

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 U.S. DEPARTMENT OF LABOR,**

Respondents.

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

FINAL BRIEF FOR OSHA AND THE U.S. DEPARTMENT OF LABOR

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and *Amici Curiae*

The parties to this case are: (1) American Tort Reform Association (ATRA), as Petitioner; (2) Occupational Safety and Health Administration (OSHA) and Secretary of Labor, as Respondents.

Intervenors for Respondents include United Steel Workers Local Union 4-227; Change to Win; International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America; and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, ALF-CIO.

Amici Curiae on behalf of Petitioner include the Chamber of Commerce of the United States of America; National Association of Manufacturers; American Petroleum Institute; and American Chemistry Council. *Amicus Curiae* on behalf of Respondents is the American Association for Justice.

B. Ruling Under Review

The ruling under review is OSHA's final rule titled "Hazard Communication" (Docket No. OSHA-HO22K-2006-0062), published in the Federal Register on March 26, 2012 at 77 Fed. Reg. 17,575. The Final Rule amended certain provisions of OSHA's Hazard Communication Standard, 29

C.F.R. § 1910.1200. Petitioner challenges changes to paragraph (a)(2) of the Standard, which states the preemptive effect of the standard.

C. Related Cases

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

Two related cases challenging provisions of the amended Hazard Communication standard are also pending before this Court. These cases are *Am. Petroleum Inst. v. Sec'y of Labor*, No. 12-1227 and *Nat'l Oilseed Processors Ass'n v. OSHA*, No. 12-1228.

These two cases were previously consolidated with this case, but this case was severed from the other two on November 2, 2012. (Docket No. 12-1227, #1402979).

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES	
TABLE OF AUTHORITIES	iii
GLOSSARY	
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	1
STATUTES AND REGULATIONS	2
STATEMENT OF FACTS	2
A. <i>Relevant Provisions of the OSH Act</i>	2
B. <i>OSHA’s Promulgation of the HazCom Standard</i>	4
C. <i>The Preemption Provision of the HazCom Standard</i>	5
D. <i>The 2012 Revisions to the HazCom Standard and the Preemption Provision</i>	10
SUMMARY OF ARGUMENT	14
ARGUMENT	
I. Standard of Review	16
II. Sections 18 and 4(b)(4) of the OSH Act Make Clear that the HazCom Standard Generally Does Not Preempt State Tort Law	16

A.	<i>Except Where There is a Direct Conflict with the HazCom Standard, the OSH Act Preserves State Tort Law Claims</i>	18
1.	<i>Section 18 of the OSH Act Preempts Only State Occupational Safety and Health Standards and Not Tort Laws of General Applicability</i>	20
2.	<i>Section 4(b)(4) Provides an Explicit Statement of Congressional Intention to Preserve and Not Preempt State Tort Law</i>	28
3.	<i>Sections 18 and 4(b)(4) Must Be Read Together</i>	37
4.	<i>ATRA's Preemption Claim is to a Large Extent Unripe</i>	41
B.	<i>OSHA's Views on the Preemptive Effect of the HazCom Standard are Thorough, Consistent, and Persuasive</i>	43
III.	Notice and Comment Requirements Did Not Apply to Non-Substantive, Clarifying Revisions to OSHA's Interpretive Statement Contained in Paragraph (a)(2) of the HazCom Standard	45
A.	<i>Notice and Comment Are Not required for Interpretive Rules Such as HazCom's Preemption Provision</i>	46
B.	<i>The Clarifying Changes Made to Paragraph (a)(2) Evinced no Change in OSHA's Interpretation of the Scope of Preemption of the HazCom Standard</i>	51
1.	<i>An Interpretive Letter Issued Prior to the 2012 Amendments and Additional OSHA Guidance Confirm that the Revisions Made to Paragraph (a)(2) Merely Clarified OSHA's Longstanding Views on the Preemptive Effect of the HazCom Standard</i>	51

2. *The Regulatory History of Paragraph (a)(2)
Also Confirms that the 2012 Revisions Simply
Clarified OSHA’s Longstanding Position that
the HazCom Standard Generally Did Not
Preempt State Failure-to-Warn Tort Law* 56

CONCLUSION..... 62

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

APPENDIX

TABLE OF AUTHORITIES

CASES:	<u>Page</u>
<i>Alaska Professional Hunters Ass'n, Inc. v. FAA</i> , 177 F.3d 1030 (D.C.Cir.1999)	49
<i>Alcaraz v. Block</i> , 746 F.2d 593 (D.C. Cir. 1984)	48
<i>American Hospital Ass'n v. Bowen</i> , 834 F.2d 1037 (D.C. Cir. 1987)	48
<i>American Mining Congress v. MSHA</i> , 955 F.2d 1105 (D.C. Cir. 1993)	47, 49
<i>Anderson v. Airco, Inc.</i> , 2003 WL 21842985, *2 (D. Del. July 28, 2003).....	38
<i>Atlas Roofing Co. v. OSHRC</i> , 430 U.S. 442 (1977)	25, 28
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997)	56
<i>Barnett Bank of Marion County v. Nelson</i> , 517 U.S. 25 (1996)	19
<i>Bass v. Air Products & Chemicals, Inc.</i> , 2006 WL 1419375 (N.J. Super. Ct. App. Div. May 25, 2006)	39-40, 41
<i>Batterton v. Marshall</i> , 648 F.2d 694 (D.C. Cir. 1980)	48
<i>Biggerstaff v. FCC</i> , 511 F.3d 178 (D.C. Cir. 2007)	42

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

<i>Bowles v. Seminole Rock & Sand Co.</i> , 325 U.S. 410 (1945)	56
<i>Catholic Health Initiatives v. Sebelius</i> , 617 F.3d 490, (D.C. Cir. 2010)	50
<i>Chevron USA Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	43
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504 (1992)	24, 53
<i>Edison Elec. Inst. v. OSHA</i> , 849 F.2d 611 (D.C. Cir. 1988)	42, 52, 56, 60
<i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	19, 32
<i>Frohlick Crane Serv., Inc., v. OSHRC</i> , 521 F.2d 628 (10th Cir. 1975).....	28
<i>Fullen v. Phillips Electronics North Am. Corp.</i> , 266 F. Supp. 2d 471 (N.D. W. Va. 2002).....	38
* <i>Gade v. National Solid Wastes Management Ass'n</i> , 505 U.S. 88 (1992)	18, 20, 21, 22, 23, 24, 26, 27
<i>Geier v. American Honda Motor Co.</i> , 529 U.S. 861 (2000)	30, 31, 32, 33, 34, 35, 36
<i>General Motors Corp. v. Ruckelshaus</i> , 742 F.2d 1561 (D.C. Cir. 1984)	47
<i>Hillsborough County v. Automated Med. Laboratories, Inc.</i> , 471 U.S. 707 (1985)	44
* <i>In re Welding Fume Prods. Liab. Litig.</i> , 364 F.Supp.2d 669 (N.D. Ohio 2005)	22, 26, 38

<i>Industrial Truck Ass'n v. Henry</i> , 125 F.3d 1305 (9th Cir. 1997).....	22
<i>International Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987)	20
<i>Jeter v. St. Regis Paper Co.</i> , 507 F.2d 973 (5th Cir. 1975).....	28
<i>Jones v. Cincinnati, Inc.</i> , 589 N.E.2d 335 (Mass. Ct. App. 1992).....	39
* <i>Lindsey v. Caterpillar, Inc.</i> , 480 F.3d 202 (3d Cir. 2007)	26, 38
<i>Lopez v. Gem Gravure Co.</i> , 858 N.Y.S.2d 226 (N.Y. App. Div. 2008).....	39
<i>Reigel v. Medtronic</i> , 552 U.S. 312 (2008)	30, 31
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996)	20, 31, 37
<i>Metwest, Inc. v. Sec'y of Labor</i> , 560 F.3d 506 (D.C. Cir. 2009)	49
<i>Minichello v. U.S. Industries, Inc.</i> , 756 F.2d 26 (6 th Cir. 1985)	27
<i>Munsell v. Dep't of Agric.</i> , 509 F.3d 572 (D.C. Cir. 2007)	41, 42
<i>Nat'l Medical Enterprises, Inc. v. Shalala</i> , 43 F.3d 691 (D.C. Cir. 1995)	48
<i>Nat'l Solid Wastes Mgmt. Ass'n v. Killian</i> , 918 F.2d 671 (7th Cir. 1990), <i>aff'd on other grounds sub nom.</i> , <i>Gade v. Nat'l Solid Wastes Mgmt. Ass'n</i> , 505 U.S. 88 (1992).....	27

<i>Nicastro v. Aceto Corp.</i> , No. L-3062-08 (N.J. Super. Ct. Monmouth Co.)	40, 41
* <i>Pedraza v. Shell Oil Co.</i> , 942 F.2d 48 ((1st Cir. 1991)	26, 27, 38
<i>Sakellardis v. Polar Air Cargo</i> , 104 F. Supp. 2d 160 (E.D.N.Y. 2000).....	38
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984)	20, 27
<i>Steel Institute of New York v. City of New York</i> , __ F.3d __, 2013 WL 1876537 (May 7, 2013)	24, 45
<i>Syncor Int'l Corp. v. Shalala</i> , 127 F.3d 90 (D.C. Cir. 1997)	48, 50
<i>Toilet Goods Ass'n v. Gardner</i> , 387 U.S. 158 (1967)	42
<i>Torres-Rios v. LPS Labs., Inc.</i> , 153 F.3d 11 (1st Cir. 1998)	39
<i>United Steelworkers v. Auchter</i> , 763 F.2d 728 (3d Cir. 1985).....	50
<i>United Steelworkers v. Marshall</i> , 647 F.2d 1139 (D.C. Cir. 1981)	16, 18, 25, 29, 47
<i>Wal-Mart Stores, Inc. v. Sec'y of Labor</i> , 406 F.3d 731 (D.C. Cir. 2005)	16
<i>Washington v. Falco S&D, Inc.</i> , 1996 WL 627999 (E.D. La. Oct 29, 1996).....	38
<i>Wayneview Care Center v. NLRB</i> , 664 F.3d 341 (D.C. Cir. 2011)	49

<i>Wickham v. American Tokyo Kasei, Inc.</i> , 927 F. Supp. 293 (N.D. Ill 1996).....	38
* <i>Wyeth v. Levine</i> , 555 U.S. 555 (2009)	19, 20, 25, 35, 37, 43, 44, 45
<i>York v. Union Carbide Corp.</i> , 586 N.E. 2d 861 (Ind. Ct. App. 1992).....	39

STATUTES AND REGULATIONS:

Administrative Procedure Act,

5 U.S.C. § 553	47
5 U.S.C. § 553(b)(3)(A)	47
5 U.S.C. § 553(b)	47
5 U.S.C. § 553(c).....	47
5 U.S.C. § 706(2)(A).....	16

49 U.S.C. § 5125(b).....	24
--------------------------	----

Occupational Safety and Health Act of 1970,

2(b), 29 U.S.C. § 651(b).....	2, 25
3(8), 29 U.S.C. § 652(8).....	3
*4(b)(4), 29 U.S.C. § 653(b)(4)	1, 2, 3, 4, 13, 15, 16,17, 18, 28, 29, 30, 31, 32, 35, 36, 37, 38, 40, 41, 43, 46, 49, 50, 53, 54
5, 29 U.S.C. § 654	36

6, 29 U.S.C. § 655	2, 3, 54
6(b)(2), 29 U.S.C. § 655(b)(2)	47
6(f), 29 U.S.C. § 655(f)	1, 16
9, 29 U.S.C. § 658	3
17, 29 U.S.C. § 666	3
18, 29 U.S.C. § 667	1, 2, 6, 7, 8, 14, 16, 17, 18, 20, 21, 22, 23, 26, 24, 31, 37, 40, 41, 43, 45, 46, 49, 50, 53, 60
18(a), 29 U.S.C. § 667(a)	3, 20, 23
*18(b), 29 U.S.C. § 667(b)	3, 6, 8, 14, 20, 22, 23, 31
18(c), 29 U.S.C. § 667(c)	3, 21, 22, 23
18(c)(1), 29 U.S.C. § 667(c)(1)	22
18(f), 29 U.S.C. § 667(f)	21
18(h), 29 U.S.C. § 667(h)	21
29 C.F.R. 1910.1200	1, 4
29 C.F.R. 1910.1200 App. C.3	34
29 C.F.R. 1910.1200 App. C.3.1	12, 33
29 C.F.R. 1910.1200 App. D., Table D-1	12, 33
29 C.F.R. § 1910.1200(a)(2)(1984)	2, 5, 6
29 C.F.R. § 1910.1200(a)(2)(1988)	5, 9, 58
29 C.F.R. § 1910.1200(c)	36

29 C.F.R. § 1910.1200 (d), (f), (g) (1984)	5
29 C.F.R. § 1910.1200 (e), (h) (1984).....	5
29 C.F.R. § 1910.1200(f)(1)(ii) (2011)	10

MICELLANEOUS:

Federal Register,

48 Fed. Reg. 52,283	5, 56-57
48 Fed. Reg. 52,284	6, 57
48 Fed. Reg. 53,280 (Nov. 25, 1983).....	4
48 Fed. Reg. 53,323	7
48 Fed. Reg. 53,323-24	4
48 Fed. Reg. 53,329	7
48 Fed. Reg. 53,334	6
52 Fed. Reg. 31,852 (Aug. 24, 1987).....	7, 57
52 Fed. Reg. 31,857	7, 57
52 Fed. Reg. 31,860	7
52 Fed. Reg. 31,860-61	58
52 Fed. Reg. 31,861	8
52 Fed. Reg. 31,877	7
59 Fed. Reg. 6126 (Feb. 9, 1994).....	9, 58
59 Fed. Reg. 6161	9, 58, 59

59 Fed. Reg. 6163	9, 33, 58, 59
62 Fed. Reg. 31,159 (Jun. 6, 1997).....	22
77 Fed. Reg. 3912 (Jan. 25, 2012)	2
77 Fed. Reg. 39,567 (July 3, 2012).....	24
77 Fed. Reg. 39,568	24
77 Fed. Reg. 39,568-69	24
77 Fed. Reg. 39,570	24

<i>Occupational Health and Safety Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294, and H.R. 13373 before Select Subcomm. on Education and Labor, 91st Cong., 1st Sess., Pt. 2, at 1592-93 (1969) (letter of Laurence H. Silberman, Solicitor of Labor)</i>	30
--	----

OSHA Brief, Hazard Communication Standard: Safety Data Sheets (http://www.osha.gov/Publications/OSHA3514.html).....	34
--	----

OSHA Quick Card, Hazard Communication Standard Labels (http://www.osha.gov/Publications/HazComm_QuickCard_Labels.html , last accessed May 7, 2013).....	34
---	----

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27746 (last accessed Apr. 29, 2013)	52-54
---	-------

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20702 (last accessed May 7, 2013) ...	54
---	----

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22281 (last accessed May 7, 2013) ...	55
---	----

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25893

(last accessed May 7, 2013) 55

http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28049 (last accessed May 6, 2013) ... 55

GLOSSARY OF ABBREVIATIONS

Abbreviation	Term
APA	Administrative Procedure Act
ATRA	American Tort Reform Association
Emp. Am. Br.	Amici Brief in support of Petitioner
HazCom	Hazard Communication
GHS	Globally Harmonized System of Classification and Labelling of Chemicals
JA	Joint Appendix
OSH Act	Occupational Safety and Health Act
OSHA	Occupational Safety and Health Administration
Pet. Br.	ATRA's Opening Brief

JURISDICTIONAL STATEMENT

The American Tort Reform Association (ATRA) challenges minor, non-substantive revisions made by the Occupational Safety and Health Administration (OSHA) to the wording of paragraph (a)(2) of OSHA's hazard communication (HazCom) standard, 29 C.F.R. § 1910.1200. The HazCom standard was promulgated by final rule published in the Federal Register on March 26, 2012. ATRA filed its petition for review on May 24, 2012. This Court therefore has jurisdiction over the appeal under § 6(f) of the Occupational Safety and Health Act (OSH Act). 29 U.S.C. § 655(f) (granting jurisdiction over challenges by “[a]ny person who may be adversely affected by a standard” filed “at any time prior to the sixtieth day after such standard is promulgated”).

STATEMENT OF ISSUES

1. Whether state tort law claims are preempted by the HazCom standard where the plain language of § 18 of the OSH Act limits the preemptive effect of OSHA standards to state occupational safety and health standards, § 4(b)(4) provides that “[n]othing in this Act shall be construed to . . . enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of,

or in the course of, employment,” and the legislative history and purpose of the OSH Act support the preservation of state tort law systems.

2. Whether notice-and-comment rulemaking requirements applied to OSHA’s minor revisions to 29 C.F.R. § 1910.1200(a)(2), HazCom’s preemption provision, where that provision merely provides OSHA’s interpretation of the scope of the HazCom standard in light of §§ 18 and 4(b)(4) of the OSH Act.

STATUTES AND REGULATIONS

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

STATEMENT OF FACTS

A. Relevant Provisions of the OSH Act

Congress enacted the OSH Act to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” 29 U.S.C. § 651(b). To that achieve that goal, Congress gave the Secretary of Labor the authority to promulgate mandatory occupational safety and health standards.¹ *Id.* § 655. An OSH Act standard “requires conditions, or the adoption or use of one or more practices, means, methods,

¹ The Secretary’s responsibilities under the OSH Act have been delegated to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* 77 Fed. Reg. 3912 (Jan. 25, 2012).

operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” *Id.* § 652(8).

Employers who fail to comply with OSH Act standards are subject to citations and penalties. *Id.* §§ 658, 666.

The OSH Act also allows states to maintain a role in promoting and enforcing occupational safety and health in their workplaces. “Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.” *Id.* § 667(a). And, with OSHA’s approval and guidance, states that wish to assume responsibility for the development and enforcement of “occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated” may submit a state plan to OSHA for approval. *Id.* § 667(b); *see also id.* § 667(c) (describing requirements for OSHA approval of state plans on issues for which OSHA has adopted standards).

Although Congress enacted the OSH Act to prevent occupational injuries and illnesses, the OSH Act does not contain any private right of action allowing employees to recover for injuries or illnesses caused by hazardous work conditions. Instead, § 4(b)(4) of the OSH Act states:

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

Id. § 653(b)(4).

B. OSHA's Promulgation of the HazCom Standard

In 1983 OSHA promulgated the HazCom standard, 29 C.F.R. § 1910.1200, after finding that millions of American workers used hazardous chemicals, but that many of them, and their employers, knew little or nothing about the often serious hazards of those chemicals. 48 Fed. Reg. 53,323-24. Chemical exposure may cause or contribute to serious and even fatal health effects such as heart ailments, central nervous system effects, kidney and lung damage, sterility, cancer, burns, and rashes, OSHA found. *Id.* Some workplace chemicals also pose physical hazards such as fires, explosions, and other serious accidents. *Id.*

The standard was intended to ensure that both employers and employees understand the hazards of dangerous chemicals used in the workplace. 48 Fed. Reg. 53,280 (Nov. 25, 1983). Among other things, the 1983 HazCom standard required chemical manufacturers to determine the hazards posed by their chemicals and to provide users with labels and

material safety data sheets containing information about the hazards.² 29 C.F.R. § 1910.1200 (d), (f), (g) (1984). Manufacturers were also required to develop a hazard communication program, maintain material safety data sheets and labels in the workplace, and provide training to employees on the hazards of the chemicals to which they are exposed. *Id.* § 1910.1200 (e), (h) (1984).

C. The Preemption Provision³ of the HazCom Standard

When it developed the HazCom standard, OSHA was aware of the “recent proliferation of state and local right-to-know laws” that subjected manufacturers to “numerous different and potentially conflicting regulations.” 48 Fed. Reg. 53,283. OSHA observed that:

Approximately twelve states and six local governments have some type of regulation related to the identification of hazardous substances. About thirteen other states and three other local governments have introduced proposed legislation either in this legislative session or in previous sessions. They cover different lists of substances, have

² Labels provide summary information on a chemical’s hazards and recommended safe handling techniques; material safety data sheets contain more detailed information about the chemical’s hazards, physical characteristics, recommended storage and handling, and emergency procedures. *See* Joint Appendix (JA) 452. Under the 2012 amendments to the HazCom standard, “material safety data sheets” are now called “safety data sheets,” JA 300, and the terms are used interchangeably in this brief.

³ Paragraph (a)(2) of the HazCom standard, 29 C.F.R. § 1910.1200(a)(2), is also known as the preemption provision, and the terms are used interchangeably in this brief.

different reporting requirements, serve different purposes, have different labeling and material safety data sheet requirements, and have different educational and training requirements.

Id. at 52,284. During the notice and comment period, several commenters argued for a single federal standard covering hazard communication. The National Paint and Coatings Association noted that:

Without a strong Federal role, individual States will enact a variety of diverse labeling rules that would hamper interstate business operations and impede worker protection. Indeed, manufacturers in interstate commerce are faced with the threat of 50 different chemical hazard warning systems mandating conflicting, overlapping, and duplicative requirements for hazard warnings.

Id.

OSHA observed that it was “in a position to reduce the regulatory burden posed by multiple State laws.” *Id.* at 53,284. To make this clear, it included in the HazCom standard paragraph (a)(2), the preemption provision, because under § 18 of the OSH Act, 29 U.S.C. § 667, the standard preempts “State laws which deal with hazard communication requirements for employees.” *Id.* Any state wishing to regulate this area was required to submit its proposed state hazard communication requirements to OSHA for approval under § 18(b) of the OSH Act, 29 U.S.C. § 667(b). 29 U.S.C. § 1910.1200(a)(2) (1984); 48 Fed. Reg. 52,284, 53,334.

Nowhere in its discussion of the problem of differing state and local right-to-know laws did OSHA consider whether state tort laws posed any problems for chemical manufacturers. Nor did OSHA discuss the effect, if any, of the HazCom standard on chemical manufacturers' future tort liability when calculating the benefits of the standard, though it did account for the reduction in the cost of compliance with the various state and local right-to-know laws. *Id.* at 53,329. OSHA's only mention of tort law simply noted that tort law was ineffective to ensure adequate hazard communication. *Id.* at 53,323.

The 1983 HazCom standard applied only to manufacturers, and in 1987 OSHA amended the standard to extend to all employers the hazard communication plan, workplace labeling, safety data sheet maintenance, and employee training requirements. 52 Fed. Reg. 31,852 (Aug. 24, 1987). In making these changes, OSHA also revised the language of paragraph (a)(2). OSHA noted that "[a]pproximately 32 States and several localities already have hazard communication/right-to-know laws covering non-manufacturing industries," and given the HazCom standard's expansion to all workplaces handling hazardous chemicals, paragraph (a)(2) was revised to make more clear that the standard preempted all such laws under § 18 of the Act, 29 U.S.C. § 667. *Id.* at 31,857, 31,860.

OSHA stated that revised paragraph (a)(2):

[N]ot only defines hazard communication as an “issue” under the terms of [§ 18(b) of] the Act, but also enumerates the generic areas addressed by the standard for purposes of establishing the parameters of preemption. Thus any State or local government provision requiring the preparation of material safety data sheets, labeling of chemicals and identification of their hazards, development of written hazard communication programs including lists of hazardous chemicals present in the workplace, and development and implementation of worker chemical hazard training for the primary purpose of assuring worker safety and health, would be preempted by the [HazCom standard] unless it was established under the authority of an OSHA-approved State plan.

52 Fed. Reg. 31,861. In addition, OSHA made a technical amendment to paragraph (a)(2) clarifying that the standard preempted not just state, but also local government right-to-know laws. *Id.* The language of the preemption provision was revised to read:

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

29 C.F.R. § 1910.1200(a)(2) (1988); 52 Fed. Reg. at 31,877. Again, OSHA made no mention of tort laws in discussing paragraph (a)(2) in the 1987 preamble to the standard.

In 1994 OSHA made a number of minor, technical updates to the HazCom standard. Though OSHA made no revisions to paragraph (a)(2), it noted several times in the preamble that manufacturers often provided more information than required by the standard to protect themselves against product liability lawsuits. 59 Fed. Reg. 6126, 6161, 6163 (Feb. 9, 1994). In addition, it replied to a comment that the safety data sheet requirements were “not sufficient to protect producers against product liability” by explaining that this concern was “irrelevant to the rulemaking,” and that producers were free to provide “additional data to satisfy product liability concerns.” 59 Fed. Reg. 6163. Similarly, another commenter was concerned that manufacturers put “worst case” rather than “realistic” recommendations on safety data sheets. *Id.* OSHA responded that manufacturers were required to put accurate information on the safety data sheets, and stated “the precautionary measures must be consistent with the hazards of the chemical, not simply written to protect the liability of the manufacturer by suggesting more protective measures than are necessary.” *Id.*

D. The 2012 Revisions to the HazCom Standard and the Preemption Provision

On March 29, 2012, OSHA published a final rule updating the HazCom standard to incorporate the Globally Harmonized System of Classification and Labeling of Chemicals (Globally Harmonized System). JA 296-619. The Globally Harmonized System is a “new approach [to hazard communication] that has been developed through international negotiations and embodies the knowledge gained in the field of chemical hazard communication since the [HazCom standard] was first adopted in 1983.” JA 298. OSHA determined that modifying the HazCom standard to align with the Globally Harmonized System would significantly enhance worker protections. JA 298.

Prior to the 2012 amendments, the HazCom standard stated in general terms the information to be included on labels and safety data sheets, but left many of the details up to the manufacturers. For example, the pre-2012 standard required hazardous chemical labels to contain “appropriate warnings,” but did not specify what hazards were required to be disclosed on the label, or what words were required to be used to communicate those hazards. 29 C.F.R. § 1910.1200(f)(1)(ii) (2011); JA 447-48. Similarly, before the 2012 amendments, the standard specified particular information

to be included on the safety data sheet, but did not indicate the order in which the information was to appear. JA 451-52.

In contrast, the Globally Harmonized System adopts a specification approach, which requires hazard information to be conveyed in a standardized manner. JA 303. Based on the nature and severity of the hazard, it requires the use of certain signal words (either “Danger” or “Warning”), a pictogram, (*e.g.*, a skull and crossbones), and a hazard statement (*e.g.*, “Fatal if Swallowed”) on a chemical’s label and safety data sheet. JA 303. As incorporated into OSHA’s HazCom standard, the Globally Harmonized System also specifies mandatory precautionary statements (containing information about safe handling and first aid) that must appear on both the label and the safety data sheet. JA 424-25, 607. Additionally, the Globally Harmonized System establishes a standardized sixteen-section format for safety data sheets so that hazard information is presented in a consistent order. JA 607.

By incorporating the Globally Harmonized System, the HazCom standard’s requirements for labels and safety data sheets became much more specific. Even so, in the preamble accompanying the 2012 amendments, OSHA made clear that the standard’s requirements remained “the minimum information to be provided by manufacturers and importers.” JA 448; *see*

also 29 C.F.R. 1910.1200 App. C.3.1 (stating that additional information may be included on a label if “it provides further detail and does not contradict or cast doubt on the validity of the standardized hazard information”); *id.* App. D, Table D-1 (“Minimum Information for a [safety data sheet]”).

During the rulemaking process, a few commenters asked OSHA to amend paragraph (a)(2) of the HazCom standard to “include in the final standard a provision which preempts state law tort claims.” JA 760; *see also* JA 706. Dow Chemical, one of these commenters, argued that because OSHA has mandated “the precise words we must use on our labels . . . it would be patently unfair to allow personal injury plaintiffs to assert that the warnings are inadequate.” JA 706. Another commenter, the Industrial Minerals Association—North America, claimed that its members had been subjected to failure-to-warn suits even though their labels and safety data sheets “exceeded relevant standards.” JA 760. Without preemption, the association argued, “the authority of OSHA rules . . . will be superseded by juries” and different juries could reach conflicting results. JA 760.

OSHA considered and rejected these requests, noting that an October 18, 2011 letter of interpretation issued by the Solicitor of Labor had already addressed these contentions and found that “the [HazCom standard] does not

preempt state failure to warn lawsuits.” JA 417. OSHA further explained that courts had held that § 4(b)(4) of the OSH Act, 29 U.S.C. § 653(b)(4), “explicitly preserves, rather than preempts, State tort law.” JA 417. While the HazCom standard might preempt “to the extent a state tort rule directly conflicted with the standard,” no evidence of such a conflict had been provided for the rulemaking record. JA 417. Moreover, the President had issued a memorandum disfavoring preemption. JA 417.

To eliminate any confusion about the preemptive effect of the HazCom standard, OSHA made two changes relevant to this appeal to the pre-2012 version of paragraph (a)(2). JA 417. The 2012 revisions to the standard changed the words “legal requirements” to “legislative or regulatory enactments” in the paragraph’s first sentence, and eliminated the words “through any court or agency” in the last sentence. JA 417. These changes are shown in redline below:

This occupational safety and health standard is intended to address comprehensively the issue of classifying the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legislative or regulatory enactments ~~legal requirements~~ of a state, or political subdivision of a state, pertaining to this subject. Classifying the potential hazards of chemicals and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not limited to, provisions for: developing and maintaining a written

hazard communication program for the workplace, including lists of hazardous chemicals present; labeling of containers of chemicals in the workplace, as well as of containers of chemicals being shipped to other workplaces; preparation and distribution of safety data sheets to employees and downstream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures. Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, ~~through any court or agency~~, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan.⁴

SUMMARY OF ARGUMENT

Under § 18(b) of the OSH Act OSHA standards are preemptive only with respect to state occupational safety and health standards “relating to [the same] occupational safety or health issue.” The HazCom standard therefore does not preempt state tort law personal injury claims as tort law does not constitute state occupational safety and health standards but instead is law of general applicability. ATRA’s assertions to the contrary not only fail to account for the specific requirements in § 18 applicable to state plans that simply cannot be read to apply to tort laws, but also fail to address the plain language of the rest of the OSH Act, as well as its legislative history and purposes.

⁴ The final rule also made other changes to this paragraph (substituting the word “classifying” for “evaluating” and eliminating the word “material” before “safety data sheet”) that are not at issue here and are reflected in the quoted text but not redlined. *See* JA 416.

Most importantly, § 4(b)(4) of the OSH Act expressly confirms the preservation of a state's tort law system, holding that “[n]othing in this Act shall be construed . . . to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.” Paragraph (a)(2) of the HazCom standard therefore correctly states the preemptive effect of the standard, and the Court should reject ATRA's challenge to the provision.

Because the OSH Act sets the terms and scope of preemption, ATRA's procedural attack on OSHA's 2012 non-substantive revisions to paragraph (a)(2) of the HazCom standard also must fail. Paragraph (a)(2) simply provides OSHA's longstanding interpretation of the HazCom standard's preemptive effect in light of governing OSH Act provisions. The 2012 revisions effected no change in this interpretation, and it is well-settled that interpretative rules are not subject to notice and comment rulemaking.

ARGUMENT

I. Standard of Review

The OSH Act provides that the determinations made by OSHA in support of its standards “shall be conclusive” if they are supported by substantial evidence in the record as a whole. 29 U.S.C. § 655(f); *United Steelworkers v. Marshall*, 647 F.2d 1189, 1206 (D.C. Cir. 1981). However, rather than challenge OSHA’s decision to adopt a standard or the content of a standard, in essence ATRA challenges OSHA’s interpretation of the OSH Act and the HazCom standard. This Court defers to OSHA’s interpretations of its regulations and the OSH Act so long as they are consistent with the text and otherwise reasonable. *Wal-Mart Stores, Inc. v. Sec’y of Labor*, 406 F.3d 731,734 (D.C. Cir. 2005). ATRA’s procedural challenge will only be upheld if it can show that the agency’s action is “contrary to law.” 5 U.S.C. 706(2)(A).

II. Sections 18 and 4(b)(4) of the OSH Act Make Clear that the HazCom Standard Generally Does Not Preempt State Tort Law.

The thrust of ATRA’s argument is that in making minor revisions to the HazCom standard’s preemption provision in 2012, OSHA somehow engaged in an “ultra vires” attempt to limit the preemptive effect of the OSH Act. Pet. Br. 38-54. Paragraph (a)(2) must be “stricken,” ATRA asserts,

because “OSHA has overstepped its standard-making authority.” Pet. Br. 43. These erroneous assertions display a fundamental misunderstanding of the preemptive scope of the OSH Act and OSHA’s authority to enact occupational safety and health standards.

Contrary to ATRA’s beliefs, the HazCom standard does not, and cannot derive any preemptive effect from the interpretive language contained in paragraph (a)(2) of the standard. This is because the scope of preemption is clearly established by the OSH Act, and OSHA lacks authority to deviate from Congress’ preemptive intent. As explained below, under § 18 of the OSH Act, 29 U.S.C. § 667, only state occupational safety and health standards in the workplace “with respect to which a Federal standard has been promulgated,” and not laws of general applicability, are preempted by OSHA standards. And, in § 4(b)(4) of the OSH Act, Congress exempted private tort actions from preemption by any OSHA standard. 29 U.S.C. § 653(b)(4) (“Nothing in this Act shall be construed . . . to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.”).

The preemptive effect of the HazCom standard is therefore quite straightforward. Reading §§ 18 and 4(b)(4) together -- and in light of the Supreme Court's guidance in *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992), and this Court's instructive language in *United Steelworkers*, 647 F.2d at 1236 -- the OSH Act preempts only state occupational safety and health standards; it preserves state tort law claims unless they conflict with the HazCom standard under general principles of conflict preemption.

Given the legislative history and purposes of the OSH Act, ATRA's attempts to minimize and explain away Congress' intent and the express language used in §§ 18 and 4(b)(4) are unpersuasive. Pet. Br. 43-54. Additionally, to the extent ATRA seeks an advisory opinion on precisely when and how a state tort law may conflict with the HazCom standard, such a request is not ripe for review and should be rejected by the Court. Paragraph (a)(2) of the HazCom standard provides OSHA's well-reasoned interpretation of the statute it administers and a standard it has promulgated, and that interpretation correctly states the scope of OSH Act preemption. The Court should therefore dismiss ATRA's petition for review.

A. *Except Where There is a Direct Conflict with the HazCom Standard, the OSH Act Preserves State Tort Law Claims.*

The express language of the OSH Act demonstrates that Congress's clear and manifest purpose was not to preempt state tort law, but instead to

preserve it. Preemption of state law by federal law may occur in three situations: (1) express preemption, which occurs when the language of the federal statute reveals an express congressional intent to preempt state law; (2) field preemption, which occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a state to supplement it; and (3) conflict preemption, which occurs either when compliance with both the federal and state law is a physical impossibility or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996). Even where Congress has not expressly preempted state law or occupied the field, a state law must yield when there is a conflict between federal and state law. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (finding preemption where compliance with both state and federal laws is impossible). Both ATRA and Employer *amici* agree that only the third type of preemption is at issue in this case. Pet. Br. 46-8, 51; Emp. Am. Br. 16.

Congressional intent is the “ultimate touchstone in every pre-emption case.” *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). “In all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . we ‘start with the

assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). This presumption applies here because providing tort remedies to its injured citizens is a traditional power of the states. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 503 (1987).

1. *Section 18 of the OSH Act Preempts Only State Occupational Safety and Health Standards and Not Tort Laws of General Applicability.*

Section 18 of the OSH Act, 29 U.S.C. § 667, “unquestionably preempts any state law or regulation that establishes an occupational health and safety standard on an issue for which OSHA has already promulgated a standard, unless the State has obtained the Secretary’s approval for its own plan.” *Gade*, 505 U.S. at 97 (internal citation omitted). This is because a state “shall” submit a plan if it wishes to “assume responsibility” for “development and enforcement . . . of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated.” 29 U.S.C. § 667(b). The “natural implication of [§ 18(a)] is that state laws regulating the same issue

as federal laws are not saved, even if they merely supplement the federal standard.” *Gade*, 505 U.S. at 100.

The approval process for state plans contained in § 18(c) likewise confirms the preemptive effect of OSHA standards on state occupational safety and health standards. Approval of a state plan requires that the state plan: (1) designate a “state agency or agencies responsible for administering the plan through the state”; (2) be at least as effective as the federal standard, required by compelling local conditions, and not place an undue burden on commerce; (3) provide for a right of entry and inspection of workplaces; (4) provide adequate assurances that the state agency has adequate legal authority and qualified personnel; (5) give satisfactory assurances of adequate funding; (6) cover public employees; (7) require employers in the state to make reports to the Secretary; and (8) provide that the state agency will make reports to Secretary as required. 29 U.S.C. § 667(c). Similarly, §§ 18(f) and (h) confirm that “states are not permitted to assume an enforcement role without the Secretary’s approval, unless no federal standard is in effect.” *Gade*, 505 U.S. at 101. Thus, given the statutory language and structure, the “unavoidable implication” of § 18 is that because OSHA has adopted the HazCom standard, states may not adopt chemical hazard right-to-know occupational safety and health standards for

the workplace without OSHA's approval. *Gade*, 505 U.S. at 99; *Indus. Truck Ass'n v. Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997) (finding that California's right to-know law known as Proposition 65 was preempted by the HazCom standard, except to the extent that the law's requirements are contained in California's state plan and approved by OSHA); 62 Fed. Reg. 31,159 (Jun. 6, 1997) (approving, with conditions, California state plan implementing Proposition 65).

In contrast, § 18 says nothing about common law rules of tort liability. Indeed, the language of the provision effectively precludes tort causes of action from its preemptive scope. For example, state standards submitted for approval under § 18 must be part of a state plan and meet requirements that are wholly inapposite to tort remedies. *See* 29 U.S.C. § 667(c). It defies common sense that Congress would require a state to submit a plan for the “development” of tort liability claims, § 18(b), or to “designate a State agency . . . for administering” tort remedies. *Id.* § 18(c)(1); *see also In re Welding Fume Prods. Liab. Litig.*, 364 F.Supp.2d 669, 689 (N.D. Ohio 2005) (“It makes no sense, for example, to read § 667(b) of the OSH Act as requiring a State to submit to the Secretary of Labor for his approval its pre-existing common law duty to warn . . .”).

ATRA places great significance on the fact that § 18(a) of the OSH Act provides that any “State agency or court”⁵ may assert jurisdiction “under State law” over any issue on which OSHA has not regulated. 29 U.S.C. § 667(a). According to ATRA, this shows that § 18 applies to both positive enactments by state and local government and the common law. Pet. Br. 44. But § 18(a) is a savings provision, not a preemption provision. The preemptive scope of § 18 is given by § 18(b), *Gade*, 505 U.S. at 99, which applies to “any State which . . . desires to assume responsibility for the development and enforcement of occupational safety and health standards.” And, “[b]ecause this provision requires federal approval of state occupational safety and health standards alone, only state laws fitting within that description are pre-empted.” *Id.* at 114 (Kennedy, concurring). Courts would neither “desire[] to assume responsibility for the development” of workplace safety rules, nor apply to OSHA in accordance with § 18(c) for permission to adopt tort rules on issues where OSHA has regulated. Rather, the more natural reading is that § 18 of the OSH Act is directed only to positive regulatory or legislative enactments addressing workplace safety.⁶

⁵ ATRA omits the word “agency” when it sets out the text of § 18(a) in its brief. Pet. Br. 44.

⁶ ATRA also focuses on OSHA’s use of the word “requirements” in the pre-2012 version of paragraph (a)(2) of the HazCom standard. Pet. Br. 36-38.

“On the other hand, 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 nonworkers alike would generally not be pre-empted.” *Gade*, 505 U.S. at 107; *see also Steel Institute of New York v. City of New York*, ___ F.3d ___, 2013 WL 1876537, **6-7 (May 7, 2013) (finding that New York City crane regulations are not preempted by OSHA’s crane standard because they are laws of general applicability, not directed at the workplace, that regulate workers as members of the general public). This is because such laws “cannot be fairly

According to ATRA, under *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this means the HazCom standard preempts state tort law. Pet. Br. 45. ATRA also notes that the Department of Transportation recently issued a notice concluding that the statutory phrase “law, regulation, order, or other requirement” includes common law obligations; certain tort claims were therefore preempted by the Hazardous Materials Transportation Act unless the common law requirements were substantively the same as the requirements under the federal scheme. Pet. Br. 45, n.12; 77 Fed. Reg. 39,567, 39,568, 39,570 (July 3, 2012) (construing 49 U.S.C. § 5125(b)).

ATRA’s argument misses the mark. *Cipollone* discussed Congress’ intent in using the term “requirement” in a statute. 505 U.S. at 515. Likewise, the DOT notice interpreted the meaning of the word “requirement” in the Hazardous Materials Transportation Act’s preemption provision. 77 Fed. Reg. at 39,568-69. Congress has not used the term “requirement” in § 18 of the OSH Act, and OSHA did not intend to expand, nor could it have expanded, the preemptive effect of the OSH Act by using the term in its pre-2012 version of the HazCom standard. *See infra* pp. 52-54 (discussing OSHA’s use of the term “requirements” in the HazCom standard).

characterized as occupational standards, because they regulate workers simply as members of the general public.” *Id.*

In this regard, it is significant that the OSH Act does not protect the general public, but applies only to employers and employees in workplaces. *See, e.g.*, 29 U.S.C. § 651(b)(1). And, Congress did not include in the OSH Act any private right of action or other remedy for workplace injuries, disease or death. *United Steelworkers*, 647 F.2d at 1235-36. Employees are therefore covered under state tort law systems as members of the general public. *See Wyeth*, 555 U.S. at 575 (“Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the 1938 statute or in any subsequent amendment. Evidently it determined that widely available state rights of action provided appropriate relief for injured consumers.”); *Atlas Roofing Co., Inc. v. OSHRC*, 430 U.S. 442, 445 (1977) (noting that even though OSHA can issue abatement orders and impose civil penalties on employers, and even though these options exist regardless of whether “an employee is actually injured or killed,” all “existing state statutory and common-law remedies for actual injury and death remain unaffected”). As the First Circuit has explained, the:

maintenance of judicial fora for the enforcement of private rights in the workplace, under State laws of general application, seems to us a function far less prophylactic than reactive; less normative than

compensatory; and less an arrogation of regulatory jurisdiction over an “occupational safety or health issue” than a neutral forum for the orderly adjustment of private disputes between, among others, the users and suppliers of toxic substances.

Pedraza v. Shell Oil Co., 942 F.2d 48, 53 (1st Cir. 1991).

In short, tort law remedies are available to anyone in the general public (including workers) who might be harmed by a wrongful act; they are not aimed specifically at correcting workplace hazards, and therefore § 18 of the OSH Act does not preempt them. *See Gade*, 505 U.S. at 107. Indeed, every federal court that has considered the issue has found that state tort law is the sort of law of general applicability that *Gade* held is not preempted by § 18 of the OSH Act. *See, e.g., Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 211 (3d Cir. 2007) (finding personal injury tort claim not preempted because plaintiff was “seeking to hold Caterpillar accountable under a state law of general applicability that applies equally to workers and non-workers”); *Pedraza*, 942 F.2d at 52-53 (“we find no warrant whatever for an interpretation [of § 18] which would preempt enforcement in the workplace of private rights and remedies traditionally afforded by state laws of general application”); *Welding Fume*, 364 F. Supp. 2d at 686 (finding that plaintiffs’ failure-to-warn claims are not preempted by the OSH Act or related federal

regulations; the common-law duty to warn is “generally applicable” and “independent of the plaintiffs’ status as employees in a workplace”).

A contrary result would deny workers (but not members of the general public) who are injured by a defective product a tort remedy against the manufacturer where there is an OSHA standard that applies to the product, even if the product did not meet OSHA’s requirements. This is a radical conclusion, unsupported by any evidence that Congress intended it, and courts have accordingly rejected it. *See, e.g., Pedraza*, 942 F.2d at 52-53; *Nat’l Solid Wastes Mgmt. Ass’n v. Killian*, 918 F.2d 671, 680 n.9 (7th Cir. 1990), *aff’d on other grounds sub nom. Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88 (1992); *cf. Silkwood*, 464 U.S. at 251 (“It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.”); *Minichello v. U.S. Indus., Inc.*, 756 F.2d 26, 29 (6th Cir. 1985) (“[e]ven . . . if the OSHA regulations were intended to affect civil liability – as Congress has made clear they are not – they would not bear upon the relationship between the parties in the case” because “OSHA regulations . . . do not even apply to the relationship between . . . producer and consumer”) (citations omitted).

2. *Section 4(b)(4) Provides an Explicit Statement of Congressional Intention to Preserve and Not Preempt State Tort Law.*

The express language in § 4(b)(4) further confirms that Congress did not intend to preempt state tort law. Under § 4(b)(4):

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

29 U.S.C. § 653(b)(4). The plain language of § 4(b)(4) thus indicates that any standard OSHA promulgates generally has no effect on employees' rights under the state tort system with respect to workplace injuries and illnesses. *See Atlas Roofing*, 430 U.S. at 445 (“existing state statutory and common-law remedies for actual injury and death remain unaffected” by the OSH Act); *Frohlick Crane Serv., Inc., v. OSHRC*, 521 F.2d 628, 631 (10th Cir. 1975) (“It would appear that by this particular provision [section 4(b)(4)] Congress simply intended to preserve the existing private rights of an injured employee, which rights were to be unaffected by the various sections of the Act itself.”); *Jeter v. St. Regis Paper Co.*, 507 F.2d 973, 977 (5th Cir. 1975) (“It seems clear that Congress did not intend [the OSH Act]

to create a new private cause of action, but, on the contrary, intended private rights to be unaffected thereby.”).

This Court’s decision in *United Steelworkers*, 647 F.2d at 1189, is instructive on this point. There, the Court determined that although the medical removal provision contained in OSHA’s lead standard “may indeed have a great practical effect on workmen’s compensation claims, it leaves the state schemes wholly intact as a legal matter, and so does not violate Section 4(b)(4).” *Id.* at 1236. This is because § 4(b)(4) has two functions: (1) it “bars workers from asserting a private cause of action against employers under OSHA standards”; and (2) “when a worker actually asserts a claim under workmen’s compensation law *or some other state law*, Section 4(b)(4) intends that 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 the state law.” *Id.* (emphasis added). This Court has therefore already assessed the effect of the OSH Act’s savings clause. And, the inescapable implication of the Court’s findings in *United Steelworkers* is that § 4(b)(4) preserves tort law claims, and therefore the HazCom standard does not preempt them. *Id.*

Congress’ manifest intent is also confirmed by the legislative history of the OSH Act. Writing to the Chairman of the House Subcommittee on

Labor while Congress was considering the legislation, the Solicitor of Labor explained that the OSH Act would in no way affect current workers' compensation or private tort law:

The provisions of S. 2788, the Administration's proposed Occupational Safety and Health Act of 1969 would in no way affect the present status of the law with regard to workmen's compensation legislation or private tort actions.

Occupational Health and Safety Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294, and H.R. 13373 before Select Subcomm. on Education and Labor, 91st Cong., 1st Sess., Pt. 2, at 1592-93 (1969) (letter of Laurence H. Silberman, Solicitor of Labor).

ATRA's attempt to evade the express language of the savings clause found in § 4(b)(4) of the OSH Act is unpersuasive. *See* Pet. Br. 49-51. ATRA unconvincingly analogizes § 4(b)(4) to the statutory provisions at issue in *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), and *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), where the Supreme Court found that savings clauses did not prevent preemption of certain tort actions. Neither decision is of help to ATRA.

The statute at issue in *Riegel* included a provision providing that compliance with certain FDA orders "shall not relieve any person from liability under Federal or State laws." *Riegel*, 552 U.S. at 325 n.4. The

Supreme Court stated that “[t]his indicates that some state-law claims are not pre-empted, as we held in *Lohr*. But it could not possibly mean that *all* state-law claims are not pre-empted, since that would deprive the [statute’s] pre-emption clause of all content. And it provides no guidance as to which state-law claims are pre-empted and which are not.” *Id.* (emphasis in original).

Unlike the ill-defined “savings” provision at issue in *Riegel*, which did not identify any particular type of obligations under state law that would not be preempted, § 4(b)(4) of the OSH Act explicitly states that it is saving from preemption “the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.” 29 U.S.C. § 653(b)(4). Nor does reading § 4(b)(4) as generally preserving employees’ common law tort actions deprive the preemptive effect of § 18 of “all content” as in *Riegel*, because as explained above, *supra* pp. 20-27, that provision is directed only at state standards aimed at “occupational safety and health issues.” 29 U.S.C. § 667(b).

Geier was a unique conflict preemption case involving a carefully balanced regulatory scheme regarding passive restraints in automobiles. *Geier*, 529 U.S. at 864-65. The Supreme Court found that the Department of

Transportation had carefully assessed the risks and benefits of various alternatives and intended its rule to promote the “gradual phase-in” of “alternative [passive restraint] protection systems” rather than to mandate immediate installation of a single type of system. 529 U.S. at 879, 881. State-imposed tort liability for failure to install a single type of passive restraint system would have conflicted with the objectives underlying the agency's choice of regulatory solutions, including the gradual phase-in of alternative types of systems, the need to overcome safety problems associated with airbags, and the necessity of building public confidence. *Id.* at 885-86. While there was a savings clause in the statute, the Supreme Court held that it did not “bar the ordinary working of conflict pre-emption principles,” because to hold otherwise “upset the careful regulatory scheme established by federal law.” *Id.* at 869-70.

Geier does not support ATRA’s claims. Section 4(b)(4) of the OSH Act does not set aside “the ordinary working of conflict pre-emption principles.” *Id.* at 869. Instead, a state tort law rule that conflicts with a requirement of the HazCom standard would be preempted under general principles of preemption. JA 417; *see also Florida Lime & Avocado Growers*, 373 U.S. at 142-43. Moreover, the HazCom standard is not comparable to the complex phase-in scheme for passive automobile

restraints at issue in *Geier*. OSHA has consistently indicated that the HazCom standard requires only “the minimum information to be provided by manufacturers and importers,” and that additional detail may be included on a label if “it provides further detail and does not contradict or cast doubt on the validity of the standardized hazard information.” JA 448; 29 C.F.R. § 1910.1200 App. C.3.1; § 1910.1200 App. D, Table D-1 (“Minimum Information for a [safety data sheet]”); 59 Fed. Reg. 6163 (stating that manufacturers are free to provide more information than required by the standard to satisfy product liability concerns).

Nor is it true, as suggested by Employer *amici*, that the revised HazCom standard removes all discretion from a manufacturer in deciding what information to include on hazardous chemical labels and safety data sheets. *See* Emp. Am. Br. 20. As noted above, the HazCom standard merely provides the “minimum information” that must be disclosed. “Chemical manufacturers and importers are free to provide additional information.” JA 448. Moreover, the standard vests considerable discretion in the manufacturer about what information may be included. For example, safety data sheets require information about “appropriate engineering controls,” “suitable (and unsuitable) extinguishing media,” and the “most important symptoms/effects.” 29 C.F.R. § 1910.1200 App. D, Table D-1.

Safety data sheets must also include recommendations for immediate medical care, personal protective equipment, emergency procedures, clean up procedures, and safe storage. *Id.*; OSHA Brief, Hazard Communication Standard: Safety Data Sheets (<http://www.osha.gov/Publications/OSHA3514.html>, last accessed May 7, 2013). Similarly, labels may provide supplemental information “as needed,” such as “directions for use.” OSHA Quick Card, Hazard Communication Standard Labels (http://www.osha.gov/Publications/HazComm_QuickCard_Labels.html, last accessed May 7, 2013). The only constraint on such information is that it not contradict, cast doubt on, or obscure the information required to be on labels by the standard. 29 C.F.R. § 1910.1200 App. C.3.

Thus, when manufacturers provide more information than required by the HazCom standard, it does not “upset the careful regulatory scheme,” *Geier*, 529 U.S. at 870, of the standard (assuming no direct conflict with the standard’s requirements). Because the HazCom standard sets a floor, rather than a ceiling for the information to be provided, the *Geier* decision does not support ATRA’s contention that the HazCom standard preempts all state tort law suits arising from workplace exposure to hazardous chemicals.⁷ *See id.*

⁷ Employer *amici* argue that the HazCom standard presents the sort of conflict at issue in *Geier* because “the [standard’s] amendments make conflict between state tort claims and federal law nearly inevitable.” Emp.

at 868. Instead, just as in *Wyeth*, the evidence shows that “Congress did not regard state tort litigation as an obstacle to achieving its purposes.” 555 U.S. at 575; *see id.* at 577-78, 581 (FDA labeling scheme which was a floor but not a ceiling on the contents of labels did not preempt tort law).

ATRA also urges a novel construction of § 4(b)(4). It saves only “the rights, duties or liabilities that arise between ‘employers and employees,’” ATRA claims. Pet. Br. 52. However this theory is undermined by the text of the statute itself. The word “between” does not appear in § 4(b)(4). Rather, § 4(b)(4) states that the OSH Act does not “affect . . . the common law or statutory rights, duties, or liabilities *of* employers and employees” (emphasis added). Under the plain meaning of this passage, a state right to

Am. Br. 20. But all it offers to support this conclusion is speculation that juries might require that labels and safety data sheets contain information that conflicts with the requirements of the amended HazCom standard. Emp. Am. Br. 20-24. OSHA agrees that to the extent that a tort judgment directly conflicts with the HazCom standard, it is preempted. But that does not mean that the purposes and objectives of the standard would be undermined if juries award damages when manufacturers fail to provide information required by the standard, or when manufacturers fail to provide additional information that does not contradict the standard’s requirements. *See Wyeth*, 555 U.S. at 574-75 (“If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA’s 70-year history. . . . Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.”).

sue a chemical manufacturer for injuries caused by a lack of proper warnings is a “common law or statutory right . . . of . . . employees” and the obligation to provide compensation in such circumstances is a “common law or statutory . . . dut[y] or liabili[y] of employers.”⁸ 29 U.S.C. § 653(b)(4).

ATRA claims that under its construction of § 4(b)(4), employees would still have the right to sue their employers in those states where workers compensation law provided a cause of action against employers who injured their employees through willful or reckless misconduct. Pet. Br. 52-53. But under that reading, very few “common law or statutory rights, duties and liabilities” would remain. *Cf. Geier*, 529 U.S. at 868 (rejecting construction of savings clause under which “little, if any, potential ‘liability at common law’ would remain”). There is no reason to read § 4(b)(4) so narrowly. In most cases, tort liability does not interfere with, but rather furthers the purposes of the OSH Act by providing an additional incentive to ensure that workers are not injured. And, as discussed above,

⁸ Additionally, ATRA’s undue emphasis on § 4(b)(4)’s use of the terms “employees” and “employer” is unwarranted. The OSH Act is concerned with safety and health in workplaces, and only prescribes duties for employers and employees. *See, e.g.*, 29 U.S.C. § 654. Thus, it is unsurprising that the OSH Act savings clause would operate to save the tort law system applicable to employers and employees (but make no mention of members of the general public). Similarly, the HazCom standard imposes duties on chemical manufacturers who are employers, 29 C.F.R. § 1910.1200(c), for the purpose of protecting employees.

Congress did not include in the OSH Act any private right of action or other remedy for workplace injuries, disease, or death, instead leaving the state tort law systems generally intact. *See supra* pp. 25-27; *see also Wyeth*, 555 U.S. at 575 (noting preservation of state tort law alongside FDA labeling requirements).

3. *Sections 18 and 4(b)(4) Must Be Read Together.*

Congress' intent is discerned primarily "from the language of the pre-emption statute and the statutory framework surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (internal references omitted).

Congressional intent is also revealed by the "structure and purpose of the statute as a whole," as well as a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Lohr*, 518 U.S. at 486.

Read together, §§ 18 and 4(b)(4) evidence Congress' clear intent to preempt positive enactments of state law aimed at occupational safety and health, but not to preempt laws of general applicability such as state tort rights and remedies.⁹ And, the great weight of cases considering the matter

⁹ ATRA's claim that "OSHA's distinction between common law obligations and positive enactments has no basis in the OSH Act," misunderstands OSHA's views. Pet. Br. 43-52. The text of the statute is clear: § 18 preempts positive enactments of law because those are the sorts of laws to which state plan requirements naturally apply. *Supra* pp. 20-27. On the

have so held. *Lindsey*, 480 F.3d at 212 (design defect claim for failure to install rollover protection not preempted by OSH Act); *Pedraza*, 942 F.2d at 53 (failure-to-warn claim against chemical manufacturer not preempted by OSH Act); *Welding Fume*, 364 F. Supp. 2d at 697 (failure-to-warn claims against welding rod manufacturers, suppliers and distributors not preempted by the HazCom standard or the OSH Act); *Anderson v. Airco, Inc.*, 2003 WL 21842985, *2 (D. Del. July 28, 2003) (failure-to-warn claim against chemical manufacturer not preempted); *Fullen v. Phillips Electronics North Am. Corp.*, 266 F. Supp. 2d 471, 477 (N.D. W. Va. 2002) (state law tort claims against employer for hazardous conditions not preempted by the HazCom standard or the OSH Act); *Sakellardis v. Polar Air Cargo*, 104 F. Supp. 2d 160, 164 (E.D.N.Y. 2000) (state statutory right to recover for injuries due to unsafe scaffolds not preempted by the OSH Act); *Washington v. Falco S&D, Inc.*, 1996 WL 627999 at **3-4 (E.D. La. Oct 29, 1996) (state failure-to-warn and negligence actions for chemical exposure not preempted by HazCom standard or OSH Act); *Wickham v. American Tokyo Kasei, Inc.*, 927 F. Supp. 293, 294-95 (N.D. Ill 1996) (failure-to-warn claim against chemical manufacturer not preempted by HazCom standard or OSH Act);

other hand, § 4(b)(4) expressly saves both common law and “statutory, rights, duties, or liabilities” related to injuries, diseases, or death. 29 U.S.C. § 653(b)(4).

Jones v. Cincinnati, Inc., 589 N.E.2d 335, 339-40 (Mass. Ct. App. 1992) (design defect claim not preempted by OSHA regulation); *York v. Union Carbide Corp.*, 586 N.E.2d 861, 866 (Ind. Ct. App. 1992) (failure-to-warn claim against chemical manufacturer not preempted by OSH Act); *Lopez v. Gem Gravure Co.*, 858 N.Y.S.2d 226, 228 (N.Y. App. Div. 2008) (failure-to-warn claim against chemical manufacturer not preempted by HazCom standard or OSH Act).

ATRA cites only two appellate court cases in support of its preemption theory, Pet. Br. 37, but close examination reveals that they do not support its position. The court in *Torres-Rios v. LPS Labs., Inc.*, did not hold that the HazCom standard preempted a failure-to-warn claim, but rather stated that the standard provided the standard of liability in such a claim. 152 F.3d 11, 13 (1st Cir. 1998). The court also rejected the plaintiff's claims that warnings should have been in Spanish, in a bigger font, and in alternative wording (none of which were required by the HazCom standard), not because tort law was preempted by the standard, but because it found that the warnings that were provided were sufficient to warn of the hazard. *Id.* at 13-15.

ATRA also relies on the unpublished New Jersey Appellate Division opinion in *Bass v. Air Products & Chemicals, Inc.*, 2006 WL 1419375 (N.J.

Super. Ct. App. Div. May 25, 2006). Relying on the preemption clause in paragraph (a)(2) of the standard, the *Bass* court held that the HazCom standard “preempts the application of state statutory or common law to plaintiffs’ failure to warn claims.” 2006 WL 1419375 at *7. The court concluded that “[t]here can be no legitimate doubt about the preemption of all plaintiffs’ state law claims regarding the content of defendants’ warnings.” *Id.*

The *Bass* court’s conclusion is not well-founded. While the court notes § 4(b)(4), it provides no account for its role in preemption. *Bass* does not address § 18 and how it governs preemption of state law. And it does not attempt to grapple with any of the authority noted above that holds that the OSH Act does not preempt state products liability law. But more importantly, *Bass* does not actually hold that the plaintiffs have no products liability claim. Rather, it decides that federal law establishes the standard of liability in such claims. *Id.* In any event, *Bass* is an unpublished, nonprecedential state court opinion, and entitled to no weight.¹⁰

¹⁰ Though ATRA doesn’t explicitly rely on it as authority, the state trial court’s various oral decisions in *Nicastro v. Aceto Corp.*, No. L-3062-08 (N.J. Super. Ct. Monmouth Co.) (bench op.) are no more persuasive. See Pet. Br. App. at 144-60. First, that court dismissed certain failure-to-warn claims “without prejudice” because it found that they concerned safety data sheets that complied with the HazCom standard. *Id.* at 146-47. Then, after issuance of the letter of interpretation by the Solicitor of Labor, the court

4. *ATRA's Preemption Claim is to a Large Extent Unripe.*

The sheer volume of cases cited above, *supra* pp. 37-40, that assess the preemptive effect of OSHA standards vis-a-vis specific tort claims, illustrate the fact that to a large extent ATRA's petition for review is not ripe for review. *Munsell v. Dep't of Agric.*, 509 F.3d 572, 585 (D.C. Cir. 2007) ("The ripeness inquiry springs from the Article III case or controversy requirement that prohibits courts from issuing advisory opinions on speculative claims.") (citation omitted). Whether any specific state tort claim conflicts with the HazCom standard and is therefore preempted will depend on the particulars of the tort claim and the HazCom requirements that are implicated. Though ATRA and Employer *amici* speculate on hypothetical failure-to-warn claims that might directly conflict with the HazCom standard, they provide no evidence that any such claims have been made. Pet. Br. 47-48; Emp. Am. Br. 19-24.

rejected the plaintiff's reconsideration motion relying on *Bass*, stating that it owed the letter no deference. *Id.* at 152-53. The court then changed its opinion and granted a second reconsideration motion after OSHA made the minor modifications to paragraph (a)(2) at issue in this petition for review, because it believed that "*Bass* would have been decided differently if it were decided today." *Id.* at 159. As in *Bass*, the *Nicastro* court never tried to square its reasoning with OSHA's authority under § 18, the savings clause in § 4(b)(4), or any of the case law holding the opposite way, and its decision should be disregarded.

Rather than attempting to determine the preemptive effect of the HazCom standard and the OSH Act in the abstract, a court deciding the issue would be on “much surer footing” addressing the issue in the context of a concrete tort claim that would allow for proper evaluation of the requirements and purposes of the standard, the OSH Act and the particular tort law at issue.¹¹ *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158, 163-64 (1967) (finding a pre-enforcement challenge to an enforcement regulation unripe, even though it presented a “purely legal issue,” because relevant statutory concerns would be better evaluated in context of an enforcement action); *Munsell*, 509 F.3d at 585 (same); *see also Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 624 (D.C. Cir. 1988) (“Review of this rulemaking is not the appropriate proceeding in which to obtain a declaratory judgment about the meaning of a regulation whose substance was unaffected by the rulemaking under review.”). Indeed, on this point, even ATRA agrees. Pet. Br. 46 (“A determination of conflict preemption must be made on a case-by-case basis, by a court.”). Thus, to the extent the Court assesses the

¹¹ For this reason, *Biggerstaff v. FCC*, 511 F.3d 178 (D.C. Cir. 2007), cited by ATRA, Pet. Br. 20, is not on point. In *Biggerstaff*, this Court found that the petitioner’s claim was ripe because he was not free to raise the validity of the rule being challenged in the state courts of his home state. *Id.* at 183. In contrast, and as discussed above, *supra* pp. 37-40, there have been numerous cases, both state and federal, that have evaluated the preemptive effect of the HazCom standard on state tort law claims.

preemptive effect of OSHA standards under the OSH Act, the specific contours of the HazCom standard's preemption of state tort law should be left to later courts to decide in actual tort lawsuits.

B. *OSHA's Views on the Preemptive Effect of the HazCom Standard Are Thorough, Consistent, and Persuasive.*

Preemption is an issue of statutory construction, and for such issues the Court determines whether Congress has answered the precise question at issue. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Congress has clearly spoken on the preemptive effect of the OSH Act, and under §§ 18 and 4(b)(4), the HazCom standard does not preempt state tort law. *See supra* pp. 20-40.

But even if Congress had not directly spoken on the issue, to the extent there is any ambiguity, OSHA's views on the preemptive effect of the HazCom standard in light of §§ 18 and 4(b)(4) are well-reasoned and deserving of special consideration. In *Wyeth*, the Supreme Court assessed what weight should be given an agency's opinion on the effect of state law on the achievement of statutory objectives. 555 U.S. at 577. The Supreme Court stated:

While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose

an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” The weight we accord the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.

Id. (citations omitted); *cf. Hillsborough County v. Automated Med.*

Laboratories, Inc., 471 U.S. 707, 714-15 (1985) (holding that an agency’s statement regarding the preemptive effect of its regulations is “dispositive” unless it is inconsistent with clearly expressed congressional intent). Under this standard, OSHA’s views merit deference.

Relying on the fact that the Supreme Court held in *Wyeth* that the FDA’s views on preemption did “not merit deference,” 555 U.S. at 577, Employer *amici* argue that the Court should similarly disregard OSHA’s views in this case. Emp. Am. Br. 26. But the Supreme Court held that the FDA’s interpretation was not entitled to deference because the FDA had reversed its longstanding position without a reasoned opinion. 555 U.S. at 577. In contrast, OSHA’s views on the preemptive effect of the HazCom standard are well-explained, both in an interpretive letter issued on October 11, 2011, and in the preamble discussion for the 2012 amendments to the HazCom standard. *See infra* pp. 51-61. These are also consistent with OSHA’s many interpretive statements over the years regarding the non-preemptive effect of OSHA standards on state tort law. *Id.* at 52-56.

In sum, in § 18 of the OSH Act Congress entrusted OSHA with administering a complex scheme for sharing the regulation of occupational safety and health between the federal government and the states. OSHA's well-considered views about the preemptive effect of that scheme and the HazCom standard and about the effect state tort law has on the accomplishment and execution of Congress' objectives should therefore be accorded deference. *Wyeth*, 555 U.S. at 577; *Steel Institute of New York*, ___ F.3d at ___, 2013 WL 1876537 at *8 (giving weight to OSHA's views on preemptive effect of cranes standard based on OSHA's "long experience in formulating and administering nationwide workplace standards").

III. Notice and Comment Requirements Did Not Apply to Non-Substantive, Clarifying Revisions to OSHA's Interpretive Statement Contained in Paragraph (a)(2) of the HazCom Standard.

ATRA devotes over half of its brief to attacking OSHA's 2012 clarifying revisions to the language of paragraph (a)(2) of the HazCom standard on procedural grounds. Pet. Br. 1-38. According to ATRA, the changes to the provision must be vacated because OSHA did not conduct notice and comment rulemaking. Pet. Br. 38. ATRA is wrong. As explained in Part II of this brief, the preemptive effect of OSHA standards is controlled by the language of the OSH Act. *Supra* pp. 16-45. Paragraph (a)(2) therefore contains nothing more than OSHA's interpretative statement

on the preemptive effect of the HazCom standard in light of the statutory requirements found in §§ 18 and 4(b)(4) of the OSH Act. And, under well-settled principles of law, agency interpretive rules are not subject to notice and comment rulemaking requirements.

OSHA has maintained its interpretive position since the promulgation of the HazCom standard, and none of the minor revisions made in 2012 evidence a change in OSHA's views. The Court should therefore reject ATRA's procedural challenge to the HazCom standard.

A. *Notice and Comment Are Not Required for Interpretive Rules Such as HazCom's Preemption Provision.*

Remarkably, ATRA appears to agree that paragraph (a)(2) of the HazCom standard contains nothing more than an interpretive statement. It argues that agencies like OSHA "can offer only their opinions as to what they think the preemptive effect of its regulations should be," and says that OSHA "cannot use its regulations to limit the scope of preemption established by Congress." Pet. Br. 40; *see also id.* at 38 ("Congress has not provided OSHA the authority to define or limit the scope of preemption that Congress established in the OSH Act"). If OSHA does not have the power to preempt state law as ATRA argues, then paragraph (a)(2) can only be interpretative. It may be that ATRA disagrees with OSHA's interpretation, but such disagreement does not make the preemption provision any less of

an interpretation. And, under the Administrative Procedure Act (APA), notice and comment requirements do not apply to interpretive rules.¹² 5 U.S.C. § 553(b)(3)(A).

Interpretive rules are “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” *American Mining Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (quoting *Attorney General’s Manual on the Administrative Procedure Act* at 30 n.3 (1947)). Interpretive rules “simply state[] what the administrative agency thinks the statute means, and only remind[] affected parties of existing duties.” *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (internal quotation marks omitted).

In contrast, notice-and-comment rulemaking procedures are required when substantive, or “legislative” rules are promulgated, modified, or revoked. 5 U.S.C. § 553. Substantive rules are those that “grant rights,

¹² Unless an exception applies, under the APA an agency must give notice of a proposed rulemaking in the Federal Register and allow an opportunity for comment by interested persons. 5 U.S.C. § 553(b), (c). Section 6(b)(2) of the OSH Act separately prescribes publication of a proposed standard in the Federal Register and a thirty-day comment period prior to the adoption of a standard. 29 U.S.C. § 655(b)(2). The courts look to the APA in interpreting the procedural provisions of the OSH Act. *See, e.g., United Steelworkers*, 647 F.2d at 1221 (looking to APA standards to determine whether adequate notice of standard had been provided).

impose obligations, or produce other significant effects on private interests,” *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980) (citations omitted), or which “effect a change in existing law or policy.” *Alcaraz v. Block*, 746 F.2d 593, 613 (D.C. Cir. 1984) (citations omitted).

While substantive rules create new law, rights, or duties, an interpretive rule “typically reflects an agency’s construction of a statute that has been entrusted to the agency to administer” and does not “*modif[y]* or *add[]* to a legal norm based on the agency’s *own authority*.” *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997) (emphasis in original). “The legal norm is one that Congress has devised; the agency does not purport to modify that norm, in other words, to engage in lawmaking.” *Id.* Thus, an agency rule that merely clarifies or explains existing laws or regulations is interpretive in nature. *Nat’l Medical Enterprises, Inc. v. Shalala*, 43 F.3d 691, 697 (D.C. Cir. 1995) (citing *American Hospital Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987)).

Since its promulgation in 1983, paragraph (a)(2) has never imposed any rights or obligations on chemical manufacturers, and nothing in the 2012 amendments to the HazCom standard changed the provision’s interpretive

nature.¹³ The provision merely provides OSHA's views on the standard's preemptive effect in light of OSH Act provisions and "advise[s] the public of the agency's construction of the statutes and rules which it administers." *American Mining Congress*, 995 F.2d at 1109. Any preemptive effect of the HazCom standard – like that of all OSHA standards – stems from and is cabined by §§ 18 and 4(b)(4) of the OSH Act, and not the standard itself. *See supra* pp. 18-40 (discussing contours of OSH Act).

The HazCom standard therefore preempts state occupational safety and health standards aimed at hazard communication in the workplace not because OSHA so stated in paragraph (a)(2) of the HazCom standard, but because § 18 of the OSH Act holds that states may not regulate occupational safety and health on an issue for which OSHA has adopted a standard unless it receives approval from OSHA to do so. *Id.* § 667. Likewise, state tort law is preserved because § 4(b)(4) provides that nothing in the OSH Act "shall be construed to enlarge or diminish or affect in any other manner the

¹³ ATRA asserts that the 2012 revisions to the wording in paragraph (a)(2) constituted a "substantive change to alter the legal rights of regulated entities," Pet. Br. 36, but offers no support for the statement. ATRA does not claim that its members have justifiably relied to their detriment on the prior version of paragraph (a)(2), requiring OSHA to do notice and comment rulemaking before changing its interpretative rule. *See Metwest, Inc. v. Sec'y of Labor*, 560 F.3d 506, 510-11 (D.C. Cir. 2009); *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). Because it has not made the claim in its opening brief, it has waived it. *Wayneview Care Center v. NLRB*, 664 F.3d 341, 367-68 (D.C. Cir. 2011).

common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.” 29 U.S.C. § 653(b)(4). Consequently, even absent the interpretive statement provided in paragraph (a)(2), the HazCom standard would preempt state and local right-to-know laws, but not state failure-to-warn tort claims.

The preemption provision found in paragraph (a)(2) is therefore nothing more than an interpretive statement applying the relevant provisions of the OSH Act to the HazCom standard. *See United Steelworkers v. Auchter*, 763 F.2d 728, 733-36 (3d Cir. 1985) (noting that paragraph (a)(2) is a statement of the preemptive effect of the HazCom standard under § 18 of the OSH Act). Paragraph (a)(2) “flows fairly from the substance of” the OSH Act. *See Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010). It does not create any rights or obligations that did not already exist, and therefore it is not an act of regulatory lawmaking. *See Syncor Int’l Corp.*, 127 F.3d at 94-95. ATRA’s procedural challenge should therefore be dismissed.

B. *The Clarifying Changes Made to Paragraph (a)(2) Evinced no Change in OSHA's Interpretation of the Scope of Preemption of the HazCom Standard.*

ATRA claims that the minor, clarifying changes OSHA made to paragraph (a)(2) in 2012 provide evidence of OSHA's "intention to alter the preemptive scope of the hazard communication standard." Pet. Br. 24. As discussed above, however, the preemptive effect of an OSHA standard is governed by the OSH Act, therefore the clarifying changes made by OSHA could not have had the effect ATRA claims.¹⁴ Moreover, OSHA's longstanding views on the preemptive effect of OSHA standards and the regulatory history of the HazCom standard demonstrate the non-substantive nature of the 2012 revisions.

1. *An Interpretive Letter Issued Prior to the 2012 Amendments and Additional OSHA Guidance Confirm that the Revisions Made to Paragraph (a)(2) Merely Clarified OSHA's Longstanding Views on the Preemptive Effect of the HazCom Standard.*

Contrary to ATRA's claim, Pet. Br. 24-38, OSHA's interpretation of the HazCom standard and its preemptive effect has not changed,

¹⁴ To be clear, neither the pre-2012 version of paragraph (a)(2) nor the post-2012 version establishes the preemptive effect of the HazCom standard. Thus, even if the 2012 revisions evidenced a change in OSHA's interpretive position (a claim OSHA denies), the statutory language still controls the scope of preemption. ATRA's belief that striking the 2012 revisions will cause the HazCom standard to have a different preemptive effect is therefore misguided.

notwithstanding the minor revisions made in 2012 to paragraph (a)(2) of the standard. This is evident because in making the minor revisions to the text of paragraph (a)(2) in 2012, OSHA relied on and referred to a previously issued letter interpreting the pre-2012 text authored by the Solicitor of Labor. JA 417. The Solicitor's letter discussed the pre-2012 language of paragraph (a)(2), and provided OSHA's interpretation of that language and the scope of the HazCom standard in light of the OSH Act. Letter from P. Smith to S. Wodka (October 18, 2011 Letter).¹⁵ As noted in the preamble to the 2012 HazCom standard, that interpretation remains in force and unchanged by the clarifying changes made to paragraph (a)(2). JA 417.

¹⁵ This letter is attached to this brief and available on OSHA's website at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTEPRETATIONS&p_id=27746 (last accessed Apr. 29, 2013). ATRA and Employer *amici*'s attempts to impugn the Solicitor's October 18, 2011 Letter by noting that David Michaels, PhD, MPH, the Assistant Secretary of Labor for Occupational Safety and Health, had previously acted as an expert witness for the letter's addressee, are baseless. Pet. Br. 10 n.6; Emp. Am. Br. 30. The letter is authored by the Solicitor of Labor. Dr. Michaels had recused himself and played no role in drafting the letter. ATRA also suggests that Dr. Michaels continued to act as an expert witness after he was confirmed as Assistant Secretary, Pet. Br. 11 n.6, but that suggestion is contradicted by the very material cited in the brief, a motion argument about whether Dr. Michael's *video* deposition, taken before he was confirmed, will be played for the jury. See Pet. Br. App. at 162, 175. ATRA also complains that OSHA should not have relied on the October 18, 2011 Letter because it was issued after the administrative record had closed and was not part of the record. Pet. Br. 35. But this Court has condoned such extra-record evidence in similar cases. *Edison Elec. Inst.*, 849 F.2d at 618.

The Solicitor noted many reasons why the HazCom standard did not preempt state failure-to-warn tort lawsuits. While (former) paragraph (a)(2)'s reference to "legal requirements" was "on its face ambiguous," the preamble discussion of the provision made it clear that OSHA was interested only in informing the public of the preemption of state or local legislative right-to-know laws that contained "differing and conflicting hazard reporting requirements." *Id.* The OSH Act contains a savings clause, § 4(b)(4), 29 U.S.C. § 653(b)(4), and if OSHA believed that it was inapplicable or superseded, it would have said so. *Id.*

The Solicitor additionally noted that both the text of the pre-2012 version of paragraph (a)(2) and the associated preamble explained that a state wishing to regulate in the area of workplace chemical hazard communication must seek approval from OSHA in accordance with § 18 of the OSH Act. *Id.* Section 18 does not apply to common law causes of action, the Solicitor explained, so this provided further evidence that the HazCom standard did not preempt common law failure-to-warn claims. *Id.* The Solicitor also noted that while the Supreme Court had interpreted the term "requirement or prohibition" in a preemption provision in another statute as including certain common law claims, *see Cipollone*, 505 U.S. 504, this decision came nine years after OSHA first adopted paragraph

(a)(2), and so provided no insight into OSHA's intent in using the word "requirement." *Id.*

The Solicitor's October 18, 2011 Letter is consistent with other statements the Department of Labor has made on the preemptive scope of OSHA standards. Indeed, OSHA has long opined that the OSH Act does not preempt tort law. In 1992, for example, OSHA responded to a letter from Senator Johnston inquiring about a crane operator's liability if an accident occurred. OSHA explained that an employer who exposed its employees to a hazard was responsible for the workers' safety under the OSH Act, but that "liability in tort is a matter of state law."¹⁶ OSHA again responded to a Congressional inquiry regarding tort liability in 1996, when Congressman Ballenger expressed concern that OSHA's workplace violence guidelines would establish a new standard of care for personal injury or wrongful death tort suits. OSHA explained that its standards and guidelines did not dictate the duties under state tort law. OSHA stated that due to § 4(b)(4) of the OSH Act, "nothing in health or safety standards issued by OSHA under Section 6 of the Act, and certainly no informal guidelines of the kind involved here, determines the tort remedies available to injured workers.

¹⁶ This letter is available on OSHA's website at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTEPRETATIONS&p_id=20702 (last accessed May 7, 2013).

That matter is determined by the laws of the individual states. It is not our role at OSHA either to foster or to foil the efforts of plaintiffs' lawyers in state court proceedings."¹⁷ In 2007, OSHA issued another letter of interpretation noting that employers have separate duties under the OSH Act and under tort law, and that "OSHA cannot determine liability under tort law or state workers' compensation law."¹⁸ OSHA reiterated that position in 2010, explaining in a letter of interpretation that the respirator standard did not preempt state tort suits.¹⁹

Given this history, and the discussion contained in the Solicitor's October 18, 2011 Letter, which discussion OSHA relied on and referenced in the preamble to the 2012 amendments to the HazCom standard, it is clear that OSHA's textual revisions to paragraph (a)(2) in 2012 -- changing the words "legal requirements" to "legislative or regulatory enactments" in the paragraph's first sentence, and eliminating the words "through any court or

¹⁷ This letter is available on OSHA's website at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22281 (last accessed May 7, 2013).

¹⁸ This letter is available on OSHA's website at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25893 (last accessed May 7, 2013).

¹⁹ This letter is available on OSHA's website at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28049 (last accessed May 6, 2013).

agency” in the last sentence -- were designed to clarify any confusion over the scope of the preemption provision and conform the language to OSHA’s longstanding views. The change in language did not evince a change in OSHA’s interpretive position, but instead clarified and confirmed that position.²⁰

2. *The Regulatory History of Paragraph (a)(2) Also Confirms that the 2012 Revisions Simply Clarified OSHA’s Longstanding Position that the HazCom Standard Generally Did Not Preempt State Failure-to-Warn Tort Law.*

The HazCom standard’s regulatory history also makes clear that OSHA has consistently interpreted the standard as preempting state and local right-to-know laws, but not tort law failure-to-warn claims. Thus, the minor, non-substantive changes made by OSHA to the text of paragraph (a)(2) in 2012 simply clarified this longstanding position.

From the start, the preamble to the 1983 standard indicated that paragraph (a)(2) was directed at state and local right-to-know laws. 48 Fed.

²⁰ OSHA’s interpretation (as set forth in the Secretary’s October 18, 2011 Letter) of the pre-2012 language in paragraph (a)(2) is entitled to deference. This is because an agency’s interpretation of its own regulations commands substantial judicial deference, and the agency’s interpretation “becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (same); *Edison Elec.*, 849 F.2d at 617 (“petitioner bears a heavy burden in seeking to persuade the court that the agency’s interpretation is erroneous”).

Reg. at 53,283 (noting “recent proliferation of state and local right-to-know laws,” which subjected chemical manufacturers to “numerous different and potentially conflicting regulations”); *id.* at 53,283 (explaining that twelve states and six local governments had enacted differing hazard communication laws and thirteen other states and three local governments were considering such enactments). OSHA explained that “[b]y promulgating a Federal standard, OSHA is in a position to reduce the *regulatory* burden posed by multiple State *laws*. In the final standard, [paragraph (a)(2) states that the HazCom standard] preempts State *laws* which deal with hazard communication requirements for employees in the manufacturing sector, except in those States with a State plan which have a standard that regulates in this area.” *Id.* at 53,284 (emphasis added). OSHA made no note of tort law in its justification for paragraph (a)(2).

OSHA amended the HazCom standard in 1987 and expanded its application to all industries. 52 Fed. Reg. 31,852 (Aug. 24, 1987). In the preamble to the 1987 amendments, OSHA noted that approximately thirty-two states and several localities had hazard communication/right-to-know laws covering non-manufacturing industries. 52 Fed. Reg. 31,857. Paragraph (a)(2) was therefore amended to state OSHA’s position that that the standard “preempt[ed] any legal requirements of a state, or political

subdivision of a state, pertaining to the subject.” 29 C.F.R. § 1910.1200(a)(2) (1988). But, as OSHA explained in the preamble, this was done only to clarify that the HazCom standard preempts *local* in addition to *state* right-to-know laws. 52 Fed. Reg. at 31,860-61. Again there was no mention of tort law in this discussion.

OSHA mentioned tort law in the preamble to the 1994 amendments to the HazCom standard, but the discussion squarely rebuts the idea that OSHA viewed the standard as preempting state failure-to-warn lawsuits. 59 Fed. Reg. 6126, 6161, 6163 (Feb. 9, 1994). The agency noted several times that chemical manufacturers often provide more information on safety data sheets than required under the standard to protect themselves from tort liability. 59 Fed. Reg. 6161, 6163. When a commenter noted that the standard’s safety data sheet requirements were insufficient to protect producers against product liability, OSHA stated that such concerns were “irrelevant” and that producers were in any event free to put additional information (not required by the standard) on the safety data sheets to protect themselves against such liability. *Id.* at 6163. Conversely, another commenter complained that producers put too much information on the safety data sheets, and OSHA responded that safety data sheets must contain information “consistent with the hazards of the chemical,” and not suggest

precautions more protective than necessary merely to guard the producer against product liability. *Id.*

It is telling that neither paragraph (a)(2) nor preemption is mentioned in these discussions on product liability and the information requirements for safety data sheets. *Id.* at 6161, 6163. This is because OSHA did not view the HazCom standard as preempting state failure-to-warn tort claims. The nature of the comments also confirms that members of the regulated community likewise did not view the standard as preempting state tort law.

Similarly, comments OSHA received and rejected during the rulemaking process for the 2012 amendments to the HazCom standard confirm OSHA's and the regulated community's longstanding view that the standard does not preempt state failure-to-warn claims. Two commenters asked OSHA to state affirmatively that the standard preempted state failure-to-warn tort law. Dow Chemical argued that it would be unfair to subject producers to lawsuits because the newly incorporated Globally Harmonized System labeling requirements eliminated much of the manufacturer's historic discretion in deciding how to communicate hazards on labels. JA 706. The Industrial Minerals Association—North America argued that conflicting tort judgments could undermine the consistency sought by the move to the Globally Harmonized System. JA 760. Neither request would

have been made if the commenter already believed that the HazCom standard preempted state tort law.

Citing the Solicitor's October 11, 2011 Letter and § 4(b)(4) of the OSH Act, OSHA rejected these commenters' requests. JA 417. OSHA noted that there could be preemption if a tort judgment required something that directly conflicted with the HazCom standard, but that no evidence of such a conflict had been presented in the record. JA 417. Therefore, OSHA amended paragraph (a)(2) to make clear that it was speaking only about the HazCom standard's preemptive effect on state legislative and regulatory enactments directed at hazard communication in the workplace. JA 417.

This history confirms that, in the two decades since the HazCom standard was first promulgated, both OSHA and participants in the rulemaking process considered the language of paragraph (a)(2) to be directed at positive enactments of state and local law (right-to-know laws), and not at state tort law failure-to-warn actions. The 2012 amendments to paragraph (a)(2) merely clarified OSHA's interpretation of the HazCom standard and the OSH Act, and ATRA's procedural challenge to the revisions to the provision should therefore be rejected. *See Edison Elec. Inst.*, 849 F.2d at 616 (rejecting procedural challenges "because the

petitioner has failed to demonstrate that the revised standard covers [its] members any differently than did the original standard”).

CONCLUSION

For the foregoing reasons, ATRA's petition for review should be dismissed.

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CERTIFICATE OF COMPLIANCE

This brief was composed in Microsoft Word using Times New Roman 14-point typeface, and complies with the type-volume limitation prescribed in Fed. R. App. P. 31(a)(7)(B) because it contains 13,929 words, excluding the sections referenced in Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ Edmund C. Baird
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Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of June, 2013, a copy of the foregoing Final Brief of the Acting Secretary of Labor was filed electronically through the Court's CM/ECF filing system on the attorneys in Case No. 12-1229.

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APPENDIX


 SEARCH

[A to Z Index](#) | [En español](#) | [Contact Us](#) | [FAQs](#) | [About OSHA](#)

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Newsletter RSS Feeds Print This Page Text Size

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[Workers](#)
[Regulations](#)
[Enforcement](#)
[Data & Statistics](#)
[Training](#)
[Publications](#)
[Newsroom](#)
[Small Business](#)

[Standard Interpretations - Table of Contents](#)

• **Standard Number:** [1910.1200](#); [1910.1200\(a\)\(2\)](#)

OSHA requirements are set by statute, standards and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <http://www.osha.gov>.

October 18, 2011

Steven H. Wodka, Esq.
577 Little Silver Point Road
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Little Silver, NJ 07739-0066

Dear Mr. Wodka:

Thank you for your letter of March 2, 2011, asking the Occupational Safety and Health Administration to issue an official interpretation of 29 C.F.R. §1910.1200(a)(2), the preemption provision in OSHA's Hazard Communication ("Hazcom") standard, 29 CFR §1910.1200. You request that OSHA clarify that the provision "was intended to preempt conflicting state regulatory actions, but not tort claims." Because this is primarily a legal question, OSHA referred your letter to my office. For the reasons that follow, the Department agrees that, as a general matter, the Hazcom standard does not preempt state tort failure to warn suits. For your information, we recently addressed a similar issue relating to OSHA's respirator standard, and came to the same conclusion. A copy of that letter is attached for your information.

Preemption Basics

It is a fundamental principle that preemption is ultimately a question of congressional intent. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). Analysis begins with the presumption that Congress did not intend to displace state and local law, especially when a statute operates in an area within the states' traditional powers. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470,485 (1996). Providing tort remedies to its citizens is one such traditional power. E.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Thus, preemption will be found only where that is the clear and manifest purpose of Congress. *Medtronic, Inc.*, 518 U.S. at 485.

Statutory Framework

Nothing in the Occupational Safety and Health Act of 1970 (OSH Act), 29 USC 651 *et seq.*, evinces a congressional intent for OSHA standards to preempt state tort actions. To the contrary, section 4(b)(4) of the OSH Act, 29 USC §653(b)(4), explicitly states that "[n]othing in this Act shall ... enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death arising out of, or in the course of, employment." This provision is the Act's sole reference to state tort law, and it is, significantly, a savings clause. See *Lindsey v. Caterpillar*, 480 F.3d 202 (3rd Cir. 2007) (allowing product liability action against tractor manufacturer); *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 53-54 (1st Cir. 1991) (holding that 4(b)(4) saves suits by employees seeking compensation for injuries, whether brought against employers or third-party suppliers); *United Steelworkers of America, AFL-CIO v. Marshall*, 647 F.2d 1189, 1235-1236 (D.C. Cir. 1980) ("when a worker actually asserts a claim under workmen's compensation law or some other state law, 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 the state law") (emphasis supplied). Both the Pedraza and Lindsey decisions also pointed out that this result is consistent with the provision's legislative history, citing a statement by then-Solicitor of Labor Lawrence Silberman during consideration of the legislation that it "would in no way affect the present status of the law with regard to workmen's compensation legislation or private tort actions." Pedraza, *supra* at 54 (emphasis by court); Lindsey, *supra* at 207-208.¹

By contrast, under certain circumstances, the OSH Act and the standards promulgated pursuant to it do preempt other types of State law regulating occupational safety and health issues. In *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88 (1992), the Supreme Court made this clear in a case involving a challenge to an Illinois state law imposing training and licensing requirements more stringent than those contained in an analogous OSHA standard. The Court construed section 18 of the OSH Act, 29 USC §667, which allows states to assume responsibility for their own occupational safety and health programs if those programs meet certain criteria, and are approved by the Secretary, to indicate a congressional intent to preempt a state occupational safety and health standard relating to an issue for which a federal standard is in effect, where there is not an approved state plan. 505 U.S. at 102.²

The Gade Court also recognized the limits of its decision, however, pointing out that "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 nonworkers alike would generally not be preempted. Although some laws of general applicability may have a 'direct and substantial effect' on worker safety, they cannot fairly be characterized as 'occupational' standards, because they regulate workers simply as members of the general public." 505 U.S. at 107. Moreover, the Court subsequently made clear that failure to warn state tort claims, which are based on "the general duty to inform users and purchasers of potentially dangerous items of the risks involved in their use . . . are no more a threat to federal requirements than would be a state-law duty to comply with local fire prevention regulations and zoning codes, or to use due care in the training and supervision of a work force." *Medtronic Inc. v. Lohr*, 518 U.S. 470, 501-02 (1996).

In short, the OSH Act's terms do not show a "clear and manifest purpose of Congress" to preempt tort actions under state law. *Wyeth*, supra, at 1 194 (internal quotes and citations omitted). All indications are to the contrary. And, as shown below, the hazcom standard is no more preemptive of state tort law than any other OSHA standard.

The Hazard Communication Standard

The Hazard Communication standard was promulgated because millions of American workers work with and are potentially exposed to hazardous chemicals, but many employers and employees know little or nothing about the often serious hazards of those chemicals. 59 *Fed. Reg.* 6126 (Feb. 9, 1994); 48 *Fed. Reg.* 53280, 53282-83 (Nov. 25, 1983). Chemical exposure may cause or contribute to many serious health effects such as heart ailments, central nervous system, kidney and lung damage, sterility, cancer, burns, and rashes. *Id.* Some chemicals also have the potential to cause fires, explosions and other serious accidents. *Id.* There are an estimated 650,000 existing chemical products, and many new ones introduced annually. *Id.*

The standard establishes uniform requirements to make sure that the hazards of all chemicals produced or used in U.S. workplaces are evaluated, and that this hazard information is transmitted to affected employers and exposed employees. 29 CFR § 1910.1200(a)(l). It sets up a "downstream flow of information" requirement, whereby manufacturers of chemicals have the primary responsibility for generating and disseminating information about chemical hazards. 29 C.F.R. §1910.1200(b)(l). Employers using the chemicals must obtain this information and inform their employees of the hazards and the identities of workplace chemicals to which they are exposed. 29 C.F.R. §1910.1200(b)(2).

In general, responsibilities are allocated as follows: Chemical manufacturers and importers must determine the hazards of each product they produce or import. Then they, as well as intermediate distributors of the chemicals, must communicate the hazard information and associated protective measures downstream to customers through labels (which include appropriate hazard warnings) and material safety data sheets (MSDSs).³

In addition to these workplace protections, the standard had a secondary purpose: it sought to "reduce the burden on interstate commerce produced by conflicting state and local regulations" relating to the identification of hazardous chemicals. 48 *Fed. Reg.* at 53334; *id.* at 53283 (noting "recent proliferation of state and local right-to-know laws," which subjected chemical manufacturers to "numerous different and potentially conflicting regulations"); *id.* at 53284 (explaining that twelve states and six local governments had enacted differing hazard communication laws and thirteen other states and three local governments were considering such enactments); *id.* ("The potential for conflicting or cumulatively burdensome State and local laws has been acknowledged by industry representatives to be immense").

The standard thus includes a preemption provision, §1910.1200(a)(2), which provides in pertinent part

[t]his occupational safety and health standard [the Hazcom standard] is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject.

As explained more fully below, these "legal requirements of a state ..." were limited to positive enactments of laws and regulations, and do not include the duties and remedies recognized only by tort law.

Analysis: Preemptive Effect of §1910.1200(a)(2)

A typical failure to warn tort claim involves an allegation that a manufacturer (or employer) failed to provide adequate warning about the risk of harm associated with a chemical or other product or its use. All reported decisions we have found have held that §1910.1200(a)(2) does not preempt state tort claims alleging inadequate warnings of chemical hazards. See, e.g., *In re Welding Fume Prods.* Liab. Litig., 364 F.Supp.2d 669, 693 (N.D. Ohio 2005); *Anderson v. Airco, Inc.*, 2003 U.S. Dist. LEXIS 13765, 2003 WL 21842085 (D.De1. July 28, 2003) *York v. Union Carbide Corp.*, 586 N.E.2d 861, 866 (Ind. Ct. App. 1992); *Fullen v. Philips Electronics North Am. Corp.*, 266 F.Supp.2d 471, 476 (N.D. W.Va. 2002). However, your letter referred to two unpublished cases that held that the standard preempts such state tort law claims. *Bass v. Air Products*, 2006 WL 1419375 (N.J. Super. A.D. 2006); *Vettrus v. Ashland*, No. C9-04-817 (Minn. 3d Jud. Dist. 2008).

It is the Department of Labor's position that the latter cases were decided incorrectly, and that section 1910.1200(a)(2) does not preempt a failure-to-warn state tort claim. The decisions finding preemption are inconsistent with the savings clause discussed above, because OSHA does not have the authority to broadly preempt any state tort law claim. *Cf. Wyeth v. Levine*, 129 S. Ct. at 1201 (FDA labeling requirement not necessarily preemptive of state tort failure to warn claim where Congress did not authorize the FDA to directly preempt state tort law). OSHA therefore intended the provision to preempt only state and local laws and regulations, i.e., positive enactments, and the use of the word "requirements" is properly understood as limited to such law. This was also the common understanding of the word when the standard was promulgated in 1983. The regulatory history makes this limitation clear. Moreover, there does not appear to be a direct conflict between the requirements of the Hazcom standard, i. e., adequate warning, and the duty underlying a failure to warn tort claim.⁴

First, although the meaning or scope of the regulatory term "legal requirements" is on its face ambiguous, its intended meaning in the hazcom standard is clearly explained in the preamble. There, the Secretary describes the burden on interstate commerce arising from the recent proliferation of state and local *legislative* enactments that contain differing and conflicting hazard reporting requirements. 48 *Fed. Reg.* at 53283-84. Nowhere in that discussion is there any complaint regarding the availability of state tort remedies. *Id.* This is not surprising in light of the savings clause making clear that the Secretary has no authority to "enlarge or diminish or affect in any other manner the common law . . . duties . . . of employers." 29 U.S.C. 653(b)(4). Indeed, one commenter, apparently recognizing the limits of OSHA's authority to provide uniformity, stated:

While we recognize statutory limitations in this area, we believe every effort should be made to see that such a Federal standard preempts State and local efforts.

48 Fed. Reg. at 53283-84 (emphasis added). Had the Secretary believed the savings clause was inapplicable or superseded, she would have provided an explanation. But there is none.⁵

Moreover, both the Hazcom standard and its preamble state that in order for a state to regulate in this area, it must submit "its intended requirements" to OSHA for approval under section 18 of the OSH Act, 29 USC §667. *48 Fed. Reg.* at 53284,53322-23; 29 C.F.R. §1910.1200 (a)(2) (no state may adopt or enforce "any requirement" except through state plan approval process). And section 18 governs only positive enactments of state law. *Gade*, 505 U.S. 103-04 ("If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the Secretary of Labor."). State laws submitted under section 18 must be part of a state plan meeting requirements that are wholly inapposite to tort remedies. Thus, by requiring section 18 approval, Congress made clear that it did not intend for the OSH Act's preemptive effect to extend to the case-by-case judicial development of the common law, and by referring to that provision, OSHA made clear that it understood that the preemption provision in the Hazcom standard could not preempt such common law.

We note that nine years after OSHA promulgated the Hazcom Standard, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), a plurality of the Supreme Court ruled that the statutory term "requirement or prohibition" in a broad preemption provision in a different statute precluded certain common law claims. However, that ruling sheds no light on the Secretary's intent in the Hazcom standard, nor could it enlarge the Secretary's statutory authority by allowing her to "diminish . . . the common law rights" of parties asserting a right in tort. In any event, later Supreme Court cases clarify that the scope of the term "requirement" in a preemption provision depends on its particular statutory context, use and intent. For example, in *Medtronic Inc. v. Lohr*, 518 U.S. 470 (1996), the Court stated that the term "was not intended to pre-empt most, let alone all, general common-law duties enforced by damages actions." §18 U.S. at 491. Among other reasons, the Court explained that in the statute at issue there, Congress (like OSHA here) "was primarily concerned with the problem of specific, conflicting state statutes and regulations rather than the general duties enforced by common-law actions." *Id.* Cf: *Bates v. Dow Agrosciences LLC*, 544 U.S. 431,443 (2005) (observing that the term "requirements" in a preemption clause does not "invariably" extend beyond positive enactments, such as statutes and regulations, and embrace common-law duties.⁶

The above analysis reveals that neither the OSH Act nor the Hazcom standard expressly preempts state tort actions. Nor do they contain any indication of Congressional or agency intent to preempt such actions. This conclusion does not mean that a state tort suit could never be preempted on conflict grounds. If the Hazcom standard requires (or prohibits) a specific action that must be specifically performed (or avoided), a state could not make that action (or omission) a tort. Our review of the Hazcom standard and a typical failure to warn claim, however, reveals no such conflict. The underlying duty (allegedly breached) of such a tort claim - the provision of an adequate hazard warning - is not inconsistent with the Hazcom standard. See *In re Welding Fume Products Litigation*, 364 F. Supp. 2d 669, 694 (N.D. Ohio 2005) (finding "no substantial, clear, or direct conflict between the HazCom Standard and the common law duty to warn invoked by plaintiffs"); *Wyeth*, 129 S.Ct. at 1197-1199 (no conflict between FDA's label requirements and the common law duty to warn at issue in that case). Therefore, it is the Department of Labor's position that the Hazcom standard, as a general matter, does not preempt state tort failure to warn suits.⁷

I hope this letter responds to your concerns. If you have additional questions, please contact Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health.

Sincerely,

M. Patricia Smith
Solicitor of Labor

cc: Jordan Barab, Deputy Assistant Secretary for Occupational Safety and Health

¹ It is significant that Congress did not include in the Act any private right of action or other remedy for workplaces injuries, disease, or death. *United Steelworkers*, supra, at 1236; *Pedraza*, supra, at 54. It is unlikely that Congress, having found occupational safety and health legislation necessary because "personal injuries and illnesses rising out of work situations impose a substantial burden . . . in terms of lost production, wage loss, medical expenses, and disability compensation payments," 29 U.S.C. 65 1(a), would in that same legislation remove the means of judicial recourse for those injuries. Instead, the lack of any private remedy under the federal OSH Act strongly suggests Congress believed that "widely available state rights of action provided appropriate relief" for workplace injuries. *Wyeth*, supra, at 1199. [\[Return to Text\]](#)

² Where no federal standard is in effect, the States are free to assert jurisdiction under State law. 29 USC §667(a). [\[Return to Text\]](#)

³ An MSDS is a detailed information bulletin describing the physical and chemical properties of a hazardous chemical, its physical and health hazards, routes of exposure, precautions for safe handling and use, emergency and first-aid procedures, and control measures. Chemical manufacturers and importers must develop an MSDS for each hazardous chemical they produce or import, and must provide the MSDS at the time of the initial shipment of a hazardous chemical to a downstream distributor or user. Distributors similarly must ensure that downstream employers are provided MSDSs. 29 CFR §1910.1200(g). [\[Return to Text\]](#)

⁴ Of course, a definitive determination of conflict can only be made based on the particulars of each case. [\[Return to Text\]](#)

⁵ The standard's statement that a state may not "adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard" was relied on by the Bass court. But read in context, the reference to "any court" clearly refers to the enforcement, not the adoption, of a requirement. Even if there were ambiguity in the term, the interpretation of the Secretary would be entitled to deference from state as well as federal courts. *Martin v. OSHRC*, 499 U.S. 144, 158 (1991). [\[Return to Text\]](#)

⁶ Bates also noted the "groundswell" of decisions finding preemption of tort claims under federal pesticide law following *Cipollone* where before *Cipollone* such suits had not been preempted). 544 U.S. at 441. [\[Return to Text\]](#)

⁷ This conclusion is also consistent with the President's May 20, 2009 Memorandum, which directed that Federal preemptive authority be exercised only where "justified under legal principles governing preemption, including the principles outlined in Executive Order 13 132." Section 4(a) of Executive Order 13132 provides: Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute. [\[Return to Text\]](#)

[← Standard Interpretations - Table of Contents](#)

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