of Commerce v. EPA*, 642 F.3d 192 (D.C. Cir. 2011); *Chamber of Commerce v. Edmondson*, 594 F.3d 742 (10th Cir. 2010).

[12] *See, e.g.*, *Healthcare Ass'n of N.Y. State v. Cuomo*, No. 1:03-cv-0413, 2011 U.S. Dist. Lexis 155141 (N.D.N.Y. Sept. 7, 2011) (participating as *amicus curiae*).

[13] *See, e.g.*, *Salley v. Option One Mortgage Corp.*, 925 A.2d 115 (Pa. 2007) (participating as *amicus curiae*).

[14] *See, e.g.*, *Am. Petroleum Inst. v. Cooper*, 835 F. Supp. 2d 63 (E.D.N.C. 2011).

[15] *See, e.g.*, *Kurns v. RR. Friction Prods. Corp.*, 132 S. Ct. 1261 (2012) (NAM); *Whiting*, 131 S. Ct. 1968 (NAM); *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223 (10th Cir. 2006) (ACC).

77 Fed. Reg. at 17,694. Accordingly, this Court should vacate OSHA's preemption amendments as procedurally invalid.

II. OSHA'S STATEMENTS ON PREEMPTION ARE CONTRARY TO LAW

Amici endorse Petitioner's arguments regarding the preemptive scope of the OSH Act and the impact of the Act's savings clause on the preemption of state tort claims. *See* Petr Br. at 43-54. Below, *amici* expand upon Petitioner's argument that the OSH Act and HCS preempt state tort claims that conflict with their full purposes and objectives (*id.* at 46-48), highlight the practical effects of OSHA's position that such suits do not conflict with HCS, and explain why OSHA's conclusions regarding preemption are not entitled to deference.

A. OSHA's View Contradicts Firmly Established Conflict Preemption Principles

The Constitution's Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, state laws that conflict with federal law are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see also McCulloch v. Maryland*, 17 U.S. 316, 427 (1819). Even absent an express preemption provision, "state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that

Congress left no room for the States to supplement it." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks and citations omitted).

The OSH Act preempts state action on issues for which OSHA has promulgated a federal standard because such action is "in conflict with the full purposes and objectives of the OSH Act." *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98-99 (1992) (plurality op.). Through the OSH Act, Congress "intended to subject employers and employees to only one set of regulations, be it federal or state," *id*. at 99, by "avoiding duplicative, and possibly counterproductive, regulation," *id.* at 102. State laws regulating occupational safety and health issues over which OSHA has promulgated a federal standard "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 98 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

State tort law is preempted to the same extent as a State's positive enactments where it "disrupts the federal scheme no less than state regulatory law to the same effect." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008). Indeed, "one would think that tort law, applied by juries under a negligence or strict-liability standard, is less deserving of preservation." *Id.*; *see also Cipollone*, 505 U.S. at 521 (plurality op.) ("[S]tate regulation can be as effectively exerted through an award of damages as through some form of preventative relief") (internal

quotation marks omitted); *Worm v. Am. Cyanamid Co.*, 970 F.2d 1301, 1307 (4th Cir. 1992) ("[A] jury verdict resulting from a pesticide manufacturer's failure to warn of the dangers of the product has an effect no different from a legislatively enacted state regulation requiring the insertion of a specific warning on the pesticide label.").

Therefore, federal statutes preempt state tort claims that stand "'as an obstacle to the accomplishment and execution of' . . . important . . . federal objectives." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881-82 (2000) (quoting *Hines*, 312 U.S. at 67). In *Geier*, the Supreme Court concluded that the express preemption provision and saving clause in the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1831 *et seq.*, read together, did not expressly preempt state tort actions. *Geier*, 529 U.S. at 868. The Court nonetheless applied conflict preemption principles because neither the express preemption provision nor the saving clause "bar[red] the ordinary working" of such principles to conflicting state tort law. *Id.* at 869; *see also id.* at 871.

Here, as in *Geier*, conflict preemption principles dictate that many state tort claims will be preempted. *Id.* at 874; *cf. Gade*, 505 U.S. at 98-99, 104 n.2 (plurality op.). The first step in this analysis is to identify the nature and purpose of the OSH Act and HCS. *See Geier*, 529 U.S. at 874-81. The next step is to determine whether state tort claims present an obstacle to achieving the objectives

of these laws. *Id.* at 881-82. This analysis confirms that conflicting state tort claims—including failure-to-warn claims—are preempted.

1. The OSH Act And HCS Aim To Establish Uniform Occupational Safety And Health Requirements

The OSH Act's carefully crafted statutory scheme demonstrates that Congress sought to establish uniform health and safety requirements in the workplace and to "avoid[] duplicative, and possibly counterproductive, regulation." *Gade*, 505 U.S. at 99, 102 (plurality op.). The OSH Act authorizes OSHA to promulgate federal standards like HCS to further Congress's purpose of uniformity, creating national standards to inform employees of potential chemical hazards in the workplace. *See* 29 U.S.C. § 655.

When OSHA first promulgated HCS in 1983, it aimed to further these goals by "establish[ing] uniform requirements for hazard communication." 48 Fed. Reg. at 53,281; *see supra* at 4. OSHA recognized the many comments of industry representatives regarding the "immense" "potential for conflicting or cumulatively burdensome State and local laws," 48 Fed. Reg. at 53,284, and sought "to reduce the regulatory burden posed by multiple State laws," *id.*; *see supra* at 4.

The recent amendments to HCS confirm OSHA's objective of uniformity and the importance of reducing the burden of conflicting laws. The amendments sought to enhance uniformity by abandoning the performance-oriented approach of the prior rule and standardizing labeling and safety data sheets to conform with the

international GHS standards. *See supra* at 6-9. These amendments were to benefit employers and employees by providing "better, more standardized, and consistent information about chemicals in their workplaces." 71 Fed. Reg. 53,617, 53,620 (Sept. 12, 2006). There cannot be any serious dispute that the HCS amendments sought to promote the very uniformity that Congress intended in promulgating the OSH Act.

2. State Tort Claims May Conflict With The Important Federal Goal Of Achieving Uniformity In Hazard Communications

The next step of the conflict preemption analysis is to assess whether a state tort claim may stand "'as an obstacle to the accomplishment and execution of'" federal objectives. *Geier*, 529 U.S. at 881-82 (quoting *Hines*, 312 U.S. at 67). As noted above, the amended HCS establishes a general rule that state tort claims are not preempted. The general rule should be exactly the opposite. Many state tort claims will be preempted, because they are highly likely to conflict with federal law and pose a significant threat to the important federal purpose of establishing national uniformity in hazard communications.

State failure-to-warn claims provide the starkest example of preempted claims. These claims challenge the adequacy of a manufacturer's labels and warnings regarding the potential hazards of chemical products, even when the manufacturer has complied with HCS labeling and warning requirements. *See*

Mulhall v. Hannafin, 841 N.Y.S.2d 282, 285 (N.Y. App. Div. 2007) ("To succeed on their failure-to-warn claim, plaintiffs were required to prove that the product did not contain adequate warnings . . ."); *Bass v. Air Prods. & Chems., Inc.*, No. ESX-L-694-99, 2006 WL 1419375, at *4 (N.J. Super. Ct. May 25, 2006) (per curiam). They thus "depend[] upon [the] claim" that manufacturers have a duty to provide labels and warnings that are different from, or that supplement, HCS requirements. *Geier*, 529 U.S. at 881.

The HCS amendments make conflict between state tort claims and federal law nearly inevitable. As discussed above, *see supra* at 4-7, the original HCS was "a performance-oriented standard that provide[d] guidance for defining hazards and for performing hazard determinations," but it "d[id] not specify an approach or format to follow." Side-by-Side Comparison of HCS Amendments, *supra*. In contrast, the amended HCS demands highly specific warnings, which aim to standardize the classification and presentation of hazard information. *See supra* at 6-9. Both the labeling and safety data sheet requirements illustrate the conflict that this increased specificity will create.

Labeling Requirements. In many cases, the amended HCS's labeling requirements will conflict with state failure-to-warn claims. For example, a claim may result in a jury's finding that proper warnings regarding a chemical product's hazards must include the word "warning" on the label. But the amended HCS

requires manufacturers to use the term "danger" for "more severe hazards" and the term "warning" for "less severe" hazards, 77 Fed. Reg. at 17,787 (codified at 29 C.F.R. § 1910.1200(c)), and provides that the two terms "shall not" appear together, *id.* at 17,824 (codified at 29 C.F.R. § 1910.1200 app. C, § C.2.1.1). Therefore, where a "more severe hazard[]" is at issue, it is impossible for a manufacturer to include the term "warning" on the label without violating federal law. *See, e.g.*, *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2577-78 (2011) (state tort duty "requir[ing] . . . [m]anufacturers to use a different, stronger label than the label they actually used" was preempted by federal labeling requirements). Imposing this additional, conflicting state requirement would present a serious obstacle to the labeling uniformity that the OSH Act and the amended HCS sought to achieve. *See supra* at 4-9, 18-19; *see, e.g.*, *Geier*, 529 U.S. at 881.

Similarly, a failure-to-warn suit may advocate a rule requiring employers to include multiple pictograms on labels. But compliance with such a rule conflicts with the amended HCS, which restricts the types of pictograms that may appear together. *See* 77 Fed. Reg. at 17,824 (codified at 29 C.F.R. § 1910.1200 app. C, § C.2.1). Given this direct conflict, such failure-to-warn suits must be preempted. *See Pliva*, 131 S. Ct. at 2577-78; *Geier*, 529 U.S. at 881; *see also Worm*, 970 F.2d at 1307 ("If federal law mandates a specific label and permits nothing additional or

different, it can hardly be urged that a state tort duty based on a warning requirement that is more elaborate and different does not conflict.”).

Finally, it is also easy to imagine a state jury deciding that the particular language used in the manufacturer’s precautionary statement inadequately warned an employee of the risk associated with the labeled product. State-imposed requirements for different language on a chemical label could easily conflict with the amended HCS’s requirements for precisely-worded precautionary statements. 77 Fed. Reg. at 17,725 (“the GHS specifies exactly what information is to appear on a label”). And, of course, a fifty-state jumble of rules imposed by state court judges and juries would profoundly undermine the goal of uniformity upon which the amended HCS is premised. *Geier*, 529 U.S. at 871 (“the rules of law that judges and juries create or apply in [tort] suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts”).

Safety Data Sheets. The amended HCS safety data sheet requirements also may conflict with the rules advocated by plaintiffs in state tort claims. Whereas the original HCS “allow[ed] any format to be used” for safety data sheets, the amended HCS specifies the order in which the information must appear. Side-by-Side Comparison of HCS Amendments, *supra*; *see also* 77 Fed. Reg. at 17,788 (codified at 29 C.F.R.§1910.1200(g)(2)). For example, a safety data sheet cannot

display detailed toxicological information—including details regarding the likely routes of exposure, symptoms, and effects of short- and long-term exposure—until Section 11, after other information, including the composition and properties of the chemical and the name and address of the manufacturer. 77 Fed. Reg. at 17,788; *id.* at 17,884-85 (codified at 29 C.F.R. § 1910.1200 app. D). A state tort claim alleging that a manufacturer should have prominently displayed certain information—such as details regarding the long-term effects of chemical exposure—near the top of the safety data sheet would thus conflict with the federal requirement that information be displayed "in the order listed" in HCS. *Id.* at 17,788 (codified at 29 C.F.R. § 1910.1200(g)(2)).

Similarly, the amended HCS mandates that first aid treatment not appear until the fourth section of the safety data sheet, after technical information such as the product's chemical composition. *Id*. A jury may find that, had this information appeared more prominently, an injured employee would have received quicker and more effective treatment. Not only is it impossible to comply with both state and federal law in these circumstances, *see Pliva*, 131 S. Ct. at 2577-78, but the various rules established by state tort claims would pose a significant obstacle to the important federal goal of uniformity, *see supra* at 18-19; *see, e.g.*, *Geier*, 529 U.S. at 881.

That the amended HCS will conflict with state tort law is particularly problematic here because the new, highly specific requirements apply primarily to chemical manufacturers, and these are the same entities most likely to be sued under state tort law. As OSHA has acknowledged, "[t]he revised HCS primarily affects manufacturers and importers of hazardous chemicals." 77 Fed. Reg. at 17,581. But these entities have the least protection from tort suits, because employees who work with their products are not required to overcome workers' compensation exclusivity requirements to sue the chemical manufacturer, as they would have to do if suing their own employer. OSHA's effort to eliminate preemption of tort suits at the very same time that it imposed far more specific requirements on those most likely to be subject to such suits—and thus subject to the conflicting requirements that the suits create—is plainly contrary to the underlying purposes of the OSH Act and HCS.

As the above examples illustrate, the practical effect of OSHA's pronouncement that the amended HCS does not preempt state tort claims is that manufacturers most vulnerable to tort suits may be held liable in such suits despite complying with HCS requirements. This will subject them to a patchwork of court-made rules that undercut the uniformity and consistency at the heart of the OSH Act and HCS. As a result, such claims stand "'as an obstacle to the accomplishment and execution of'" the important federal goal of enhancing

workplace safety through uniform requirements, and are preempted. *Geier*, 529 U.S. at 881 (quoting *Hines*, 312 U.S. at 67).[16]

3. The Saving Clause Does Not Save Tort Claims From Conflict Preemption

The OSH Act's saving clause, *see* 29 U.S.C. § 653(b)(4), does not alter the conflict preemption analysis, because a "saving clause . . . does *not* bar the ordinary working of conflict pre-emption principles," *Geier*, 529 U.S. at 869 (emphasis in original), nor does it impose any "special burden" against preemption, *id.* at 872-74. In any event, as discussed further in Petitioner's brief, the OSH Act's saving clause provides no basis for excluding common law claims from the scope of preemption. See Petr Br. at 48-54.

B. OSHA's Views On Preemption Are Not Entitled to Deference

OSHA cannot rely on principles of agency deference to bolster its flawed interpretation of the preemptive force of the OSH Act and the amended HCS. OSHA's views are not entitled to *Chevron* deference, because Congress did not delegate authority to OSHA to limit the preemptive scope of the OSH Act. Nor are

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[16] Prior case law holding that HCS did not preempt state tort claims interpreted the far less specific, performance-oriented HCS rather than the much more proscriptive amended HCS. *See In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp. 2d 669, 694-97 (N.D. Ohio 2005) (reasoning that the original HCS was "silent" regarding the specific warning required, because it required only an "appropriate" warning, but not any specific one); *see also Pedraza v. Shell Oil Co.*, 942 F.2d 48 (1st Cir. 1991). These cases do not address whether the more detailed standard conflicts with state tort law, and thus are inapposite here.

they entitled to *Skidmore* deference, because they do not reflect the agency's expertise, and they fail to demonstrate thoroughness, valid reasoning, and consistency.

1. *Chevron* Does Not Apply

Chevron deference applies to agency views only where "Congress has delegated policymaking responsibilities" to an agency, and the agency acts "within the limits of that delegation." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); *see also United States v. Mead Corp.*, 533 U.S. 218 (2001). Therefore, "agencies have no special authority to pronounce on pre-emption absent delegation by Congress." *Wyeth*, 555 U.S. at 577; *see also Pliva*, 131 S. Ct. at 2575 n.3; *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Courts therefore refuse to defer to "agency proclamations of preemption." *Wyeth*, 555 U.S. at 575-76; *see also Pliva*, 131 S. Ct. at 2575 n.3.

No deference applies to OSHA's statements regarding preemption here. The OSH Act does not give OSHA general authority to limit its preemptive scope through agency pronouncements. *See Wyeth*, 555 U.S. at 577; Petr Br. at 40-43. It is thus different from statutes that expressly authorize agencies to determine a law's preemptive scope. *Cf.* 21 U.S.C. § 360k (authorizing FDA to determine the scope of the statute's preemption clause); *see also Wyeth*, 555 U.S. at 577 n.9 (citing similar examples). Thus, this Court "need not decide whether the

[statements by OSHA] are otherwise 'reasonable.'" *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002). Instead, it should "perform[] its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption." *Wyeth*, 555 U.S. at 576.

2. *Skidmore* Deference Is Not Warranted

Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), courts may give some weight to "a persuasive articulation of views within an agency's area of expertise." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011). The degree of deference depends on the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency." *Skidmore*, 323 U.S. at 140. Applying these factors, *Skidmore* deference is inappropriate.[17]

Agency Expertise. OSHA's proclamations regarding preemption here do not reflect the agency's exercise of its expertise. *Cf. Kasten*, 131 S. Ct. at 1335. While it may be appropriate to give "'some weight' to an agency's views about the impact of tort law on federal objectives," *Wyeth*, 555 U.S. at 576; *see also Geier*,

[17] Because OSHA's preemption statements purport to interpret the OSH Act, *see* 77 Fed. Reg. at 17,694, *amici* focus on *Skidmore* deference. To the extent that OSHA's statements rely on its interpretation of its own regulations, the Supreme Court has firmly declined to apply *Auer* deference to "an agency's ultimate conclusion about whether state law should be pre-empted." *Pliva*, 131 S. Ct. 2567, 2575 n.3. In any event, for the reasons discussed in Part.II.B.2, OSHA's views do not represent its "fair and considered judgment on the matter," *Auer v. Robbins*, 519 U.S. 452, 462 (1997), and do not merit deference under any standard.

529 U.S. at 883, an agency's bare "*conclusion* that state law is preempted" does not warrant deference, *Wyeth*, 555 U.S. at 576 (emphasis in original). Here, the agency's statements regarding preemption are mere conclusions based on statutory interpretation; they do not represent the agency's expert views regarding the impact of tort law in this context. *See* 77 Fed. Reg. at 17,694; Letter from M. Patricia Smith, Solicitor of Labor, to Steven H. Wodka, Esq. (Oct. 18, 2011).[18]

Thoroughness of Agency Consideration. The thoroughness of OSHA's consideration also counsels against *Skidmore* deference. OSHA's statements regarding preemption were made "without offering States or other interested parties notice or opportunity to comment." *Wyeth*, 555 U.S. at 577. OSHA's "views on state law are inherently suspect in light of this procedural failure," and therefore do not merit deference. *Id.* (FDA's statements regarding preemption are not entitled to *Skidmore* deference where made without following notice-and-comment procedures).

Validity of Agency's Reasoning. OSHA's "reasoning" provides no basis for deference. OSHA primarily relies on the saving clause, which it argues creates a distinction between tort law and positive enactments of law. *See* 77 Fed. Reg. at 17,694. But OSHA fails to recognize that a "saving clause . . . does *not* bar the

[18] *Available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=27746&p_table=INTERPRETATIONS.

ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869 (emphasis in original). And there is no reason to distinguish between state tort claims and other state laws in a conflict preemption analysis, because state tort claims carry just as much potential—if not more—to upset Congress's carefully balanced federal scheme and to pose an obstacle to the important federal purpose of uniformity. *See supra* at 16-17; Petr Br. at 43-48.

Moreover, OSHA failed to analyze conflict preemption in light of the amended HCS. Instead, it made the conclusory statement that "no commenter has provided any evidence of . . . a conflict," 77 Fed. Reg. at 17,694—a statement that is highly suspect, since OSHA failed to provide interested parties with notice and an opportunity to comment on preemption, *see supra* at 11-15, and given the quite obvious potential for conflict that the amended HCS's specific requirements create. OSHA provides no reasoning to which this Court could defer in a conflict preemption analysis.

Consistency. OSHA's amendments to the HCS preemption provision represent a shift in position from the original HCS, which further counsels against *Skidmore* deference. *Wyeth*, 555 U.S. at 579 (refusing to defer to inconsistent agency position). The previous version did not distinguish between state tort claims and positive enactments of law; instead, it expressly included state court adjudications within its preemptive scope. *See* 29 C.F.R. § 1910.1200(a)(2)

(2011). It was not until October 18, 2011—five years *after* OSHA published its Advanced Notice of Proposed Rulemaking—that OSHA changed its views in response to a question from Steven Wodka, an attorney seeking a more advantageous litigation position in a case in which David Michaels, now Assistant Secretary for OSHA, had previously testified as an expert on behalf of Mr. Wodka's client. *See* Petr Br. at 10 n.6. Shortly after OSHA's letter to Wodka (which interpreted the far less specific requirements of the original HCS), OSHA amended its preemption provision to conform to its new views on preemption, without accounting at all for how the amended HCS's more precise requirements may impact the preemption analysis. As discussed above (at 6-9, 19-25), the amended HCS imposed more stringent labeling and warning requirements to further promote uniformity—thereby increasing the risk that state tort claims would interfere with the amended HCS—and yet OSHA, for the first time, officially attempted to foreclose any possibility that state tort claims would be preempted. The inconsistency of OSHA's position—along with its lack of expertise, thoroughness and reasoning—confirms that OSHA's views on preemption are not entitled to *Skidmore* deference. *See Wyeth*, 555 U.S. at 579.

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This Court should reject OSHA's statements that the OSH Act and the amended HCS do not preempt state tort claims. OSHA's views are contrary to

well established conflict preemption principles because many state tort claims will directly conflict with the highly specific labeling and warning requirements of the amended HCS. Moreover, OSHA's position is not entitled to deference. *Chevron* deference does not apply, because Congress did not delegate to OSHA general authority to limit the preemptive force of the OSH Act or the HCS. Nor do OSHA's views merit *Skidmore* deference, because they do not reflect the agency's exercise of its expertise, nor do they reflect the thoroughness, valid reasoning and consistency that *Skidmore* requires.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to vacate the Final Rule preemption amendments to HCS.

Respectfully submitted,

Dated: March 15, 2013

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,905 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), as counted using the word-count function on Microsoft Word 2007 software.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: March 15, 2013

s/ Jacqueline M. Holmes
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send an electronic notification of such filing to all parties.

s/ Jacqueline M. Holmes
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