

1985  
March 6

THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NEW JERSEY STATE CHAMBER	:	
OF COMMERCE, <u>et al.</u> ,	:	
	:	Nos. 85-5087
Plaintiffs-Appellees-	:	85-5088
Cross-Appellants,	:	85-5095
	:	
v.	:	
	:	
ROBERT E. HUGHEY, <u>et al.</u> ,	:	
	:	
Defendants-Appellants-	:	
Cross-Appellees,	:	
	:	
and	:	
	:	
JOSEPH H. RODRIGUEZ, <u>et al.</u> ,	:	MOTION FOR A STAY OF THE
	:	DISTRICT COURT ORDER AND
Defendant-Intervenors-	:	JUDGMENT PENDING APPEALS
Appellant-Cross-Appellees.	:	AND MOTION FOR AN EXPEDITED
	:	APPEAL
<hr/>		
FRAGRANCE MATERIALS	:	
ASSOCIATION OF THE UNITED	:	
STATES, <u>et al.</u> ,	:	
	:	
Plaintiffs-Appellees,	:	
	:	
v.	:	
	:	
WILLIAM VAN NOTE, <u>et al.</u> ,	:	
	:	
Defendants-Appellants,	:	
	:	
and	:	
	:	
JOSEPH H. RODRIGUEZ, <u>et al.</u> ,	:	
	:	
Defendant-Intervenors-	:	
Appellants.	:	
	:	

The State of New Jersey, the New Jersey Public Advocate and  
Intervenor Organizations, appellants in the above-captioned appeals,

move the Court to stay the enforcement of the Order and Judgment entered by the United States District Court for the District of New Jersey pending the disposition of these appeals. Additionally, appellants request that this Court expedite the disposition of the appeals.

Application for a stay of the district court's order and judgment pending the disposition of this appeal was sought from the district court on the 28th day of January, 1985. This application was denied on February 25, 1985. The reasons given by the district court for denying the application are set forth in Exhibit D to the Brief in support of this motion at pp. A84-88. Specifically, the district court concluded that any irreparable harm was of the defendants' own doing, that there was very little likelihood of success on appeal, and that the plaintiffs below would suffer economic burdens if a stay were granted. The district court did conclude that the public interest favored a stay, since "there is unquestionably a public interest in health authorities, fire departments having information about hazardous substances in workplaces in the community where they are" (Id. at 88).

The motion for a stay pending appeal of the district court's Order and Judgment and the motion to expedite the disposition of the appeals should be granted for the following reasons:

1. Enforcement of the district court's Order and Judgment pending the disposition of these appeals will result in irreparable injury to the State of New Jersey, Defendant-Intervenors, and residents of the State of New Jersey, and, inter alia, will continue to have the following specific harmful effects:

(a) the State of New Jersey's ability to enforce environmental laws and to act prospectively to prevent spills, leaks, explosions, and dangerous releases of toxic and hazardous chemicals contained in manufacturing workplaces will be substantially impaired during the pendency of these appeals;

(b) the ability of firefighters and emergency response personnel to identify hazardous substances and to respond to chemical emergencies at manufacturing facilities will be substantially impaired during the pendency of these appeals;

(c) the ability of the general public to obtain critical information concerning toxic and hazardous substances stored in their communities and emitted into the environment by manufacturing facilities will be effectively halted during the pendency of these appeals; and

(d) the ability of physicians to make accurate diagnoses concerning chemical exposures related to manufacturing facilities will be substantially impaired during the pendency of these appeals.

2. There is a substantial likelihood that the State of New Jersey and Defendant-Intervenors will prevail on the merits of their appeal that the district court erred in enjoining the New Jersey Right to Know Act as it

applies to manufacturing employers. Specifically, the district court erred in the following respects:

(a) those provisions of the New Jersey Worker and Community Right to Know Act, N.J.S.A. 34:5A-1 et seq., which are supported by non-worker benefit purposes -- e.g., those portions generating hazardous substance information to the community, emergency response personnel, and state enforcement officials -- are not preempted by the Occupational Safety & Health Act of 1970, 29 U.S.C. §651 et seq. and the OSHA Hazard Communication regulation, 29 C.F.R. §1910.-1200;

(b) additionally, the district court should have severed the unconstitutional portions of the statute and should not have enjoined the enforcement and implementation of the following provisions of the Right to Know Act, and regulations promulgated thereunder:

1. The requirement that the New Jersey Department of Health (DOH) and the Department of Environmental Protection (DEP) develop and publicly distribute lists of hazardous substances used, manufactured, stored, or emitted from workplaces in the State. These lists are (a) the environmental hazardous substances list, N.J.S.A. 34:5A-4a; (b) the workplace hazardous substances list, N.J.S.A. 34:5A-5a; and (c) the special health hazard substances list, N.J.S.A. 34:5A-5b.



2. The provision that disclosure of information concerning emissions into the environment, in particular the chemical name and CAS number, may not be withheld from the public by means of a trade secret claim. N.J.S.A. 34:5A-15(h).

3. The provision that information concerning special health hazard substances, in particular the chemical name and CAS number, may not be withheld from the public by means of a trade secret claim. N.J.S.A. 34:5A-3s; 34:5A-3t; 34:5A-5b; N.J.A.C. 8:59-10.

4. The requirement that employers complete the environmental survey, N.J.S.A. 34:5A-7b; 34:5A-3k; the emergency service information survey, N.J.A.C. 7:1G-5; and the workplace survey, N.J.S.A. 34:5A-7a; 34:5A-3y, thereby listing those hazardous substances on the DOH and DEP lists that are present in their facilities or known to be emitted into the environment.

5. The requirement that the DOH prepare, and publicly distribute, hazardous substance fact sheets describing the health effects of exposure to hazardous substances located in employers' facilities or known to be emitted into the environment. N.J.S.A. 34:5A-3n; 34:5A-10a.

6. The provision requiring employers to label containers with the chemical name and CAS numbers of the contents of the containers. N.J.S.A. 34:5A-14a; 34:5A-14b.

3. A stay of the district court's Order and Judgment during the pendency of these appeals will not irreparably injure Plaintiff manufacturers, since they, at worst, will suffer a temporary and minimal economic burden;

4. The public interest strongly favors the grant of a stay pending appeal.

The foregoing reasons also support the issuance of an order expediting the disposition of these appeals and advancing the date for oral argument.

Relevant portions of the record of this litigation upon which the applicants rely, attached hereto and filed herewith, are as follows:

1. Exhibit A - Opinion of the District Court
2. Exhibit B - Order (Chamber of Commerce)
3. Exhibit C - Final Judgment (Fragrance Materials)
4. Exhibit D - Transcript of District Court Hearing and Ruling on Motion for Stay Pending Appeal

These motions have been filed in this Court promptly upon the receipt by the applicants of the transcript of the hearing on the applicants' motion for a stay pending appeal in the district court, which contains the reasons for the district court's denial of the stay.

Wherefore, the State of New Jersey, the New Jersey Public Advocate and Intervenor Organizations respectfully request that the order of the district court, insofar as it enjoins the continued implementation of the provisions set forth in paragraphs 2b(1)-(6), to manufacturing sector employers, be stayed pending appeal.

In addition, the applicants request that the disposition of these appeals be expedited by advancing the date for oral argument on the merits.

Respectfully submitted,

INTERVENORS:

JOSEPH H. RODRIGUEZ,  
PUBLIC ADVOCATE

By: Richard A. Goldberg / SAT  
Richard A. Goldberg  
Assistant Deputy Public Advocate

By: Sharon A. Treat  
Sharon A. Treat  
Assistant Deputy Public Advocate

Department of the Public Advocate  
Division of Public Interest Advocacy  
CN-850  
Trenton, NJ 08625

REITMAN, PARSONNET, MAISEL &  
DUGGAN

By: Bennet D. Zurofsky / SAT  
Bennet D. Zurofsky, Esquire  
744 Broad Street - Suite 1807  
Newark, NJ 07102

PUBLIC INTEREST LAW CENTER OF  
PHILADELPHIA

By: Jerome Balter / SAT  
Jerome Balter, Esquire  
1315 Walnut Street  
Suite 1632  
Philadelphia, PA 19107

STATE OF NEW JERSEY:

IRWIN I. KIMMELMAN  
Attorney General of New Jersey

By: Michael S. Bokar / SAT  
Michael S. Bokar  
Deputy Attorney General

Dated: March 6, 1985

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v.	:	On Appeal From The United
	:	States District Court for the
ROBERT E. HUGHEY, <u>et al.</u> ,	:	District of New Jersey
	:	
Defendants-Appellants-	:	
Cross-Appellees	:	
	:	Sat Below:
and	:	Debevoise, U.S.D.J.
	:	
JOSEPH H. RODRIGUEZ, <u>et al.</u> ,	:	
	:	
Defendant-Intervenors-	:	
Appellants-Cross-	:	
Appellees.	:	

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JOINT BRIEF OF THE STATE OF NEW JERSEY, THE PUBLIC  
ADVOCATE, AND INTERVENOR ORGANIZATIONS IN SUPPORT  
OF MOTION TO STAY JUDGMENT PENDING APPEAL AND  
MOTION FOR ACCELERATION OF THE APPEAL

---

JOSEPH H. RODRIGUEZ,  
PUBLIC ADVOCATE  
By: Richard A. Goldberg, Esquire  
Sharon A. Treat, Esquire  
Department of the Public Advocate  
Division of Public Interest Advocacy  
CN-850  
Trenton, NJ 08625

REITMAN, PARSONNET, MAISEL &  
DUGGAN  
By: Bennet D. Zurofsky, Esquire  
Reitman, Parsonnet, Maisel & Duggan  
744 Broad Street  
Suite 1807  
Newark, NJ 07102

PUBLIC INTEREST LAW CENTER  
OF PHILADELPHIA  
By: Jerome Balter, Esquire  
1315 Walnut Street  
Philadelphia, PA 19107

IRWIN I. KIMMELMAN  
ATTORNEY GENERAL  
By: Michael S. Bokar, Esquire  
Hughes Justice Complex  
7th Floor  
CN-112  
Trenton, NJ 08625

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## INTRODUCTION

On August 29, 1983, the State of New Jersey enacted a Right To Know Act, which is designed to protect workers, emergency services personnel, firefighters and members of the general public from the hazards of exposure to toxic and chemical substances in the workplace. The purpose of this statute is to safeguard the health and safety of New Jersey inhabitants -- a well-recognized exercise of the State's traditional police powers.

On November 25, 1983, the federal Occupational Safety and Health Administration promulgated a Hazard Communication provision pursuant to the agency's authority under the Occupational Safety and Health Act of 1970. The 1970 Act authorizes the Secretary of Labor to set standards to assure safe and healthful working conditions for working men and women. The Hazard Communication regulation implements the Act by requiring that certain employers in the manufacturing sector evaluate chemicals produced in their workplace or imported by them to determine if they are hazardous.

Although the district court explicitly recognized that Congress was solely concerned with the protection of workers in the workplace, the court still concluded that the OSHA regulation preempts all aspects of the Right To Know Act relating to employers in the manufacturing sector, including those provisions of the Act that have clear and distinct non-worker benefits and that are designed to protect the health and safety of emergency services personnel, firefighters, and the public. Furthermore, the district court enjoined the State of New Jersey from enforcing these public protection provisions of the Right To Know Act against such employers.

The applicants - the State of New Jersey, certain state officials charged with implementing the Right To Know Act, the New Jersey Public

Advocate, and a variety of labor and environmental organizations that intervened below -- will demonstrate in this brief that the district court's order should be stayed pending the disposition of the appeal by this Court. First, the district court's analysis of the merits of the preemption claim is flawed in two fundamental respects. The court initially ignored the benchmark of preemption analysis when a well-established exercise of the State's sovereign powers is at issue: historic police powers of the State are not to be superseded by a federal act unless that was the clear and manifest purpose of Congress. This oversight led the district court to invalidate large portions of the New Jersey Act. This conclusion cannot be squared with the limited scope of the federal OSH statute and regulation, the lack of any Congressional intent to preempt the exercise of the State's police powers to protect the health and safety of the public or emergency personnel, and the absence of any demonstrable conflict between the requirements of the OSHA provision and the New Jersey Right To Know Act.

Furthermore, the district court failed to accord proper deference to state sovereignty and, specifically, overlooked the oft-repeated tenet that preemption of state law is not favored. Contrary to the compelling reasons for a more circumspect approach to preemption in this case, the district court stopped the State of New Jersey in its tracks and concluded that the State was preempted by the OSH Act and regulation from applying the Right To Know Act to manufacturing employers in any manner -- rather than excising those few provisions which are solely intended to benefit workers in the workplace. In short, the district court fundamentally erred by adopting an expansive view of preemption of state law rather than undertaking the painstaking effort required by the Supreme Court to preserve the legitimate exercise of the State's traditional police powers.



Second, the applicants will suffer serious irreparable harm if the district court's injunction is not stayed pending appeal. The order effectively prevents the State of New Jersey from implementing the present Right To Know Act to protect the public, emergency personnel and the environment from chemical hazards in the manufacturing sector. The abrupt cessation of State authority in this area constitutes irreparable harm of the highest magnitude.

Third, in contrast to the harm to the State and its citizens, the plaintiffs below will not suffer any irreparable harm if a stay is granted. The plaintiffs are only able to point to unsubstantiated financial costs and the burdens of compliance with State law; however, the former has never been considered irreparable harm and the latter is the inevitable consequence of conducting business where both federal and state regulatory authority overlap. These factors do not constitute irreparable harm and, in any event, they are outweighed by the irreparable harm to the applicants if New Jersey's efforts to protect its citizens are thwarted.

Finally, the public interest favors a stay. The hazards of toxic and chemical substances faced by the people of New Jersey are a matter of national attention, and there is a compelling public interest in favor of allowing the State to continue essential efforts to preserve the lives and property of its citizens. The abstract public interest in national and uniform regulation of the workplace pales in comparison to the real and present dangers to the public health and safety that could be avoided by continued implementation of the Act.

## STATEMENT OF THE CASE

The consolidated cases on appeal arise from two separate challenges to the New Jersey Worker and Community Right To Know Act (Right To Know Act). N.J.S.A. 34:5A-1 et seq.

### A. Proceedings

On August 10, 1984, the New Jersey State Chamber of Commerce, three chemical and business associations, and eight pharmaceutical companies filed a complaint in the United States District Court for the District of New Jersey attacking the constitutionality of the Right To Know Act. The complaint alleged, inter alia, that (1) the Right To Know Act is preempted by OSHA's Hazard Communication rule, 29 C.F.R. §1910.1200, which was promulgated under the federal Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §651 et seq.; and (2) the provisions of the Right To Know Act requiring the disclosure of certain trade secrets constitute an unconstitutional taking of property without due process of law. Plaintiffs sought a declaration that the Right To Know Act is unconstitutional and an order enjoining the defendants (New Jersey's Commissioner of Environmental Protection, Commissioner of Health, Acting Commissioner of Labor and the State of New Jersey) from enforcing the requirements of the Right To Know Act.<sup>1</sup> The defendants filed their Answer on September 6, 1984.

On September 21, 1984, a separate complaint was filed by two associations whose members are engaged in the manufacture and sale of fragrance and flavor materials, and thirteen corporations which compound, mix, blend

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<sup>1</sup> An amended complaint setting forth these claims was filed on August 15, 1984.

and/or manufacture fragrances and flavors or their ingredients. This complaint, which alleged the same two claims set forth above, sought an injunction to prevent the defendants (New Jersey's Commissioner of Environmental Protection, Commissioner of Health, and Acting Commissioner of Labor) from enforcing the Right To Know Act.<sup>2</sup>

On September 28, 1984, plaintiffs in the Chamber of Commerce suit moved for a preliminary injunction against enforcement of the Act.

On October 19, 1984, the Public Advocate of the State of New Jersey<sup>3</sup> and twenty-nine unions, environmental organizations and other interested parties<sup>4</sup> filed a motion to intervene in both cases as defendant-intervenors supporting the constitutionality of the Right To Know Act.

On November 13, 1984, plaintiffs in the Fragrance Materials Association action filed a motion for summary judgment on the preemption and takings claims.<sup>5</sup>

On November 15, 1984, the district court granted the motion to intervene<sup>6</sup> and heard arguments on the motion for a preliminary injunction in the Chamber of Commerce action.

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<sup>2</sup> The two cases were consolidated by the district court on November 5, 1984.

<sup>3</sup> The Public Advocate is a cabinet level official of New Jersey state government charged by law with representing the public interest. N.J.S.A. 52:27E-29. The public interest is defined by statute as an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens," N.J.S.A. 52:27E-30.

<sup>4</sup> These other parties included community advocacy groups, firefighter organizations and public health associations.

<sup>5</sup> Plaintiffs in the Chamber of Commerce suit subsequently joined in this motion for summary judgment.

<sup>6</sup> An order granting the motion to intervene was filed on January 25, 1985.

On November 29, 1984, the defendant-intervenors filed a cross-motion for summary judgment on their claims. The district court heard the motions and cross-motions for summary judgment in the Fragrance Materials Association case on December 10, 1984.<sup>7</sup>

On January 3, 1985, the district court entered summary judgment (1) declaring that the Right To Know Act is preempted by the 1970 federal OSH Act and the federal Hazard Communication provision to the extent that the Right To Know Act affects employers in the manufacturing sector; and (2) permanently enjoining defendants from enforcing the Right To Know Act against such employers until the Act and regulations adopted pursuant to it have been approved as a state plan by the Secretary of Labor under appropriate provisions of the federal Act. The district court also determined that the absence of trade secret protection for certain extremely hazardous substances under the Right To Know Act does not constitute a taking requiring compensation under the Due Process Clause.<sup>8</sup> The district court entered an order in the Chamber of Commerce suit and final judgment in the Fragrance Materials action on January 10, 1985, setting forth these conclusions.<sup>9</sup>

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<sup>7</sup> On November 20, 1984, the defendant-intervenors requested an opportunity to present testimony on the following two issues at the hearing on December 10: (1) the trade secret provision in the Right To Know Act is a specifically tailored response to local public health and environmental conditions pursuant to the State's broad police powers; and (2) the provisions of the Right To Know Act are supported by independent purposes relating to the protection of the health and safety of members of the public, firefighters and other emergency personnel, and none of the Act's provisions conflict with the OSHA Hazard Communication provision. On November 21, 1984, Judge Debevoise advised the parties that no live testimony could be presented at the hearing on December 10, but that he would consider any additional affidavits the parties wished to submit.

<sup>8</sup> The opinion of the district court is appended to this motion as Exhibit A.

<sup>9</sup> The order and final judgment are appended to this motion as Exhibits B and C. Timely notices of appeal have been filed by the state defendants and defendant-intervenors. Plaintiffs in the Chamber of Commerce case have also filed a timely notice of cross-appeal from those portions of the order and final judgment denying relief on the trade secrets claims and rejecting the preemption claim relating to non-manufacturing employers.

On January 30, 1985, the State of New Jersey filed an application for a stay pending appeal, in which the defendant-intervenors joined. This motion was heard<sup>10</sup> and denied by the district court on February 25, 1985.<sup>11</sup>

B. Statement of Relevant Facts

For the purposes of this motion, a full discussion of the relevant portions of the OSH Act, the OSHA Hazard Communication rule, and the New Jersey Right To Know Act is unnecessary.<sup>12</sup> Rather, the following discussion summarizes the different purposes of the federal statute and regulations and the state statute, as well as summarizing of the central provisions of the laws involved in this litigation.

1. The OSH Act

The OSH Act, 29 U.S.C. §651 et seq., was enacted in 1970. The Act is designed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . ." 29 U.S.C. §651(b). More specifically, the Act requires that "[e]ach employer shall furnish to his employees employment at a place which is free from recognized hazards . . ." 29 U.S.C. §654(a)(1).

Among many other methods of attaining this goal, Congress authorized the Secretary of Labor "to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce . . ." 29 U.S.C. §651(b)(3). The Secretary is specifically directed to promulgate

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<sup>10</sup> The transcript of the district court's ruling on the motion for stay pending appeal is appended to this motion as Exhibit D.

<sup>11</sup> The order denying the motion for a stay pending appeal has not been filed as of the date of this motion.

<sup>12</sup> A full recitation of these provisions is included in the opinion of the district court. Exhibit A at A8-A22.

standards "which require[] conditions or the adoption or use of one or more practices, means, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §652(8); §655. [emphasis added]. An employer covered by the Act must comply with these standards. 29 U.S.C. §654(a)(2).

## 2. The OSHA Hazard Communication Rule

On November 25, 1983, pursuant to his statutory obligation to promulgate occupational or worker benefit standards, the Secretary, through OSHA, issued a final "Hazard Communication" rule. 48 Fed. Reg. 53,340; 29 C.F.R. §1910.1200. The limited purpose of the rule is as follows:

### §1910.1200 Hazard communication.

(a) Purpose. (1) The purpose of this section is to ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated, and that information concerning their hazards is transmitted to affected employers and employees within the manufacturing sector. This transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training.

29 C.F.R. §1910.1200; 48 Fed. Reg. 53340 (Nov. 25, 1983) [emphasis added].

In short, the OSHA rule establishes a workplace rule designed to transmit certain hazard communication information solely to employees in one specific sector of the economy -- manufacturing.

### 3. The Right to Know Act<sup>13</sup>

In sharp contrast to OSHA's limited focus on manufacturing workplace employees, the New Jersey Act has very broad and expansive public purposes. The provisions of the state law are clearly intended to provide state enforcement officials, emergency response personnel and local community members, as well as workers, with detailed information concerning hazardous substances housed in or emitted from a broad range of New Jersey plants and businesses.

Specifically, the Right to Know Act contains four central provisions -- hazardous substance lists, surveys, fact sheets and container labelling -- which are principally designed to collect and to transmit hazardous substance information to emergency response personnel, including firefighters, the public, state enforcement officials, and medical professionals. First, the Act requires that the New Jersey Departments of Environmental Protection (DEP) and Health (DOH) develop environmental and workplace hazardous substance lists which identify, at the minimum, all "substances used, manufactured, stored, packaged, repackaged, or disposed of or released into the environment of the state which, in the department's determination, may be linked to the incidence of cancer; genetic mutations; psychological malfunctions . . .; and other diseases; or which by virtue of their physical properties, may pose a threat to the public health and safety." N.J.S.A. 34:5A-4; -5. In addition, these lists incorporate by reference existing documents which identify toxic materials (e.g., 29 CFR Part 1910, Subpart Z), N.J.S.A. 34:5A-5(a), and which designate particularly dangerous substances, N.J.S.A. 34:5A-5(b).

Second, the DEP and DOH must develop and issue environmental and workplace surveys. N.J.S.A. 34:5A-4(b); -5(c). These surveys are sent

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<sup>13</sup> The provisions of the Right To Know Act are reproduced in full in Exhibit E, which is appended to this motion.

by the Departments to employers covered by the Right to Know Act for the purpose of reporting hazardous materials present in their facilities. N.J.S.A. 34:5A-6. Copies of completed environmental surveys are then to be transmitted to the DEP, the county health department, the local fire department and the local police department. N.J.S.A. 34:5A-7(b).<sup>14</sup> Similarly, workplace surveys are sent to the county health department, the local fire department, and the local police department, as well as the Department of Health. N.J.S.A. 34:5A-7(a). The public at large is specifically authorized to obtain copies of all completed surveys through either the DEP or DOH, N.J.S.A. 34:5A-9(d); -1-(d), or through the appropriate county health department. N.J.S.A. 34:5A-22.

Third, the Right to Know Act mandates that the DOH must prepare hazardous substance fact sheets for each hazardous material identified on the hazardous substance lists and transmit the pertinent fact sheets to each employer. N.J.S.A. 34:5A-5(d); -8. These fact sheets must identify for each substance the following detailed information:

- (1) The chemical name, the Chemical Abstracts Service number, the trade name, and common names of the hazardous substance;
- (2) A reference to all relevant information on the hazardous substance from the most recent edition of the National Institute for Occupational Safety and Health's Registry of Toxic Effects of Chemical Substances;
- (3) The hazardous substance's solubility in water, vapor pressure at standard conditions of temperature and pressure, and flash point;
- (4) The hazard posed by the hazardous substance, including its toxicity, carcinogenicity, mutagenicity, teratogenicity, flammability, explosiveness, corrosivity and reactivity, including specific information on its reactivity with water;

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<sup>14</sup> N.J.S.A. 34:5A-25 permits health, fire and police departments to request information from employers covered by the Act to supplement the surveys.



(5) A description, in nontechnical language, of the acute and chronic health effects of exposure to the hazardous substance, including the medical conditions that might be aggravated by exposure, and any permissible exposure limits established by the federal Occupational Safety and Health Administration;

(6) The potential routes and symptoms of exposure to the hazardous substance;

(7) The proper precautions, practices, necessary personnel protective equipment, recommended engineering controls, and any other necessary and appropriate measures for the safe handling of the hazardous substance, including specific information on how to extinguish or control a fire that involves the hazardous substance; and

(8) The appropriate emergency and first aid procedures for spills, fires, potential explosions, and accidental or unplanned emissions involving the hazardous substance.

N.J.S.A. 34:5A-3(n).

Quite clearly, these fact sheets are designed for the use of emergency response personnel, the public, state enforcement officials, and medical personnel -- as well as by employees. Indeed, the Act specifically authorizes "any person" to request and obtain needed fact sheets from the Department of Health. N.J.S.A. 34:5A-10().

The fourth central and non-worker benefit provision of the Right to Know Act is the state's comprehensive hazardous substance labelling program, N.J.S.A. 34:5A-14. Specifically, the Act requires that virtually "every employer shall take any action necessary to assure that every container at his facility containing a hazardous substance shall bear a label containing the chemical name and Chemical Abstracts Service number of the . . . substance . . . ." N.J.S.A. 34:5A-14(a).<sup>15</sup>

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<sup>15</sup> N.J.S.A. 34:5A-14(a) also requires the labelling of pipelines.

These labels are designed to be used in conjunction with the hazardous substance surveys and hazardous substance fact sheets. They will enable emergency response personnel to quickly identify dangerous materials stored in a facility, allow state enforcement officials to accurately inventory stored substances and review filed survey forms, and permit medical personnel and health officials to conduct needed epidemiological research and other studies.

It is plain that each of these provisions -- substance lists, surveys, fact sheets, and labels -- are an integral part of the Right To Know Act's comprehensive program to communicate information about toxic and hazardous substances to the public, the state, and emergency response personnel. None of these provisions are limited to workers or are solely designed to benefit workers. Finally, it is also apparent that none of the central provisions of the Right To Know Act conflicts in any way with the OSH Act or Hazard Communication regulation. Rather, the district court concluded that "[d]efendants demonstrate that many state requirements correspond with or complement the federal requirements and that emergency compliance with one set of requirements can be used to meet the other set." Exhibit A at A24.

## ARGUMENT

- I. THE COURT SHOULD STAY THE JUDGMENT OF THE DISTRICT COURT ENJOINING THE IMPLEMENTATION AND ENFORCEMENT OF THE NEW JERSEY RIGHT TO KNOW ACT IN ITS ENTIRETY AS APPLIED TO THE MANUFACTURING EMPLOYERS TO PERMIT THE IMPLEMENTATION OF THE PUBLIC AND EMERGENCY RESPONSE PROVISIONS OF THE ACT PENDING THE DISPOSITION OF THESE APPEALS.
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It is well-settled that a party seeking a stay pending appeal must show: (1) the likelihood of irreparable harm to the movant in the absence of a stay; (2) the likelihood of success on the merits of the appeal; (3) the prospect of substantial harm to the opposing parties if the stay is granted; and (4) the public interest. Rennie v. Klein, 481 F. Supp. 552, 554 (D.N.J. 1979); Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc., 559 F. 2d 841, 842-43 (D.C. Cir. 1977); Reed v. Rhodes, 549 F. 2d 1046, 1047-48 (6th Cir. 1976); Reserve Mining Co. v. United States, 498 F. 2d 1073, 1076-77 (8th Cir. 1974).

Generally, the standard for granting a stay pending appeal is similar to the test for a preliminary injunction. Kershner v. Mazurkiewicz, 670 F. 2d 440, 443 (3d Cir. 1982); In Re Arthur Treacher's Franchisee Litigation 689 F. 2d 1137 (3d Cir. 1982). Nevertheless, the federal courts have applied these criteria in a flexible manner where difficult legal issues of first impression or important public policy questions have been involved. Providence Journal Co. v. Federal Bureau of Investigation, 595 F. 2d 889 (1st Cir. 1979); Washington Metropolitan Area Transit Comm'n., 559 F. 2d at 842-843; Evans v. Buchanan, 435 F. Supp. 832, 843 (D. Del. 1977). In determining whether to grant a stay, the appellate court "necessarily approaches the matter from a different perspective" than did the district

court, which is reviewing its own decision. Providence Journal Co., 595 F. 2d at 890; Evans, 435 F. Supp. at 844. Thus, "[m]eaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable." Providence Journal Co., 595 F. 2d at 890 [emphasis added].

As demonstrated below, the applicants meet the standards for granting a stay pending appeal. Therefore, this Court should stay the district court's injunction pending a decision on the appeal and permit the State to implement the non-workplace provisions of the Right to Know Act as it applies to manufacturing employers.

A. THE MOVANTS WILL BE IRREPARABLY  
HARMED IF THE STAY IS NOT GRANTED

The provisions of the Right to Know Act enjoined by the order and judgment of the District Court establish a comprehensive State program intended to address numerous "problems arising in the workplace and extending into the community at large." Exhibit A at A10. Implementation of the "community" provisions of the Act -- those provisions that provide information and rights to the State, to firefighters and emergency response personnel, to medical professionals, and to the public at large -- was enjoined by the District Court, despite that court's determination that "[t]here seems little question but that New Jersey could enact legislation and regulate [manufacturing sector] employers in order to achieve the non-workplace objectives" of the Act. Exhibit A at A40.

Without the grant of a stay pending appeal, the effect of the district court's injunction will be to cause irreparable harm both to the State of New Jersey's comprehensive chemical hazards regulation and enforcement program and to the intended beneficiaries of the non-workplace provisions

of the Right to Know Act. Specifically, the injunction has (1) substantially impaired the State's ability to enforce environmental laws and to act prospectively to prevent spills, leaks or explosions of toxic and hazardous chemicals used in manufacturing facilities; (2) prevented firefighters and emergency response personnel from using chemical hazards information generated and distributed by the Right to Know Act to prepare for and respond to chemical emergencies at manufacturing facilities; and (3) effectively halted the dissemination of information to the general public about toxic chemicals emitted into the environment and used by manufacturing facilities located in communities throughout the State of New Jersey. Unless this Court grants a stay of the district court's judgment pending disposition of the appeal, and permits the State to implement and enforce the critical community right to know provisions of the Act -- the hazardous substance and special health hazard substance lists, the workplace and environmental surveys, the chemical information fact sheets, and the container labeling requirements -- the State and the public will continue to suffer irreparable harm in the following areas.

1. The State's regulatory and enforcement program for toxic chemicals.

The effect of the District Court's injunction will be to seriously undermine the State's entire program to collect and analyze information about toxic chemical hazards, many of which emanate from manufacturing facilities. The Right to Know Act establishes a comprehensive system for collecting information about specific substances used in manufacturing processes (the workplace survey, N.J.S.A. 34:5A-5) and toxic chemicals emitted from manufacturing facilities into the environment (the environmental survey, N.J.S.A. 34:5A-4). The State was provided access to these facilities to enforce the Act and other environmental laws and regulations, and to conduct workplace

health and exposure surveys. N.J.S.A. 34:5A-10(c). Exhibit F at A111-115; Exhibit H at A121-A122. Container labeling was to have provided valuable information concerning the specific location of particular chemicals, information that is critical to the State's ability to enforce the law, plan for and respond to chemical emergencies, and conduct long-term health exposure studies needed to provide the data for future regulatory actions. N.J.S.A. 34:5A-14. Exhibit G at A119-A120; Exhibit H at A113-A114. The district court's injunction against the implementation and enforcement of the community-benefit provisions of the Act as applied to manufacturing employers will, therefore, irreparably harm New Jersey's ability to protect its citizens and the environment from the known health and safety hazards caused by chemicals used in the manufacturing sector.

2. Emergency preparedness and response.

The District Court's injunction will also cause irreparable harm to the public and to firefighters and other emergency response personnel who will be unable to properly plan for and respond to chemical emergencies in manufacturing facilities. For example, without access to the Workplace Surveys and Emergency Services Information Survey, emergency response personnel will simply not know what toxic chemicals are being used or stored in which facilities, the volume of use, and the hazards specific to particular substances. Exhibit G at A119. Although fact sheets prepared by the DOH may be available for particular hazardous chemicals, manufacturing employers will not be required to inform firefighters that such chemicals are present at their facilities. Moreover, without labeling of containers with chemical name and Chemical Abstract Services (CAS) numbers, once emergency personnel reach the site of a fire, spill or explosion, they will be unable to identify the specific substances at the site and assess the risk to themselves and to the public.

Exhibit G at A119. Under such circumstances, emergency response will become a lethal guessing game, placing the public at great risk and jeopardizing the health and lives of firefighters as well.

3. Communication of chemical identity and hazards information to the public.

The major premise of the Legislature in enacting the Right to Know Act was that the public had an "inherent right" to know about the chemicals used and stored in the communities where they live and work and emitted into the very air they breathe. N.J.S.A. 34:5A-2. Access to this information was deemed a public right so that New Jersey's citizens would be able to know "the full range of the risks they face so that they can make reasoned decisions and take informed action concerning their employment and their living conditions." Id. The district court's injunction has taken this right away from the public as far as manufacturing plants are concerned. Unless the Court grants a stay of the district court's judgment, the public will simply be unable to find out the names of the chemicals they are routinely exposed to in their air and water, and the health hazards associated with these substances. Despite the fact that many emissions and chemicals used in manufacturing plant processes are known to cause acute toxic effects, or lead to cancer or reproductive effects, exposure information will not be available for treating physicians or their patients. Clearly, members of the public will be irreparably harmed by unknowingly exposing themselves to toxic chemicals in their communities, and by being denied access to the information about these substances that could be used to avoid exposure and to diagnose and treat illness and disease associated with such exposure.

The irreparable harm to the public and to the State's regulatory and enforcement program resulting from the district court's judgment will not

be mitigated by the existence of the OSHA Hazard Communication regulation, 29 C.F.R. §1900.1200. The OSHA regulation will not go into effect for chemical manufacturers until November 25, 1985. Other covered employers will not have to comply until May 25, 1986. 29 C.F.R. §1910.1200. Presumably, this is well after this Court's determination of the appeal in this case. In any event, the OSHA program is a fundamentally different information program which does not address the needs of the community and of emergency response personnel, and is designed solely to benefit workers. For example, the OSHA program lacks a system for transmitting information to the local level, is not concerned with chemical emissions into the environment, and fails to provide firefighters with needed labeling that provides the specific chemical name and CAS number -- information that is also critical to the effectiveness of the State's enforcement and health monitoring programs.

Clearly, the harm to the public health, safety and welfare caused by the precipitous dismantling of the State's community right to know program for the manufacturing sector rises to the level of "irreparable injury" required for a stay pending appeal. The seminal case establishing the legal principles to be applied in a motion for a stay or injunction pending appeal is Virginia Petroleum Jobbers Ass'n. v. Federal Power Comm'n., 259 F. 2d 921 (D.C. Cir. 1958) (cited in this circuit with approval in United States v. Commonwealth of Pennsylvania, 533 F. 2d 107, 110 n.9 (3d Cir. 1976)). In that case, the court stated:

The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. Id. at 925. [emphasis in original].



In the present case, it is the plaintiff manufacturing companies and their trade associations, not the State of New Jersey or the intervenor groups, that have alleged merely economic burdens and harm caused by the time and energy expended in complying with the Right to Know Act. See infra at pp. 29-30. In stark contrast, the intended community beneficiaries of the Right to Know Act will, in the absence of a stay pending appeal, suffer irreparable harm in its most pristine form, because the State will be prevented from implementing an important program designed to protect "inhabitants of the state who live near industrial or other facilities and to enable fire and health officials to protect the community from health risks and other hazards." Exhibit A at A52.

B. THE MOVANTS ARE LIKELY TO  
SUCCEED ON THE MERITS OF  
THEIR APPEAL

In enjoining the Right to Know Act in its entirety as applied to manufacturing employers, the District Court failed to heed a fundamental precept of preemption analysis: historic police powers of the State are not to be superseded by a federal act unless that was the clear and manifest purposes of Congress. This precept is a reflection of the well-established principle that preemption of state law by federal statute or regulation is not favored. Having severely undervalued these constitutional imperatives, the district court also completely overlooked the obligation of federal courts to preserve the constitutional provisions of state legislation, even where other provisions of a statute are invalidated. Since the district court's conclusions regarding the preemptive force of the OSHA regulation are predicated on a fundamentally flawed legal analysis, there is a strong likelihood of success on the merits of the applicants' appeal.

The standard for judging an applicant's likelihood of success on the merits was addressed by the United States Court of Appeals for the District of Columbia Circuit in Washington Metropolitan Area Transit Comm'n., 559 F. 2d at 843 (cited with approval in Rennie v. Klein, 481 F. Supp. 552, 554 (D.N.J. 1979)). The court concluded:

a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors. Id. [Emphasis added].

As demonstrated below, the applicants clearly meet this standard, since it is likely that this Court will hold on appeal that the community information provisions of the Right to Know Act may not be preempted by the OSHA Hazard Communication regulation. Indeed, as will become evident, the injunction issued by the district court was overly broad and not tailored to address the constitutional defects the district court found in the Right To Know Act. In the following discussion, the applicants will address, first, the district court's failure to adhere to basic standards of preemption, and second, the lower court's failure to apply the principle of severability to preserve the State's legitimate exercise of its police powers.

1. The District Court Erred In Overlooking Its Responsibility As A Federal Court To Construe State Statutes To Avoid Preemption, Absent An Unmistakable Indication To The Contrary

It is well-established that the State has broad police powers to enact legislation that furthers the public health and well-being of its citizens. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442, 80 S.Ct. 813, 815 (1960). See also, Penn Terra Ltd. v. Dept. of Environ. Resources, 733 F.2d 267, 272 (3rd Cir. 1984). Although the OSH Act gave the federal government a prominent role in the areas of occupational health and safety, the Act is limited in scope and restricts the Secretary of Labor's authority to activities that "assure so far as possible every working man and woman in this Nation safe and healthful working conditions" 29 U.S.C. §651(b).<sup>16</sup> In short, even where the OSH Act has a preemptive effect, the scope of preemption is circumscribed by the express terms of federal law. Furthermore, when OSHA issued the Hazard Communication provision, the agency expressly limited its preemptive scope to employers in the manufacturing sector, Standard Industrial Classification (SIC) Codes 20 through 39. 29 C.F.R. §1910.1200(b)(1). Exhibit A at A18-A19.

Yet, the district court did not merely invalidate the worker protection provisions of the Right To Know Act that are expressly preempted by the federal statute and administrative regulation. The lower court decree was

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<sup>16</sup> Even in the workplace, states continue to play a substantial role in preserving the health and safety of their workers. 29 U.S.C. §667(a). It is state law that provides remedies for injured workers and, in areas where no federal standard has been promulgated, states retain the authority to regulate industrial health and safety. W. Va. Mfrs. Ass'n. v. W. Va., 714 F.2d 308, 313-14 (4th Cir. 1983).

more expansive and wide-ranging, for the court's injunction also extended to the public protection provisions of state law. However, neither Congress nor OSHA ever expressed any intent to promulgate, let alone preempt, provisions relating to the health and safety of firefighters, emergency services personnel and the public. Consequently, the district court's judgment was not predicated upon Congressional or OSHA intent -- the touchstone of preemption analysis -- but upon the bald conclusion that "[t]he workplace and non-workplace regulatory schemes are inextricably intertwined." Exhibit A at A40.

The district court's summary analysis of the extent of preemption reflects a misunderstanding of the responsibility of federal courts in this area. First, federal courts should be extremely "circumspect" before invalidating the State's exercise of its police powers under the Supremacy Clause. Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1542 (D.C. Cir. 1984). As the Supreme Court has repeatedly emphasized: "the historic police powers of the State [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947). See also, Pacific Gas and Elec. v. State Energy Resources Conserv., \_\_\_ U.S. \_\_\_, 103 S.Ct. 1713, 1723 (1983); Ray v. Atlantic Richfield, 435 U.S. 151, 157, 98 S.Ct. 988, 994 (1978).

This Court has similarly recognized the need for a cautious approach to the preemption of a State's exercise of its police powers.

The police power of the several States embodies the main bulwark of protection by which they carry out their responsibilities to the People; its abrogation is therefore a serious matter. Congress should not be assumed, therefore, to have been miserly in its refund of that power to the States. Where important state

law or general equitable principles protect some public interest, they should not be overridden by federal legislation unless they are inconsistent with explicit congressional intent such that the supremacy clause mandates their supersession.

Penn Terra Ltd. v. Dept. of Environ. Resources, 733 F.2d at 272.

In light of these principles, the district court was obligated, if at all possible, to preserve the full force and effect of the Right To Know Act provisions that were not expressly preempted by federal law. As we will explain below, the principle of severability, if properly applied to the Right To Know Act as the State and the intervenors requested, would have been entirely consistent with this duty; the district court's generalized notions of inextricability were not.

Second, the district court's conclusions on the scope of preemption fail to accord proper respect to the State's independent sovereignty. Appropriate deference to the State's broad police powers requires a federal court to adhere strictly to the precept that preemption of state law by federal statute or regulation is not preempted in the absence of persuasive reasons. Chicago and North Western Transportation Co. v. Kalo Brick and Tile Co., 450 U.S. 311, 317, 101 S.Ct. 1124, 1130 (1981). To ensure that the preemptive effect of federal law is not unduly broad, "[s]tatutes should therefore be construed to avoid preemption." Penn Terra Ltd. v. Dept. of Environ. Resources, 733 F.2d at 273. This could have been effectively accomplished in the present case by applying the principle of severability -- an approach which, as we explain below, would have preserved the legitimate exercise of the State's police powers in the Right To Know Act.

2. The District Court Erred In Failing To  
Invoke The Presumption of Severability  
To Preserve The Non-Workplace Provisions  
Of The Right To Know Act

As mentioned above, the notable aspect of the District Court's decision is its determination that the non-workplace purposes and provisions of the Act are a wholly valid exercise of the State's police power, and its refusal to preserve the community provisions in light of these findings. In its opinion, the District Court stated:

Defendants would exempt from pre-emption the statutory and regulatory requirements for hazardous substance lists, the surveys, the fact sheets and the labeling provisions. There seems little question but that New Jersey could enact legislation and regulate employers in order to achieve the non-workplace objectives to which defendants refer. [Emphasis provided].  
Exhibit A at A39-A40.

Yet, the court went on to assert that the "workplace and non-workplace schemes are inextricably intertwined," Id. at A40, and therefore, could not be severed. In fact, the community and emergency response provisions are easily severed from the provisions that solely benefit workers.<sup>17</sup>

There is a presumption of severability when legislation is reviewed for constitutionality. As the United States Supreme Court recently held in Regan v. Time, Inc., \_\_\_ U.S. \_\_\_, 104 S.Ct. 3262 (1984):

In exercising its power to review the constitutionality of a legislative act, a federal court should act cautiously. A

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<sup>17</sup> The issue of severability was raised before the district court and was discussed in the district court's opinion and at the February 25, 1985, hearing on the motion for a stay pending appeal. Exhibit A at A39, n. 3; Exhibit D at A80.

ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary. Id. at 3269.

Determining "(w)hether an unconstitutional provision is separable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability."

Id. at 3269. In making its inquiry into legislative intent, "(u)nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Id., quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976). For the reasons discussed above, the rigorous application of the principle of severability is especially appropriate when a federal court is asked to invalidate a state's exercise of its police powers under the Supremacy Clause.

When passing upon the constitutionality of such state enactments, the federal courts look to the decisions of the state courts, particularly where there is a generalized or particular severability provision in state law. See, e.g. Watson v. Buck, 313 U.S. 387, 61 S. Ct. 962, 964 (1941); 2 Sutherland Statutory Construction § 44.11 (Sand, 4th Ed.). New Jersey has a general statutory provision establishing a presumption of severability when part of a statute is found unconstitutional. N.J.S.A. 1:1-10.<sup>18</sup> The New Jersey courts

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<sup>18</sup> 1:1-10. Partial unconstitutionality

If any title, subtitle, chapter, article or section of the Revised Statutes, or of any statute or any provision thereof, shall be declared to be unconstitutional, invalid or inoperative, in whole or in part, by a court of competent jurisdiction, such title, subtitle, chapter, article, section or provision shall, to the extent that it is not unconstitutional, invalid or inoperative, be enforced and effectuated, and no such determination shall be deemed to invalidate or make ineffectual the remaining titles, subtitles, chapters, articles, sections or provisions. Amended by L.1960, c. 187, p. 782, § 10.

have given the same effect to this general severability statute as to particular saving clauses, having held that N.J.S.A. 1:1-10 establishes a presumption of separability so that "[o]rdinarily if a part of a statute is adjudged invalid and the remainder can stand independently without conflict with the over-all basic purpose of the Legislature, it will be allowed to do so." N.J. Chapt., American Institute of Planners v. N.J. State Bd. of Professional Planners, v. N.J. State Bd. of Professional Planners, 48 N.J. 581, 593 (1967). See also 2 Sutherland Statutory Construction, supra, § 44.11.

A determination as to whether the valid and invalid provisions of a statute are interwoven is important in determining the Legislature's intent concerning severability. The New Jersey Supreme Court has held that the essential inquiry is whether the provisions

are so intimately connected and mutually dependent as reasonably to sustain the hypothesis that the Legislature would not have adopted the one without the other. Where the principal object of the statute is constitutional, and the objectionable provision can be excised without substantial impairment of the general purpose, the statute is operative except insofar as it may contravene fundamental law. And the question is to be considered in the settled principle that a permissible doubt as to validity is to be resolved in favor of the enactment.

State v. Lanza, 27 N.J. 516, 528 (1958). (citing St. John The Baptist Greek Catholic Church of Perth Amboy v. Gengor, 121 N.J. Eq. 349 (E. & A. 1937).) See also State v. Doto, 10 N.J. 318 (1952); Angermeier v. Borough of Sea Girt, 27 N.J. 298 (1958).

The federal courts have taken a similar view. The basic consideration is whether the valid remaining provisions can stand on their own without giving a statute "an effect altogether different from that sought by the



measure viewed as a whole." American Waterways Operators, Inc. v. Askew, 335 F. Supp. 1241 (M.D. Fla. 1971), rev'd on other grounds, 411 U.S. 325 (1973), quoting Carter v. Carter Coal Co., 298 U.S. 238, 313 (1936). Indeed, "the court must struggle to effectuate the constitutional purpose of the Legislature, to decide which clauses, subparts and sections must be enjoined, and to determine which of the remaining provisions may still be enforced." Charles v. Carey, 579 F. Supp. 464 (N.D. Ill., 1983).

The most striking feature of the district court's opinion is the utter lack of any attempt to apply this presumption of severability and to undertake the rigorous process of statutory analysis prescribed by these decisions. This is particularly troublesome in view of the federal court's obligation to preserve, if at all possible, the legitimate exercise of the State's sovereign police powers. Indeed, a proper application of the principle of severability would have compelled the district court to conclude that the community and emergency response provisions of the Right to Know Act could, and should, have been preserved. The legislative findings and declarations provision clearly sets forth a community protection and emergency response preparedness as a dominant purpose of the Act, N.J.S.A. 34:5A-2,<sup>19</sup> a purpose that was specific

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<sup>19</sup> 34:5A-2. Legislative findings and declarations

The Legislature finds and declares that the proliferation of hazardous substances in the environment poses a growing threat to the public health, safety, and welfare; that the constantly increasing number and variety of hazardous substances, and the many routes of exposure to them make it difficult and expensive to adequately monitor and detect any adverse health effects attributable thereto; that individuals themselves are often able to detect and thus minimize effects of exposure to hazardous substances if they are aware of the identity of the substances and the early symptoms of unsafe exposure; and that individuals have an inherent right to know the full range of the risks they face so that they can make reasoned decisions and take informed action concerning their employment and their living conditions.

(Footnote continued on next page)

found by the district court, and upheld as a constitutional, unpreempted exercise of the State's traditional police powers. Exhibit A at A10, A40, A53.

The District Court concluded that these provisions could not be severed because they were "interwined." Exhibit A at A40. But a careful review of the Act -- that is constitutionally required of federal courts in these circumstances -- reveals that the converse is true. First, the Act is divided into subparts, sections and provisions that can be severed in fact; therefore, there is no structural bar in the statute to application of the principle of severability. Second, effecting such a separation between the worker protection and public protection provisions will not do violence to the Legislature's intent, and the remaining public protection provisions can easily stand on their own as separate legislation. Therefore, once the principle of severability is properly applied, it is clear that the provisions solely dealing with communication of information to workers and worker rights set forth in the margin<sup>20</sup> can be excised "without substantial

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The Legislature further declares that local health, fire, police, safety and other government officials require detained information about the identity, characteristics, and quantities of hazardous substances used and stored in communities within their jurisdiction, in order to adequately plan for, and respond to, emergencies, and enforce compliance with applicable laws and regulations concerning these substances.

The Legislature further declares that the extent of the toxic contamination of the air, water, and land in this State has caused a high degree of concern among its residents; and that much of this concern is needlessly aggravated by the unfamiliarity of these substances to residents.

The Legislature therefore determines that it is in the public interest to establish a comprehensive program for the disclosure of information about hazardous substances in the workplace and the community, and to provide a procedure whereby residents of this State may gain access to this information. L.1983, c. 315, § 2, eff. Aug. 29, 1984.

<sup>20</sup> See, e.g. N.J.S.A. 34:5A-12 (employer's central file; posting of notice; distribution of literature on employee rights; employee access to information); N.J.S.A. 34:5A-16 (employee requests for information; refusal to work; complaint; civil action; penalty); N.J.S.A. 34:5A-17 (discharge or penalizing of employee for exercising rights; complaint; adjudication).

impairment of or conflict with the overall legislative purpose" of the Right To Know Act. N.J. Chapt., American Institute of Planners, 48 N.J. at 593.

In sum, the applicants have shown a strong likelihood of success on appeal -- the community and emergency response provisions of the Right To Know Act as applied to the manufacturing sector are clearly severable from the rest of the Act. Therefore, the district court erred in failing to discharge its responsibility to sever the constitutional provisions of the State statute from the preempted worker benefit provisions of the Act. This Court should, therefore, stay that part of the district court's judgment enjoining the implementation and enforcement of the non-workplace provisions of the Act.

C. THE OPPOSING MANUFACTURERS AND TRADE ASSOCIATIONS WILL NOT BE SUBSTANTIALLY HARMED IF THE STAY IS GRANTED

The third factor considered by the court in a stay application is the potential for substantial harm to the parties opposing the stay if the court grants the applicants' motion. The plaintiff manufacturers and trade associations will not suffer irreparable, or even substantial, harm if the critical public protection provisions of the Right To Know Act remain in force pending disposition of the appeal.

As discussed above, mere expenditure of effort and money to comply with federal or state law does not rise to the level of irreparable harm. A. O. Smith v. Federal Trade Comm'n., 530 F.2d 515, 525 (3d Cir. 1976); Virginia Petroleum Jobbers Ass'n., 259 F.2d at 925. Irreparable harm is defined as "that which cannot be repaired [and] retrieved . . . the injury must be of a peculiar nature, so that compensation in money cannot atone for it." A. O. Smith, 530 F.2d at 25, quoting with approval Gause v. Perkins, 3 Jones Eq. 177, 69 Am. Dec. 728 (1857).

In the district court, the plaintiff manufacturers and trade associations failed to establish irreparable harm from compliance with the community protection provisions of the Right To Know Act. The district court recognized that the costs of complying with provisions of the Act barring trade secret claims for special health hazard substances posed the greatest potential threat of irreparable injury to the companies, but ruled against plaintiffs on the merits of that issue and affirmed the validity of the trade secret provision as applied to both manufacturing and non-manufacturing employers. Exhibit A at A54; Exhibit D at A71.

Aside from the potential costs associated with complying with the trade secret provisions of the Act -- costs that the plaintiffs will pay whether or not this Court grants a stay pending appeal -- the opposing parties can point only to the prospect of inconvenience, confusion and unspecified economic costs if they comply with the public protection provisions of the Right To Know Act. Inconvenience and burden do not rise to the level of irreparable harm. In contrast, the potentially catastrophic impact on the State's residents if the motion for the stay is denied is precisely the kind of harm that cannot be corrected by mere monetary payments. It is clear that any harm to the plaintiffs caused by staying the district court's judgment is of an entirely different, and less substantial order.

#### D. A STAY PENDING APPEAL IS IN THE PUBLIC INTEREST

The final factor the Court must assess in determining whether to grant a stay pending appeal is the public interest. "In considering where the public interest lies, it is essential to evaluate the possible effects upon the public from the grant or denial of injunctive relief." Oburn v. Shapp, 521 F.2d 142, 150 (3rd Cir. 1975) [emphasis in original]. While not determinative, the potential harm to the public takes an added significance when the effect

of the district court's injunction is to "interdict a governmental program or agency administration of it." Cerro Metal Products v. Marshall, 620 F.2d 964, 972 (3rd Cir. 1980). See also, Continental Group, Inc. v. Amoco Chem. Corp., 614 F.2d 351, 358 (3rd Cir. 1980); Constructors Ass'n of Western Pennsylvania v. Kreps, 573 F.2d 811, 820 (3rd Cir. 1978). Additionally, when the State, as here, was the defendant below, there is a considerable overlap between the irreparable harm in the absence of a stay and the harm to the public interest. Cf. Hecht v. Bowles, 321 U.S. 321, 329, 64 S.Ct. 587, 592 (1944).

The harm to the public interest will be both immediate and concrete if the public protection provisions of the Right To Know Act applicable to manufacturing sector employers are halted pending appeal. The district court explicitly acknowledged in its decision the important public purposes of the Act: "the New Jersey statute and regulations are designed to protect not only workers but also inhabitants of the state who live near industrial or other facilities and to enable fire and health officials to protect the community from health risks and other hazards" (Exhibit A at A31). Certainly, the continued implementation of these public protection provisions is vital, since it is well-known that there is a constant threat of fires and other serious public health and safety hazards from the proliferation of chemical and manufacturing facilities in New Jersey. (Exhibit A at A9).

Specifically, as Thomas A. Burke, the Director of the Office of Science and Research of the New Jersey DEP<sup>21</sup> states in his affidavit in support of a stay pending appeal:

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<sup>21</sup> This affidavit is appended to the motion as Exhibit F. The Office of Science and Research is responsible for implementing the DEP's responsibilities under the Right To Know Act.

The employers in the manufacturing sector (Standard Industrial Classification (SIC) Codes 20-39) use a substantial number of hazardous substances in quantities that can pose significant health and safety risks to the citizens of New Jersey. For instance, the Department's Industrial Survey of more than 15,000 employers in the manufacturing sector disclosed annual admission of more than 1,460,000 pounds of vinyl chloride, a human carcinogen. ¶. 10. Exhibit F at A113.

Indeed, Dr. Burke states unequivocally that "[w]ithout a stay which would allow the DEP to implement the Right To Know Act in the manufacturing sector, the Department's ability to protect the public health and safety would be severely hampered." ¶. 11.<sup>22</sup> For these reasons, the

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<sup>22</sup> Dr. Burke's affidavit is replete with references to the potential harm to the public if a stay pending appeal is not granted: there is a "greater risk of injury to persons and property from chemical emergencies" (¶. 12); "there is a potential for serious health effects resulting to emergency response personnel and community residents" (¶. 13) and there is a possibility that "many individuals will needlessly suffer" (¶. 15).

James Ross, Chief of the Office of Emergency Preparedness of the New Jersey DEP, also emphasizes the serious adverse effect of the district court's order to the public interest:

If the manufacturing sector is exempt from the requirement to provide [information under the Right To Know Act], it will not be available to the people whose lives are on the line when they enter a facility to respond to a fire, spill, or other emergency. Without information about hazardous substances at manufacturing facilities, emergency response personnel will be responding unaware of the dangers they may face; they may be unable to adequately protect their health and safety. They will also lack adequate information to respond to emergencies in an effective manner, thus potentially jeopardizing the public safety as well. Exhibit G at A119-120.

district court stated in denying a stay pending appeal, that "there is unquestionably a public interest in health authorities, fire departments having information about hazardous substances in workplaces in the community where they are." Exhibit D at A88. Therefore, unless a stay pending appeal is granted, there is direct and immediate "possibility of substantial harm to the public interest." Oburn v. Shapp, 521 F.2d at 152.

In contrast, the only public interest asserted in opposition to a stay is the generalized concern for uniform national regulation. This broad principle has little weight, however, since it is "expressed only in general and abstract terms." Continental Group, Inc. v. Amoco Chem. Corp., 614 F.2d at 357. Indeed, the relative importance assigned to national uniform regulation entirely depends on the plaintiffs' eventual success on the merits; as such, this factor is nothing more than a restatement of their argument in favor of federal preemption. Id. at 358. Furthermore, the claim that the Right To Know Act will disrupt uniform national regulations is overblown, for the district court found, "that many state requirements correspond with or complement the federal requirements and that employer compliance with one set of requirements can be used to meet the other set." Exhibit A at A24.

In any event, the generalized concern for uniform national regulation is not a sufficient counterweight to the concrete and specific impact upon New Jersey resulting from the district court's substantial encroachment upon the State's authority to protect the lives and property of its citizens. Cf. Constructors Association of Western Contractors v. Kreps, 573 F.2d at 820. Finally, the interest in uniform national regulation is even more theoretical in the present context, since the limited worker-protection provisions of the federal rule will not go into effect until November 1985, and the appeal could very well be decided by that date.

Consequently, consideration of the public interest dictates that "specific acts presumptively benefiting the public not be halted until the merits [can] be reached and a determination made as to what justice require[s]." Continental Group, Inc. v. Amoco Chem. Corp., 614 F.2d at 358. In the present case, the concrete and specific detriment to the public flowing from the district court's interdiction of the implementation of the public protection provisions of the Right To Know Act in the manufacturing sector supports the issuance of a stay pending appeal.

In sum, the applicants have satisfied all four criteria for obtaining a stay pending appeal in this Court, and their motion should be granted.<sup>23</sup>

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<sup>23</sup> One aspect of the district court's decision denying the stay pending appeal must also be considered. The district court asserted that the State's "delay" in filing its application after entry of the order and judgment was a factor in its decision to deny the motion for a stay. Exhibit D at A21-A22. There was no such delay. In each case, when counsel for the plaintiffs forwarded a proposed judgment to the Court, the State promptly submitted objections to the form of the judgment as did the Public Advocate and the intervenors. Neither the State nor the Public Advocate was advised until the end of January that Judge Debevoise had signed the proposed judgments on January 10. Upon learning that the order and judgment had been signed without any response to the outstanding objections, the State, joined by the intervenors, immediately filed a motion for stay.



II. THE COURT SHOULD EXPEDITE ITS  
DISPOSITION OF THE MERITS OF  
THE APPEAL IN THIS CASE

Because of the serious implications for public health and safety caused by the district court's judgment enjoining the public and emergency response provisions of the Right To Know Act for manufacturing employers, the applicants have moved pursuant to Rule 31(a), Federal Rules of Appellate Procedure, and I.O.P. Chapter 10(C), to expedite this Court's disposition of the merits of their appeal. The standard briefing schedule already imposes an appropriate timetable, and appellants intend to submit their respective briefs in accordance with this schedule. However, applicants respectfully request that the Court schedule argument for the appeal in this case four weeks after the final briefs are filed with the Court. This will ensure the prompt disposition of the appeal without disturbing the usual four weeks' time for study afforded the Court by I.O.P. Chapter 1(A).

The reasons supporting the Court's grant of a stay pending appeal also favor an expedited argument and disposition of the appeal. As the applicants have discussed above in detail, the district court's judgment has halted a valid State regulatory and enforcement program in its tracks, substantially impairing the ability of the State and of local emergency response personnel to prevent, prepare for, and respond to emergencies involving toxic and hazardous chemicals in manufacturing plants. The district court's judgment has also disrupted the flow of information to the public and to medical professionals about the presence of toxics in the air and the environment from manufacturing facilities.

An expedited disposition of the merits of the appeal will help to insure that the disruption of the State's regulatory program will be as brief as possible, and that any consequent harm to the public will be

minimized. Particularly in the event that the Court denies the applicants' Motion for a Stay Pending Appeal, expediting the argument and disposition of the appeal itself will help insure that the public is not harmed unnecessarily. Since there is a strong likelihood of success on the merits of applicants' appeal -- particularly with respect to the constitutional validity of the non-workplace provisions of the Act -- an expedited argument and disposition would facilitate the ability of the State of New Jersey to take necessary steps to safeguard the lives and property of its citizens.

## CONCLUSION

For the foregoing reasons, the State of New Jersey and the Intervenors request that the Court grant their Motion for Stay Pending Appeal to allow the State to continue implementation of the following severable non-workplace provisions of the Right to Know Act:

1. The requirement that the New Jersey Department of Health (DOH) and the Department of Environmental Protection (DEP) develop and publicly distribute lists of hazardous substances used, manufactured, stored, or emitted from workplaces in the State. These lists are (a) the environmental hazardous substances list, N.J.S.A. 34:5A-4a; (b) the workplace hazardous substances list, N.J.S.A. 34:5A-5a; and (c) the special health hazard substances list, N.J.S.A. 34:5A-5b.
2. The provision that disclosure of information concerning emissions into the environment, in particular the chemical name and CAS number, may not be withheld from the public by means of a trade secret claim. N.J.S.A. 34:5A-15(h).
3. The provision that information concerning special health hazard substances, in particular the chemical name and CAS number, may not be withheld from the public by means of a trade secret claim. N.J.S.A. 34:5A-3s; 34:5A-3t; 34:5A-5b; N.J.A.C. 8:59-10.
4. The requirement that employers complete the environmental survey, N.J.S.A. 34:5A-7b; 34:5A-3k; the emergency service information survey, N.J.A.C. 7:1G-5; and the workplace survey, N.J.S.A. 34:5A-7a; 34:5A-3y, thereby listing those hazardous substances on the DOH and DEP lists that are present in their facilities or known to be emitted into the environment.
5. The requirement that the DOH prepare, and publicly distribute, hazardous substance fact sheets describing the health effects of exposure to hazardous substances located in employers' facilities or known to be emitted into the environment. N.J.S.A. 34:5A-3n; 34:5A-10a.
6. The provision requiring employers to label containers with the chemical name and CAS numbers of the contents of the containers. N.J.S.A. 34:5A-14a; 34:5A-14b.

Additionally, applicants request that the Court grant their request to expedite the argument and disposition of the merits of their appeal, and schedule argument four weeks after the parties' briefs are filed.

Respectfully submitted,

JOSEPH H. RODRIGUEZ,  
Public Advocate of New Jersey

INTERVENORS

BY: Richard A. Goldberg / SAT.  
RICHARD A. GOLDBERG  
Assistant Deputy Public Advocate

Sharon A. Treat  
SHARON A. TREAT  
Assistant Deputy Public Advocate

Bennet D. Zurofsky / SAT.  
BENNET D. ZUROFSKY  
Reitman, Parsonnet, Maisel & Duggan

Sidney Reitman / SAT.  
SIDNEY REITMAN  
Reitman, Parsonnet, Maisel & Duggan

Jerome Balter / SAT  
JEROME BALTER  
Public Interest Law Center of Philadelphia

STATE OF NEW JERSEY

IRWIN I. KIMMELMAN  
Attorney General of New Jersey

BY: Michael J. Bokar  
MICHAEL BOKAR  
Deputy Attorney General

Dated: March 6, 1985

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

1985  
April 30

NEW JERSEY STATE CHAMBER OF  
COMMERCE, et al.,

Plaintiffs-Appellees-Cross-Appellants,

v.

ROBERT E. HUGHEY, et al.,

Defendants-Appellants-Cross-Appellees,

v.

JOSEPH H. RODRIGUEZ, et al.,

Defendant-Intervenors-Appellants-Cross-Appellees

FRAGRANCE MATERIALS ASSOCIATION OF THE  
UNITED STATES, et al.,

Plaintiffs-Appellees,

v.

WILLIAM VAN NOTE, et al.,

Defendants-Appellants-Cross-Appellees,

v.

JOSEPH H. RODRIGUEZ, et al.,

Defendant-Intervenors-Appellants-Cross-Appellees )

No. 85-5087

On Appeal from Final  
Judgments of United  
States District  
Court for the  
District of New  
Jersey

Sat Below:

Dickinson R.  
Debevoise, U.S.D.J.

---

REPLY BRIEF FOR DEFENDANTS-APPELLANTS-CROSS-APPELLEES.

---

IRWIN I. KIMMELMAN  
Attorney General of New Jersey  
Attorney for Defendants-Appellants-  
Cross-Appellees  
Richard J. Hughes Justice Complex  
CN 112  
Trenton, New Jersey 08625  
(609) 292-4772

MICHAEL R. COLE  
First Assistant Attorney General  
Of Counsel

MICHAEL S. BOKAR  
Deputy Attorney General  
On the Brief

## ARGUMENT

### POINT I

#### APPELLEES' ARGUMENT THAT THE OSH ACT AND OSHA RULE PREEMPT THE NEW JERSEY ACT IN ITS ENTIRETY IS WITHOUT MERIT.

The appellees appear to argue in their briefs that the Federal Hazard Communication rule and the OSH Act preempt the New Jersey Act and implementing regulations in their entirety. This broad-brush challenge was rejected by the District Court, which held the State Act preempted only as to manufacturing employers (SIC codes 20 through 39). The distinction drawn by the Court between manufacturing and nonmanufacturing employers comports with the plain language of the OSHA rule's preemption clause and of the Preamble to the rule. 29 C.F.R. §1910.1200(a)(2) states:

This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of §18 of the Occupational Safety and Health Act (29 U.S.C. 651 et seq.) which deals with state jurisdiction and state plans. [Emphasis added.]

If the text of this provision leaves any doubt that the OSHA rule intends to preempt only within the manufacturing codes covered by the rule, the rule's extensive Preamble dispels the uncertainty. In Part II B of the Preamble, for example, the authors explicitly state:

In the final standard, OSHA 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. In order to regulate with respect to hazard communication for employees in the manufactur-

ing sector, a State will have to submit their [sic] intended requirements to OSHA for approval under section 18(b) of the Act which deals with State plans.... [48 Fed. Reg. 53284; emphasis added.]

See also, 48 Fed. Reg. 53322 ("... the Secretary intends to scrutinize carefully any state law or regulation submitted under an approved state plan which contains any hazard determination or communication requirements which are applicable to chemical manufacturers or other employers in SIC Codes 20-39."). It is thus crystal clear that the OSHA rule intends to preempt inconsistent state laws only insofar as they regulate manufacturing businesses covered by the rule, i.e. those within SIC codes 20 through 39.

The decision to thus limit the scope of preemption is consistent with certain critical judgments made by the Secretary at the time the rule was adopted. The agency concedes in the Preamble that the decision to restrict the rule to manufacturing was not based on a judgment that employees in other industry sectors did not face similar risks from hazardous chemicals. To the contrary, the agency states in the Preamble, "OSHA acknowledges that exposures to hazardous chemicals are occurring in other industries as well." 48 Fed. Reg. 53286. Indeed, the manufacturing sector, according to the Preamble, accounts for less than half of all reported chemical-source injuries and illnesses. Id. at 53285. The agency merely decided to exercise its discretion under the OSH Act to "establish rulemaking priorities" by first regulating the sector that in its judgment had "the greatest demonstrated need," thus establishing "the informational framework upon which standards dealing with other industries can be based, if necessary." Id. at

63286. See, United Steelworkers of America v. Marshall, 647 F.2d 1189, 1309-1310 (D.C. Cir. 1981), cert. den. 453 U.S. 913 (1981).

In view of the decision of the Federal rulemakers to restrict the rule's coverage to the manufacturing sector, and in view of the clearly stated intent to preempt state hazard communication laws only insofar as they apply to this sector, any suggestion that the rule preempts the New Jersey Act outside this sector is patently without merit. In West Virginia Mfrs. Ass'n. v. State of West Virginia, 714 F.2d 308 (4th Cir. 1983), the Court held that OSHA standards that established exposure limits for certain toxic and hazardous substances but said nothing about communication of the hazards to employees did not preempt a West Virginia law requiring employers to post warning notices concerning such substances in work areas. In language equally pertinent here, the Court concluded:

... we are reluctant to attribute proscriptive meaning to the Federal agency's decision not to require posting. Federal determinations not to regulate may stem from innumerable considerations unrelated to the health and safety issue. Such a negative implication should not be preclusive. We hold that West Virginia properly may assert her interest in this fashion. [714 F.2d at 304; emphasis added.]

Appellees appear to argue that section 18 of the OSH Act, 29 U.S.C. §667, has a broader preemptive effect on state laws such as New Jersey's than does the OSHA rule and its preemption clause, which were, of course, adopted pursuant to the act. Section 18(a) provides that a state may assert jurisdiction under state law over "any occupational safety or health issue with respect to which no standard is in effect under §655 of this title. The obverse corollary to the absolute grant of state jurisdiction in section



(a) is set forth in subsection (b) of that section. That subsection states that a state desiring to develop and enforce state standards "relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title" must submit a state plan to the Secretary for review and approval. The brief of the appellees in Fragrance Materials Association attempts to convert the "relating to" clause of subsection (b) into an all-embracing preemption clause comparable to the ERISA preemption provision construed by the Supreme Court in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). That provision stated that the ERISA act "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the act.

No such explicit, sweeping preemption language appears in, or can be read into, section 18(b) of the OSH Act, and appellees cite no decision under the act that supports their all-encompassing interpretation of this provision. Certainly the Secretary and OSHA, when adopting the Hazard Communication rule, did not construe the "relating to" clause of section 18(b) to preempt in their entirety state laws that touch on the same general subjects as an OSHA standard. The OSHA rule and its preemption clause, in terms consistent with the language of section 18 read as a whole, purport to adopt a standard limited to the issue of hazard communication "to employees in the manufacturing sector," and to preempt state laws "pertaining to this subject." See, West Virginia Manufacturers Association v. State of West Virginia, *supra*. The initial brief submitted by the State demonstrates that this rule, and the OSH Act under which it was promulgated, are not

defended by the great majority of the New Jersey provisions that have as an independent purpose and effect notification or protection of the community, the environment or emergency response personnel, as opposed to employees, against the dangers of hazardous chemicals originating in the workplace. In sum, appellees' construction of section 18(b) of the OSH Act as preempting any state law or provision that in any way "relates to" a subject regulated by an OSHA standard finds support neither in the OSH Act, the OSHA rule nor any decision interpreting the act.

## POINT II

THE NEW JERSEY PROVISIONS PROHIBITING EMPLOYERS FROM MAKING TRADE SECRET CLAIMS WITH RESPECT TO THE CHEMICAL NAME AND CODE NUMBER OF SUBSTANCES ON THE SPECIAL HEALTH HAZARD SUBSTANCE LIST DO NOT EFFECT A COMPENSABLE TAKING OF PRIVATE PROPERTY.

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Appellees contend that insofar as the New Jersey Act and the implementing regulations prohibit employers from making trade secret claims for substances on the special health hazard substance list, the State will effect a taking of private property without just compensation in violation of the Taking Clause of the Fifth Amendment to the United States Constitution and the similar clause of Art. 1, para. 20 of the New Jersey Constitution. In each of its aspects, this claim cannot withstand scrutiny.

It is crucial to bear in mind that the hazardous substances included on the special list are those found by the State, on the basis of reliable scientific evidence, to be so highly noxious as to "pose a special hazard to the health and safety" of the community. 16 N.J.R. 2586. The Supreme Court held more than 65 years ago that state laws enacted under the police power that require manufacturers to make public disclosure of a product's ingredients despite a trade secret claim do not violate the Taking Clause. In Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919), the Court held that the clause was not violated by a Kansas law requiring proprietary food manufacturers to label containers with the names and percentages of ingredients. It concluded:

The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealing, to require that the nature of

the product be fairly set forth. [249 U.S. at 432.]

Accord, National Fertilizer Ass'n. v. Bradley, 301 U.S. 178, 182 (1937).

In its recent decision in Ruckelshaus v. Monsanto Company, \_\_\_ U.S. \_\_\_, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), a case that is controlling here, the Court quoted the above passage from Corn Products in holding that the Taking Clause was not violated by Federal disclosure of trade secret information which chemical manufacturers were required to submit to the Federal government in order to secure registration of new pesticides. 81 L.Ed.2d at 835-836. The Court held that proprietary information recognized as a property right by the state in which the product is manufactured is protected by the Taking Clause. Id. at 833. But it concluded that public disclosure of such information by a government agency under a regulatory law such as the Federal pesticide act does not constitute a compensable taking unless the company submitting the information has, among other things, a "reasonable investment-backed expectation" that the data will not be disclosed. Id. at 834. Insofar as Monsanto submitted proprietary data to the Environmental Protection Agency in order to secure registration of its products, and insofar as the information was disclosed by the agency "in a manner that was authorized by law at the time of the submission," said the Court, there was no compensable taking. Id. at 835.

In particular, the Court held there could be no such taking as of the October 1, 1978 effective date of amendments to the Federal pesticide act that expressly permitted public disclosure of such data by the EPA despite a trade secret claim. Id. at

834-835. Indeed, the Court added, the Taking Clause was not violated by EPA disclosure of such data even before enactment of the pesticide act's disclosure provisions, because during that period no law, including the Federal Trade Secrets Act, could be said to give manufacturers a reasonable investment-backed expectation of Federal nondisclosure. Id. at 836. "In an industry that long has been the focus of great public concern and significant government regulation," the Court said on this point, "the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety and environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest." Ibid. On the other hand, it said, there would be a compensable taking if, on remand, Monsanto established that the EPA disclosed proprietary data at any time during a period when the Federal act contained an "explicit assurance of confidentiality" and if the data "constituted trade secrets under Missouri law." Id. at 839.

Monsanto argued, as the appellees do here, that "the [Federal] statute's requirement that a submitter give up its property interest in the data constitutes placing an unconstitutional condition on the right" to market its products. Ibid. The Court responded that "such restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community.'" Ibid. It added that this is "particularly true in an area, such as pesticide sale and use, that has long been the source of public concern and the subject of government regulation." Ibid. If, said the Court, a company decided that disclosure of particular trade secret data was too great a price to pay,

it had the option of avoiding disclosure by electing not to market the product in this country. Ibid. n.11. Accord, Mobay Chemical Corp. v. Gorsuch, 682 F.2d 419, 422-423 (3rd Cir. 1982), cert. den. 103 S.Ct. 343 (1982); Chevron Chemical Company v. Costle, 641 F.2d 104, 116-117 (3rd Cir. 1981). See also Westinghouse Elec. v. U.S. Nuclear Regulatory Comm'n., 555 F.2d 82, 95 (3rd Cir. 1977); Troy Ltd. v. Renna, 727 F.2d 287, 299-303 (3rd Cir. 1984).

Monsanto firmly establishes that the New Jersey provisions requiring employers to disclose the chemical name and CAS number of special health hazard substances as a condition of the right to use or store such substances at their New Jersey facilities, and barring trade secret claims for this data, do not effect a compensable taking. The Court squarely holds that where, as in that case and here, a law intended to protect public health and safety requires public disclosure of proprietary information submitted by a manufacturer that has the choice of submitting the data or else surrendering the right to manufacture or market its product, governmental disclosure of submitted information does not constitute a compensable taking where, as here, the law gives clear notice to the company that the data is subject to public release. In the case of the special health hazard substance list, the legislative decision to authorize broad public disclosure of information about these substances, including data claimed to be proprietary, finds clear justification in the special danger they pose to the public, the environment and emergency response personnel.

Appellees argue that the present case is distinguishable from Monsanto on the ground that data submissions by employers under the State Act are not made on a "voluntary" basis. Submis-

sions of proprietary information under the Federal pesticide registration provisions at issue in Monsanto, however, were no more voluntary than under the State Act. As noted by the Court, a company's failure to submit the required data would have precluded it from obtaining EPA registration of its product, a precondition to its right to market the product in interstate commerce. 81 L.Ed.2d at 835. The Court at one point in its opinion did characterize data submissions under the Federal act as "voluntary", ibid, but only in the same sense that submissions under the New Jersey Act are voluntary: companies, the Court noted, had the choice of either submitting the information or else forfeiting the right to market products to which the data related. Ibid. and n.11.

The amicus brief filed by Fragrance Materials Association also attempts (at pages 7-8) to distinguish Monsanto on the asserted ground that the Federal pesticide act, unlike the New Jersey act, "specifically prohibited the use or disclosure of data relating to 'formulas.'" This assertion misconstrues both the Federal and the New Jersey acts. The 1978 amendments to the Federal act at issue in Monsanto, as noted by the Court, expressly authorized public disclosure by the EPA of "all health, safety and environmental data" required from pesticide manufacturers, including active-ingredient information. 81 L.Ed.2d at 828 and n.5. The act did contain a prohibition on disclosure of "the identity or percentage quantity of any inert ingredient of a pesticide," but even this irrelevant exception did not apply where the EPA "determined that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment." Ibid. The New Jersey provisions applicable to special health hazard substances, on the other

and, require no disclosure of percentage quantities of a substance's ingredients, but merely require employers to state the chemical names and Chemical Abstracts Service numbers of hazardous chemicals present in their facilities. The disclosure of this limited amount of information concerning such chemicals has been found by the State to be, in the words of the Federal pesticide act, "necessary to protect against an unreasonable risk of injury to health or the environment."

Accordingly, there is no merit to the contention that appellees are entitled to compensation for public disclosure of asserted trade secret information submitted to the State with respect to substances on the special list. Even if the case were otherwise, appellees would not be entitled to the Federal injunctive relief they seek, in view of the right granted by Art. 1, para. 20 of the State Constitution to bring an action in the state courts to recover compensation for private property taken for a public purpose. See, e.g., Joseph H. Reinfeld, Inc. v. Schieffelin & Co., 94 N.J. 400, 468 A.2d 563, 573 (1983). As the Supreme Court held in Monsanto, "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." 81 L.Ed.2d at 841.



CONCLUSION

For these reasons, and for the reasons discussed in the State's initial brief, <sup>these</sup> ~~that~~ parts of the judgments of the District Court holding that the New Jersey Act is not preempted as applied to nonmanufacturing employers~~x~~ and holding that the provisions barring trade secret claims for special health hazard substances do not violate the Taking Clause~~x~~ should be affirmed, *and that part of the judgment holding the Act preempted as applied to manufacturing employers should be reversed.*

Respectfully submitted,

IRWIN I. KIMMELMAN  
Attorney General of New Jersey  
Attorney for Defendants-  
Appellants-Cross-Appellees

By: Michael S. Bokar  
Michael S. Bokar  
Deputy Attorney General

DATED: April 30, 1985



1985  
May 2

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Nos. 85-5087

85-5088

85-5095

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Sat Below

Dickinson R. Debevoise  
U.S.D.J.

REPLY BRIEF OF DEFENDANT-INTERVENORS/  
APPELLANTS-CROSS-APPELLEES

JOSEPH H. RODRIGUEZ  
PUBLIC ADVOCATE OF NEW JERSEY  
BY: RICHARD E. SHAPIRO, ESQ.  
RICHARD A. GOLDBERG, ESQ.  
Division of Public Interest Advocacy  
CN-850  
Trenton, N. J. 08625  
(609) 292-1692

REITMAN, PARSONNET, MAISEL  
& DUGGAN  
BY: SIDNEY REITMAN, ESQ.  
BENNET D. ZUROFSKY, ESQ.  
744 Broad Street, Suite 1807  
Newark, N. J. 07102

PUBLIC INTEREST LAW CENTER  
OF PHILADELPHIA  
BY: JEROME BALTER, ESQ.  
1315 Walnut Street, Suite 1632  
Philadelphia, PA. 19107



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## INTRODUCTION

On August 29, 1983, the State of New Jersey enacted a Right To Know Act, which is designed to protect workers, emergency services personnel, firefighters and members of the general public from the hazards of exposure to toxic and hazardous substances. The purpose of this statute is to safeguard the health and safety of New Jersey inhabitants -- a well-recognized exercise of the State's traditional police powers.

On November 25, 1983, the federal Occupational Safety and Health Administration promulgated a Hazard Communication rule pursuant to the agency's authority under the Occupational Safety and Health Act of 1970 (OSH Act). The 1970 Act authorizes the Secretary of Labor to set standards to assure safe and healthful working conditions for working men and women. The Hazard Communication rule implements the Act by requiring that employers in the manufacturing sector evaluate chemicals produced in their workplace or imported by them to determine if they are hazardous and communicate certain information about these chemicals to their employees.

Although the plain language of the OSH Act, its legislative history, and the administrative construction of the preemptive effect of its provisions demonstrate that the express preemptive reach of the OSH Act is limited to occupational safety and health issues affecting employees in the workplace, the district court concluded that the OSHA regulation preempts the Right To Know law in its entirety insofar as it relates to employers in the manufacturing sector. Moreover, although provisions of the Act have clear and distinct non-worker benefits and are designed to protect the health and safety of emergency services personnel, firefighters, and the public, the district court enjoined the



State of New Jersey from enforcing these public protection provisions of the Right To Know Act against such employers.\*

As defendant-intervenors have explained in their original brief, the district court's overly expansive view of preemption in the present case is erroneous. First, Congress did not manifest a clear intent in the OSH Act to supplant the historic police power of the State to protect public health and safety and the environment. To the contrary, the express preemptive reach of the OSH Act is plainly designed to invalidate state law only where health and safety matters between employers and workers are being regulated and there is a federal standard in effect addressing these occupational health and safety matters.

Second, because the New Jersey Right To Know Act fulfills traditional state purposes other than the communication of hazard information to workers, the OSHA rule has no express preemptive effect on the non-workplace provisions of state law.

Third, these non-occupational provisions of the Right To Know Act are not impliedly preempted, since the plaintiffs failed to demonstrate below that there is any actual conflict between the Hazard Communication rule and the provisions of state law or that the New Jersey Act frustrates a federal purpose.

Under these circumstances, the district court was obligated to sustain the legitimate exercise of the State's police power and limit federal preemption to these portions of the Act that solely relate to occupational hazard communication. At the very least, the lower court

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\* The district court did determine that the trade secrets provision of the Right To Know Act does not constitute an unconstitutional taking under the Fourteenth Amendment.

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Second, because the New Jersey Right To Know Act fulfills traditional state purposes other than the communication of hazard information to workers, the OSHA rule has no express preemptive effect on the non-workplace provisions of state law.

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\* The district court did determine that the trade secrets provision of the Right To Know Act does not constitute an unconstitutional taking under the Fourteenth Amendment.

should have applied the strong presumption in favor of severability to preserve the non-workplace provisions of the New Jersey Act. Yet, the district court did neither.

In their briefs, the plaintiffs rely on isolated words and phrases from the OSH Act, and preemption provisions from other federal statutes, to support their sweeping view of the preemptive effect of the Hazard Communication rule. On cross-appeal, plaintiffs also contend that the limited disclosure provision of the Right To Know Act effects a taking in violation of the Fourteenth Amendment.

In this brief, defendant-intervenors will first address the trades secrets issue on cross-appeal and then reply on the preemption issue. As we will explain, the district court's ruling on the trade secrets issue should be affirmed, while the lower court's determination on the preemption issue should be reversed.

## COUNTERSTATEMENT OF THE CASE

This counterstatement addresses the facts and procedural history relating to the trade secret issue raised on the cross-appeal. The Right to Know Act provides broad protection to virtually all trade secret claims. N.J.S.A. 34:5A-15. Under the Act, any trade secret claim will be protected pending administrative and judicial review of any contention that no trade secret exists in fact with regard to the claim. N.J.S.A. 34:5A-15(d). The only exceptions are the Act's explicit denial of any trade secret protection as to the identity and presence of any emissions into the environment, N.J.S.A. 34:5A-15(h), and as to substances on the special health hazard substance list, N.J.S.A. 34:5A-5(b); -15; -16. Special health hazard substances are defined as substances

which, because of their known carcinogenicity, mutagenicity, teratogenicity, flammability, explosiveness, corrosivity, or reactivity pose a special hazard to health and safety . . . .

N.J.S.A. 34:5A-5(b).\* Even as to these substances, however, the Act only requires disclosure of their presence and identity. N.J.S.A. 34:5A-3k;-3y,-4b,-5c,-7 and 14. Nothing in the Act requires disclosure of how they are used or of any formulas or procedures in which they are employed. As to these matters, a trade secret may still be claimed.

In both the New Jersey State Chamber of Commerce and the Fragrance Materials Association of the United States actions, the plaintiffs alleged that the limited disclosure provisions of the New Jersey Right to Know Act unconstitutionally take trade secrets in violation of the

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\* The Department of Health has placed 835 items on the special health hazards list. Of these, 335 are carcinogenic, mutagenic (causing genetic mutations) and teratogenic (causing birth defects); these are considered special health hazard substances in a pure form or in a mixture at a concentration of 0.1% or greater. The remaining 500 substances are flammable, explosive, reactive or corrosive and are considered special health hazards in a pure form or in a mixture at very high concentrations. JA 16.

Fifth and Fourteenth Amendments. On cross-motions for summary judgment, the lower court unequivocally rejected this claim. JA 42-55.

Before the district court, the plaintiffs did not prove the existence of a single, specific trade secret that would be lost if the limited disclosure provisions of the Act were implemented. Instead, they relied upon conclusory statements that many trade secrets would be jeopardized or lost by the operation of the State law. The district court accurately summarized the gossamer state of plaintiffs' proofs in this regard as follows:

No evidence whatsoever has been submitted to show what effect, if any, the Right to Know Act trade secret provisions will have on employers in non-manufacturing sectors. The affidavits in this regard were submitted by employers in the manufacturing sector, and they were couched in vague and conclusory terms. JA 52-55.

Faced with this lack of specificity, the opposing affidavits submitted below by the defendant-intervenors were necessarily non-specific. These affidavits did, however, make two basic points: (1) the presence of any substance on the special hazard substance list could be revealed through reverse-engineering or chemical analysis, and (2) in those cases where the so-called trade secret could not be reverse-engineered or chemically analyzed, the mere revelation to the public of the presence of a particular special hazard substance is not likely to undo the trade secret. See Affidavit of Joseph Hunter, JA 383, ¶¶8-10. Proof of an inability to reverse-engineer or chemically analyze is, of course, relevant to the validity of any trade secret claim. See, e.g., Kewanee Oil Co. v. Bicron Corp., 416 U. S. 470, 476 (1974).

Despite the lack of proof of any specific trade secret that would be lost through operation of the New Jersey law, the district court apparently assumed the existence of at least one valid trade secret, out

of the thousands claimed, and analyzed the issue on the merits. JA 27. For the purposes of this cross-appeal, the defendant-intervenors are willing to accept the same assumption in this Court so that the merits of the trade secret claim may be addressed.

In analyzing the merits, the court below concluded that even if such a trade secret existed, it would not be unconstitutionally taken by the Act. This determination, of course, makes any factual dispute irrelevant. This conclusion applies to both the manufacturing and non-manufacturing sectors, as reflected in the Order entered in the Chamber of Commerce case. JA 68. In the Fragrance Materials case the issue was not formally reached, since the district court's decision on the pre-emption issue was dispositive of the entire controversy. JA 63.

The Chamber of Commerce plaintiffs have appealed the trade secret rulings to this Court. The Fragrance Materials plaintiffs have joined in that appeal as amicus curiae.

I.

THE TRADE SECRET PROVISIONS OF  
THE RIGHT TO KNOW ACT DO NOT  
CONSTITUTE AN UNCONSTITUTIONAL  
TAKING OF PROPERTY UNDER THE  
FOURTEENTH AMENDMENT

In Ruckelshaus v. Monsanto Co., 52 U.S.L.W. 4886, 104 S.Ct. 2862

(1984),\* the Supreme Court set forth a four part analysis that must be employed in determining whether there has been an unconstitutional taking of property: (1) does the party claiming the taking have a "property interest" protected by the Fifth and Fourteenth Amendments? (2) If so, has that "property interest" been taken? (3) If it has been taken, has that taking been for a "public use"? and, (4) If there is a taking for public use, is just compensation available? Id. at 4889, 104 S.Ct. at 2872. A party claiming an unconstitutional taking can only prevail, therefore, if it shows that it has "property" that has been "taken" and that the taking either was not for a "public use" or, if it was for a "public use," that no just compensation is available. Id.

In rejecting the trade secret claims made by the Chamber of Commerce and Fragrance Materials plaintiffs below, the district court carefully analyzed the Monsanto decision, which it properly held to be controlling, and concluded that no "taking" had occurred. JA 54.

In the following argument, defendant-intervenors will address each of the four Monsanto questions in detail, demonstrating not only that there has been no "taking," but also that the plaintiffs have no

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\* Monsanto involved the disclosure of trade secrets of pesticide manufacturers who were required to register with federal agencies under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §136 et seq.

"property interest" due to passage of the Right to Know Act. Finally, defendant-intervenors will demonstrate that even if one assumes "property" has been "taken," New Jersey law provides just compensation.

A. The Plaintiffs Have No Property Interest

The Court's initial inquiry under Monsanto is whether the trade secrets which non-manufacturing employers must disclose under the Right to Know Act are property rights protected by the Fourteenth Amendment.

Protection of trade secrets is not a natural right, nor is it a right created by the federal constitution or federal law. "A trade secret claim in the federal courts is governed not by federal common law but by state law." Rohm & Haas Co. v. ADCO Chemical Co., 689 F.2d 424, 429 (3rd Cir. 1982); see also, Ruckelshaus v. Monsanto Co., supra; Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Chevron Chemical Co. v. Costle, 641 F.2d 104, 114-115 (3rd Cir. 1981), cert. denied 452 U.S. 961 (1981). The governing principle has been succinctly stated by this Court as follows:

[I]n determining whether federal due process protections apply [to claimed trade secrets], we must first find an entitlement created by some law. Both here and in the District Court Chevron has assumed more than it has explained the source of the property right it claims. It does rely on the "common law of trade secrets," but if we may borrow Justice Holmes' often misused aphorism, "[t]he common law is not a brooding omnipresence in the sky but the articulable voice of some sovereign or quasi-sovereign that can be identified . . ."

Chevron Chemical Co., supra, 641 F.2d at 114-115 [citations and footnotes omitted].

Here, the relevant sovereign is the State of New Jersey. While New Jersey law plainly protects some things that might be claimed as trade secrets, it does not protect any alleged proprietary interest that happens



to be labeled by a party as a trade secret. In particular, New Jersey has long held that trade secrets are only protected insofar as "they will not impair the public interest." Solari Industries, Inc. v. Malady, 55 N.J. 571, 585, 264 A.2d 53, 60 (1970); see also, e.g., Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35, 274 A.2d 577, 582 (1971). This is in accord with the "black-letter" statement of the limit of trade secret protection found at §757 comment d. of the Restatement of Torts, wherein it is stated that "[a] privilege to disclose [what would otherwise be a trade secret] may also be given by the law, independently of the other's consent, in order to promote some public interest." [Emphasis added]. The Restatement's formulation of trade secret law has been held to provide much of the substance of the trade secret law of New Jersey. Rohm & Haas Co. v. ADCO Chemical Co., supra, 689 F.2d at 431.

The "public interest" in the limited amount of information required to be disclosed by the Right to Know Act is clear. The Act only requires disclosure of the presence and identity of environmentally hazardous substance emissions into the environment, N.J.S.A. 34:5A-15(h), and the presence and identity of special health hazard substances, as defined in N.J.S.A. 34:5A-5(b). See page 4, supra. These disclosure requirements are extremely narrow and are limited solely to those areas that involve the greatest public interest in health and safety -- emissions into the environment and exposure to particularly dangerous substances. The identity and presence of substances implicated in all other trade secret claims are protected pending administrative and judicial review. N.J.S.A. 34:5A-15.

Moreover, even as to those limited materials as to which no trade secret claim can be made, the Act only requires the disclosure of the presence and identity of the extremely dangerous substance. The Act does not require any revelation of production methods, processes, or formulas

for manufacturing any product.

In these appeals, the plaintiffs no longer contend that it is unconstitutional for them to be forced to reveal the presence and identity of substances emitted into the environment. Chamber of Commerce Br. at 29-30. The narrow question before the Court is whether New Jersey trade secret law protects claimed trade secrets as against the public interest in knowing of the presence and identity of mutagens, teratogens, flammables, explosives, corrosives and reactives that pose a special hazard to health and safety and are being used in the community. See N.J.S.A. 34:5A-5(b).

A review of New Jersey law indicates that there is no reason to believe that trade secret protection has ever been accorded to the mere identity and presence of hazardous substances as against the public's right to know. Virtually all judicial discussion of trade secrets under New Jersey law is in a commercial context involving a breach of trust. Thus, the only public interests specifically addressed in case law are the public interests in competition, fair dealing, discouragement of theft or other breach of trust, and avoidance of unfair restraint on competition or employee mobility. E.g., Sun Dial Corp. v. Rideout, 16 N.J. 252, 108 A.2d 442 (1954); see also Whitmyer Bros. v. Doyle, *supra*; Solari Industries Inc. v. Malady, *supra*. See generally, McGarrity & Shapiro, The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies, 93 Harv. L. Rev. 837, 863 (1980). There is no reason to believe, however, that these are the only public interest limitations upon the definition of a trade secret.

To the contrary, New Jersey law supports the view that whatever trade secret protection might otherwise exist, it must give way to the public interest in knowing of the presence and identity of especially

hazardous substances in the community. Certainly, the public interest in community health and safety is significantly stronger than the interest in fair business practices. In New Jersey, property rights have long been viewed as subordinate to human values. In the words of Chief Justice Weintraub:

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law.

State v. Shack, 58 N.J. 297, 303, 227 A.2d 369, 372 (1971) [emphasis added].

Thus, the public interest in knowing about cancer-causing agents and other dangerous substances stored and used in the community is exactly the type of public interest to which the definition of property has been subordinated in New Jersey. Indeed, plaintiffs have not pointed to even one authority to support their position that New Jersey law ever provided trade secret protection to the mere identity and presence of such substances as against the public's right to know. The plaintiffs, therefore, have no property right against the public interest in disclosure of the presence and identity of the substances on the special health hazard substance list.

Furthermore, any other conclusion would be absurd. Stripped to its essence, the plaintiffs claim a right to profit from their use of carcinogens, mutagens, teratogens, flammables, explosives, corrosives, and reactives that "pose a special hazard to health and safety," and thereby endanger the community due to possible exposure -- accidental or otherwise -- and to do this in secret without providing any warning or knowledge to the

community. There is no such right in New Jersey to endanger an unknowing populace.

Even before passage of the Right to Know Act, New Jersey tort law required dangers to be accompanied by appropriate warnings and labels. See, e.g., O'Brien v. Muskin Corp., 94 N.J. 169, 180, 463 A.2d 298, 303 (1983); D'Arienzo v. Clairol, Inc., 125 N.J. Super. 224, 310 A.2d 106, (Law Div. 1973). Significantly, no New Jersey case has ever recognized a trade secret claim as a defense to this duty to label and warn.

Nor is the right of the public to know the identity of substances it is or may be exposed to a new development in the law. As long ago as 1919 the United States Supreme Court rejected a due process challenge to a statute requiring manufacturers to disclose their trade secret formulas to the public. In the words of the Court, "[t]he right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth." Corn Products Refining Co. v. Eddy, 249 U.S. 427, 431-432 (1919); see also Ruckelshaus v. Monsanto, supra, 52 U.S.L.W. at 4891, 104 S.Ct. at 2875-76; Mobay Chemical Corp v. Gorsuch, 682 F.2d 419, 423 (3rd Cir. 1982), cert. denied, 459 U.S. 988 (1982). If such a requirement may be imposed upon corn syrup, as in Corn Products Refining Co., then certainly it may be imposed upon known carcinogens, mutagens, teratogens, flammables, explosives, corrosives, and reactives. The public's right to know that chemicals used in the area may mutate their children or otherwise seriously injure them is at least as great as its right to know the formula of corn syrup.

In rejecting defendant-intervenors' claim that plaintiffs have no property interest in the limited trade secret information required under

the Right To Know Act, the district court misconstrued their contention. Defendant-intervenors do not assert that the Right To Know law "redefined the property interest in trade secrets to exclude the right of secrecy." JA 52. Rather, as the above argument makes clear, New Jersey law even prior to the Right To Know Act defined the dimensions of trade secret protections in terms of impairment of the public interest. Thus, plaintiffs' "property" interest was always subject to a determination that the public interest necessitates disclosure of certain trade secrets.\*

In sum, the "public interest" limitations of New Jersey's trade secret law prevent a finding that plaintiffs have any property interest in the limited information required to be disclosed by the Right to Know Act. In passing that Act, the Legislature simply articulated the State's long-standing public interest in the health and safety of its citizens and reaffirmed the principle of New Jersey law articulated in State v. Shack, supra, that the welfare of its citizens is more important than the profits of its corporations.

B. The Right To Know Act Provisions Requiring The Disclosure Of Certain Limited Trade Secrets Do Not Constitute A Taking

In Monsanto, the Supreme Court also directly confronted the question of when government disclosure of information that would otherwise be a trade secret constitutes a taking. In assessing Monsanto's claims, the Court dealt with three periods of time under FIFRA when Monsanto had to submit trade secret information. First, prior to amendments in 1972, FIFRA was silent with respect to the Environmental Protection Agency's

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\* In contrast, Missouri trade secrets law apparently does not specifically incorporate a "public interest" dimension in the state-defined property interest. Ruckelshaus v. Monsanto, supra, 52 U.S.L.W. at 4889-90, 104 S.Ct. at 2872-74.

(EPA) use and disclosure of data submitted to it in connection with an application for registration. Second, as a result of the 1972 amendments to FIFRA, during the period from October 22, 1972, through September 30, 1978, a pesticide manufacturer submitting data was given an opportunity to protect its trade secrets from disclosure by designating them as trade secrets at the time of submission. Under FIFRA, the EPA was free to use non-trade secret data when considering the application of another registrant, provided the EPA required the subsequent applicant to pay reasonable compensation to the original submitter. The statute, however, prohibited the EPA from disclosing publicly, or considering in connection with the application of another, any data submitted by an applicant if both the applicant and the EPA determined that the data constituted trade secrets.

Finally, under the 1978 amendments to FIFRA, pesticide registrants were granted a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978. All other data submitted after December 31, 1969, could be cited and considered in support of another application for 15 years after the original submission if the applicant offers to compensate the original submitter. Data not qualifying for either the 10-year or 15-year periods may be considered by the EPA without limitation. Additionally, the 1978 amendment provides data to qualified requesters notwithstanding the prohibition. This provision, however, does not authorize the disclosure of information that would reveal "manufacturing or quality control processes" or certain details about deliberately added inert ingredients unless "the Administrator has first determined that the disclosure is necessary to protect against an unreasonable risk of injury to health or the environment." JA 43-44.

The Supreme Court concluded that EPA's consideration or disclosure of data submitted by Monsanto to the agency prior to October 22, 1972, or after September 30, 1978, "does not effect a taking." 52 U.S.L.W. at 4893, 104 S.Ct. at 2879. In contrast, EPA consideration or disclosure of data submitted by Monsanto to the agency between October 22, 1972, and September 30, 1978, will constitute a taking, because "the use or disclosure conflicts with the explicit assurance of confidentiality or exclusive use contained in the statute during that period." Id. In effect, the Court concluded that a taking occurs only when the submitter has a "reasonable investment-backed expectation" predicated on the government's specific promise in positive law to keep the information in confidence. By so holding, the Court properly focused upon the breach of trust inherent in disclosure following a promise of governmental secrecy, i.e., the same type of breach of trust that underlies all of trade secret law and is inherent in the use of the word "secret" itself.

As the district court recognized in the present case, the Supreme Court's decision in Monsanto is directly controlling, and an inquiry into the reasonable investment-backed expectations of plaintiffs disposes of the taking question regarding trade secrets. However, while the lower court focused on the situation which prevailed in the pre-1972 period in Monsanto, JA 54-55, defendant-intervenors submit that the circumstances of the present case are more analogous to the conditions prevailing after the 1978 FIFRA amendments. As in Monsanto, plaintiffs here cannot have a reasonable investment-based expectation that the State "would keep the data confidential beyond the limits prescribed in the amended statute itself." 52 U.S.L.W. at 4891, 104 S.Ct. at 2875. Furthermore, plaintiffs were on notice under the Right To Know Act of the manner in which the State is

authorized to use and disclose any special health hazard substances. In short, where the government makes plain its intention or right to disclose information that it requires a corporation to submit, there is no taking because there is no interference with any reasonable investment-backed expectation. In language that applies with equal force to the plaintiffs in the case at bar, the Court stated in Monsanto:

As long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking. See Corn Products Refining Co. v. Eddy, 249 U.S. 427, 431-432 (1919) ("The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth"); see also Westinghouse Electric Corp. v. United States Nuclear Regulatory Commission, 55 F.2d 82, 95 (3rd Cir. 1977).

52 U.S.L.W. at 4891, 104 S.Ct. at 2876.

Plaintiffs in this appeal seek to overcome the dispositive effect of Monsanto by contending that submissions of data under FIFRA after October 1, 1978, were "voluntary," whereas "the preliminary data required by the Right to Know Act, for which no economic advantage is exchanged, can hardly be deemed voluntary." (Chamber of Commerce Br. at 32-33; Fragrance Materials Amicus Curiae Br. at 8-9).

This misses the point. Monsanto's submission of information as a condition on its right to market pesticides in this country is no more "voluntary" than the obligation imposed upon plaintiffs to disclose special health hazard substances in return for the privilege of doing business in New Jersey.\*

\* Monsanto's challenge to the FIFRA requirements, 52 U.S.L.W. at 4891, 104 S.Ct. at 2875, is clear evidence that the company itself did not regard the burden of submitting information to be a "voluntary" act in the sense suggested by the plaintiffs.



The Court merely meant that Monsanto had the choice to refuse to submit the data and forego registration in the United States, 52 U.S.L.W. at 4891 n. 11, 104 S.Ct. at 2876 n. 11, or to comply with the FIFRA requirements. Similarly, as the district court observed, under the Right to Know Act, "[e]mployers may face the unpleasant choice of disclosing trade secrets or limiting or shutting down operations in New Jersey." JA 55. In neither case do the governmental restrictions constitute an unconstitutional taking; rather, they "are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community.'" 52 U.S.L.W. at 4891, 104 S.Ct. at 2875. Therefore, the claim that the restrictions on Monsanto were voluntary, while the obligations under the Right to Know Act are not, is fanciful.

Fragrance Materials also tries to fit their situation into the Court's ruling on Monsanto with respect to data submitted during the period from October 22, 1972, through September 30, 1978 (Fragrance Materials Amicus Curiae Br. at 10-11). In brief, their argument is that New Jersey common law provided protection from trade secret disclosure prior to the enactment of the Right to Know Act and, therefore, the Act's provisions which require disclosure of such trade secrets constitute a taking. However, as the district court stated in rejecting this assertion:

[T]he situation during that period was totally dissimilar from the situation in the present case. There during the 1972-1978 period the statute itself gave a registrant the opportunity to protect its trade secrets from disclosure.\* Registrants submitted trade secret data relying on that statutory guarantee. The 1978 amendment of FIFRA stripped away the protection of the guarantee. That is what the Supreme Court characterized as a taking.

Nothing like that has happened in New Jersey. There has been no antecedent period of disclosure

\* Monsanto, 52 U.S.L.W. 4892, 104 S.Ct. at 2877-78.

during which the state committed itself to protecting trade secrets. JA 53. [Emphasis and footnote added].

Finally, plaintiffs intimate that the State has no right to obtain the disclosure of special health hazard substances (Chamber of Commerce Br. at 34), even though these substances could cause cancer, mutations, birth defects and catastrophic fires or explosions. Nearly seventy years ago, a similarly asserted "right of a manufacturer to maintain secrecy as to his compounds and processes" was rejected in favor of the State's "promotion of fair dealing." Corn Products Refining Co. v. Eddy, 249 U.S. at 431-32. A fortiori, the plaintiffs cannot now claim a right to use special health hazard substances in secret when these substances could have a direct, immediate and potentially disastrous impact on the health and safety of the public, emergency services personnel and workers. Consequently, plaintiffs' taking arguments cannot withstand even cursory scrutiny.\*

In sum, there is no unconstitutional taking effected by the trade secret provisions of the Right to Know Act. There is, instead, a legitimate exercise of New Jersey's police power that is reasonably calculated to protect and promote the health and safety of its residents.

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\* Fragrance Materials suggests that greater protection under the takings clause should be accorded formula data, which will presumably have to be disclosed under the Right to Know Act, than the data that had to be submitted by Monsanto under FIFRA. Even assuming that Fragrance Materials plaintiffs will have to submit formula data under the New Jersey law, an assertion that is contradicted by the limited disclosure requirements in the New Jersey Act, see pp. 4 and 10, supra, their contention lacks any constitutional basis. Certainly, the analysis in Monsanto did not rely on the nature of the alleged trade secrets, and the Fragrance Materials' argument is a transparent attempt to fashion a distinction without a difference.

C. Any Possible Taking Is For A Public Use

Plaintiffs cannot, and do not, dispute that any possible taking is for a public use. Monsanto is, once again, dispositive of the issue.

The Court held that a taking is for a public use

[s]o long as the taking has a conceivable public character, the means by which it will be attained is . . . for Congress to determine.

52 U.S.L.W. at 4893, 104 S.Ct. at 2879. See also Hawaii Housing Authority v. Midkiff, 52 U.S.L.W. 4673, 104 S.Ct. 234 (1984). Here the public character is plain, as the Act serves health and safety purposes of the community, government, and emergency response agencies.\*

D. New Jersey Provides Adequate Remedies At Law For Any Taking Of Private Property

The federal Constitution does not prohibit governments from taking a property for public use; it simply requires just compensation. U. S. Constitution, Amendments V and XIV. There is an analogous guarantee in the New Jersey Constitution. Article I, paragraph 20. Thus, so long as there is an avenue by which just compensation may be obtained, there is no federal constitutional violation, and no injunction may issue when property is taken for a public use. See, e.g., Ruckelshaus v. Monsanto, supra, 52 U.S.L.W. at 4894, 104 S.Ct. at 2880.

In the present case, it cannot be doubted that if the plaintiffs are correct and some of their private property has been taken, then they may obtain just compensation through an action in state court. The

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\* To the extent that Fragrance Materials asserts that the New Jersey disclosure provisions will not fulfill the desired legislative purposes (Fragrance Materials Amicus Curiae Br. at 9-10, 12), they are raising a question of legislative policy, not a constitutional issue for this Court to resolve. Monsanto, 52 U.S.L.W. at 4893, 104 S.Ct. at 2880.

fact that such a cause of action was not explicitly created by the Right to Know Act is of no importance, since nothing in the Act purported to repeal pre-existing remedies. Id. at 4895, 104 S.Ct. at 2882.

The remedy existing here is a suit for money damages directly under Article I, paragraph 20 of the New Jersey Constitution. Joseph H. Reinfeld, Inc. v. Schiefflin & Co, 94 N.J. 400, 468 A.2d 563, 573 (1983); Washington Market Enterprise, Inc. v. City of Trenton, 68 N.J. 107, 116, 343 A.2d 408, 413 (1979); cf. King v. South Jersey National Bank, 66 N.J. 161, 177, 330 A.2d 1, 10 (1974) (Hughes, C.J.) ("Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence . . .").

The governing principles were most recently set out in Ruckelshaus v. Monsanto:

Equitable relief is not available to enjoin an alleged taking of private property for a public use duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697, n. 18, (1949). The Fifth Amendment does not require that compensation precede the taking. Hurley v. Kincaid, 285 U.S. 95, 104 (1932).

52 U.S.L.W. at 4894, 104 S.Ct. at 2890. The point is that governments may take any property for a public use, so long as they also may be required to pay for it. Here, any taking is for a public use and, although the State may dispute whether any taking has occurred, its own courts provide a forum wherein compensation can be obtained if plaintiffs' taking claims prove to be correct. N.J.Const., Art. I, para. 20; Joseph H. Reinfeld, Inc., supra; Washington Market, supra.

In this regard, the present case is identical to Ruckelshaus v. Monsanto. There, like here, the Legislature created no specific remedy for redress of the alleged deprivation of property. But there, like here, pre-existing remedies remain for claims "founded upon the Constitution," and, because money damages could be obtained through such remedies for a viable taking claim, there was no constitutional violation. 52 U.S.L.W. at 4894, 104 S.Ct. 2882.\*

Defendant-intervenors have convincingly demonstrated above that Monsanto compels the conclusion that no taking has occurred under the facts of this case. But, even if plaintiffs prevail on that aspect of their claim, they still have not provided a basis for finding the Right to Know Act unconstitutional, since avenues exist through which they may obtain "just compensation." Under these circumstances, the plaintiffs are neither entitled to summary judgment nor the issuance of preliminary or final injunctive relief, and the judgment of the district court on this issue should be affirmed.

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\* Indeed, this Court need go no further than conclude that such remedies exist to affirm defendant-intervenors' summary judgment on the plaintiffs' taking claims. Since the plaintiffs can obtain compensation under New Jersey law in the event of a taking, it is, perhaps, best to leave the determination of the extent of trade secret protection to future consideration by New Jersey courts.

## II.

### THE OSH ACT AND THE OSHA HAZARD COMMUNICATION RULE HAVE NO PREEMPTIVE EFFECT ON NON-MANUFACTURING SECTOR EMPLOYEES

Although OSHA plainly limits the scope of the Hazard Communication rule to manufacturing employers, 29 C.F.R. §1910.1200(b)(1), the Chamber of Commerce plaintiffs argue on cross-appeal that the rule preempts New Jersey from enforcing the state law against any employer. To support this position, the Chamber of Commerce makes the sweeping claim that OSHA deliberately determined that non-manufacturing employers are "best left unregulated" and free of any state or local hazard communication requirements. (Chamber of Commerce Br. at 25-26). Therefore, the Chamber of Commerce appears to suggest that since OSHA may at some point in the future decide to regulate non-manufacturing employers, New Jersey is now impliedly prohibited from implementing its Right To Know Act with respect to these employers.

The Chamber of Commerce argument is patently without merit.\* The preemptive effect of a federal regulation must be assessed under principles analogous to those governing federal statutes. Fidelity Federal Savings and Loan Assn. v. de la Cuesta, 458 U.S. 141, 152-54 (1982). Therefore, the Court's initial inquiry in evaluating the Chamber of Commerce's claim is whether the federal agency meant to preempt state law in the particular area. Id. at 154.

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\* The Chamber of Commerce ignores the curious inconsistency between their vigorous argument in Point I that "[t]he express language of the OSH Act and the Hazard Communication Standard establish the scope of federal preemption in the case sub judice" (Br. at 12), and their effort in Point II to divine an implied intent to preempt, notwithstanding express language to the contrary.

OSHA's intent in the Hazard Communication rule is unambiguous. As mentioned above, OSHA expressly limited the coverage of this rule to employers in the manufacturing sector, SIC Codes 20 through 39, and as the plaintiffs must concede, the agency explicitly reserved "the right to separately regulate other segments in the future." 48 Fed. Reg. 53, 334 (November 25, 1983). Thus, OSHA's rule was only meant to cover manufacturing sector employees, and nothing more. Therefore, the preemptive effect of Section 18 of the OSH Act does not extend to non-manufacturing employers outside of SIC Codes 20 through 39. To the extent that the plaintiffs feel that there is a need to regulate non-manufacturing employees to ensure national uniformity and prevent frustration of the Hazard Communication rule (Chamber of Commerce Br. at 26-28), their complaint is with OSHA over the scope of its rule. These concerns, however, do not provide any basis for implying a preemptive effect beyond that explicitly intended by the agency.

Nor can the plaintiffs draw any support for their novel view of the preemptive force of the OSHA rule from the OSH Act or its legislative history. Congress explicitly and unequivocally set forth the preemptive scope of an OSHA standard in Section 18 of the Act, 29 U.S.C. §667. Section 18(a) authorizes the states to regulate "any occupational safety or health issue with respect to which no standard is in effect under Section 6." [Emphasis added]. Section 18(b) provides, in essence, that any state desiring to assume responsibility over an occupational health and safety issue "with respect to which a standard has been promulgated under Section 6" must submit a state plan to OSHA. [Emphasis added]. Thus, the OSH Act specifically describes the extent to which Congress intends for the states to be preempted with respect to standards. Since

there is no OSHA Hazard Communication standard "in effect" for non-manufacturing employers, the district court correctly concluded that "New Jersey is free to act as to those employers." JA 39. It is equally clear that under Section 18(b), the plaintiffs reliance on OSHA's reservation of a future right to regulate these other sectors is "of no moment," id., since no federal standard "has been promulgated" for employers in the non-manufacturing areas. Consequently, the Chamber of Commerce's argument is directly refuted by the express language of the OSH Act.

Moreover, in the face of these clear expressions of Congressional and OSHA intent, the plaintiffs do not provide any legal authority to support their contention that the agency's failure to regulate an area should be construed as an implicit decision that the subject is "best left unregulated." The cases cited by the Chamber of Commerce are simply inapposite.\* If anything, Arkansas Electric Cooperative Corp. v. Arkansas Public Commission, 51 U.S.L.W. 4539, 103 S.Ct. 1905 (1983) directly undercuts the plaintiffs' argument. In that case, the Supreme Court held that the Arkansas Public Service Commission was not preempted from regulating

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\* In both City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), and Upholstered Firm Action Council v. California Bureau of Home Furnishings, 415 F.Supp. 63 (E.D. Cal. 1976), the language and extensive legislative history of the federal statutes at issue indicated a Congressional intent that federal regulation should exclusively govern the area under review. In contrast, in the present case the OSH Act and its legislative history clearly indicate that Congress did not intend that OSHA would occupy the entire area of occupational health and safety.

Furthermore, National Labor Relations Board v. Nash-Finch Co., 404 U.S. 138 (1971), does not involve the preemption of a state law at all, but involves the implied authority of the NLRB to enjoin state action where federal power preempts the field. Finally, in Exxon Corp. v. City of New York, 548 F.2d 1088 (2d Cir. 1977), the Court held that a city ordinance was preempted under the express preemption language in the federal Clean Air Act, 42 U.S.C. §1857 et seq. As pointed out by the district court in the case sub judice, the express preemption provision of the OSHA rule only extends to employers in the manufacturing sector.



rural power cooperatives, since nothing in the language, legislative history, or underlying policy of either the Federal Power Act, 16 U.S.C. §792 et seq., or the Rural Electrification Act, 7 U.S.C. §907 et seq., ever suggested that the area at issue "is best left unregulated." Id. at 4542-43. The Supreme Court recognized that "[t]here may come a time when the [federal agency] changes its present policy, and announces that state . . . regulation is inconsistent with the federal policy." Id. at 4543. However, the Court explicitly stated it "will not . . . , in this federal challenge to the [state agency's] mere assertion of jurisdiction, assume that such a hypothetical event is so likely to occur as to preclude . . . any [state regulation] at all." Id. Similarly, this Court should not assume the intent postulated by the Chamber of Commerce in the face of a record that is utterly without foundation for such speculation.

Finally, the Chamber of Commerce makes the somewhat perplexing assertion that the district court "erred in severing the statute to allow its enforcement against non-manufacturing employers." (Chamber of Commerce Br. at 28). This contention misconstrues the district court's reasoning. In determining that the application of the Right To Know Act to non-manufacturing employers was not precluded by federal law, the district court was invoking principles of preemption, not the doctrine of severance. Such an analysis dictates that those provisions of the state law not expressly preempted by OSHA are beyond the reach of the Supremacy Clause. As the Court of Appeals for the Fourth Circuit aptly recognized in dismissing an identical challenge to the West Virginia Right To Know Act:

Moreover, we are reluctant to attribute proscriptive meaning to the Federal agency's decision not to require posting. Federal determinations not to regulate may stem from innumerable considerations unrelated to the health and safety issue. Such a

negative implication should not be preclusive.

West Virginia Mfrs. Ass'n v. State of West Virginia, 714 F.2d 308, 314 (4th Cir. 1983).

The doctrine of severability is irrelevant to this determination.

In sum, the judgment of the district court on this point should be affirmed, because the OSH Act and the OSHA rule have no preemptive effect on the implementation of the New Jersey Right To Know Act against non-manufacturing sector employers.

### III.

#### THE OSHA HAZARD COMMUNICATION RULE DOES NOT PREEMPT THE NON-OCCUPATIONAL RIGHT TO KNOW PROVISIONS OF THE NEW JERSEY ACT

The New Jersey Act created a comprehensive program through which workplace hazardous chemical information could be communicated to workers, the public, firefighters and other emergency response personnel, and state government agencies. The program to provide hazardous chemical information to workers can rightly be classified as an occupational safety and health program, for it involves communications between an employer and its employees about conditions of employment. The other three programs are non-occupational because they do not involve any communication between an employer and his employees, but rather concern communication to non-employees.

In contrast, the sole purpose of the Hazard Communication rule is to communicate "chemical hazards to employees in the manufacturing sector." 29 C.F.R. §1910.1200(a)(2). The OSHA rule does not provide for any non-occupational hazard communications; it does not provide for any hazard communication to the public, emergency response personnel or the State government.

Notwithstanding the restricted scope of the OSHA rule, the plaintiffs focus on isolated words and phrases in the OSH Act and the rule to piece together a Congressional and agency intent to preempt all portions -- both occupational and non-occupational -- of the New Jersey Act. This approach to preemption is clearly misdirected, for it substitutes a series of broad assumptions gleaned from parsed statutory terms for the careful examination of Congressional intent in the particular act, Fidelity Federal Savings and Loan v. de la Cuesta, 458 U.S. at 152. Indeed, the

fallacy of plaintiffs' approach is starkly revealed by a careful analysis of the particular bits and pieces of the 1970 OSH Act they rely on.

Plaintiffs initially assert that the term "issue" in Sections 18(a) and (b) indicates that Congress "bars the exercise of state jurisdiction over issues addressed by the OSHA standard." (Chamber of Commerce Br. at 13). From this premise, plaintiffs conclude, as did the district court, that even those provisions of the Right To Know Act directed to the health and safety of the general public and emergency services personnel are subject to the express preemptive effect of the federal statute and administrative rule. Plaintiffs reason that broad preemption is appropriate, since "to accomplish these objectives the Right To Know Act deals with precisely the same subjects in the workplace as are regulated by the OSHA Standards." JA 32.

Taken alone, the word "issue" might conceivably be construed in the expansive manner suggested by plaintiffs. However, when read in the context of the OSH Act, it is clear that the preemptive effect of this language, and of the OSHA Hazard Communication rule, are much more limited. First, defendant-intervenors have already demonstrated that the express language of the OSH Act, its legislative history, and the administrative construction by OSHA\* reveal that the express preemptive reach of the OSH Act is limited to occupational health and safety issues affecting employees in the workplace. (Br. of Defendant-Intervenors/Appellants at 20-25). Indeed, Section 18 does not refer broadly to all issues related to a federal standard, only "occupational safety and health" issues.

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\* Certainly, the construction and application of a statute by the agency charged with its administration is entitled to substantial deference. Udall v. Tallman, 380 U.S. 1, 16-18 (1965).

Second, only an "occupational safety and health issue with respect to which a Federal standard has been promulgated under section 655" is subject to preemption under Section 18(b). Section 655 does not purport to grant the Secretary of Labor the authority to promulgate standards that have any broader impact than assuring "the greatest protection of safety or health of the affected employees," within the limits of feasibility. 29 U.S.C. §655(a). Since a federal standard must relate to the occupational health and safety of employees, it is reasonable to assume that Congress intended the same scope in referring to an "occupational safety or health issue" in Section 18. Thus, Congress intended to limit the State's ability to exercise jurisdiction over occupational health or safety matters affecting employees when a federal standard is in effect, not to restrict the State's ability to regulate, for other purposes, subjects in the workplace that are addressed by a federal standard.\*

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\* In suggesting that the non-workplace purposes of the New Jersey Right To Know Act are irrelevant to preemption analysis in the present case, Chamber of Commerce Br. at 18-20, the plaintiffs reveal a lack of appreciation for the expressions of preemptive intent in the OSH Act and OSHA rule discussed in the text.

Similarly, the Fragrance Materials plaintiffs misunderstand the importance and relevance of affidavits submitted by the defendant-intervenors to demonstrate the various important non-worker related purposes of the New Jersey Act. (Br. at 15, n. 17). It is clear from the discussion in the text that the purposes of the New Jersey law are critical to the resolution of these appeals. The Legislature has very carefully set forth the importance of transmitting hazardous substance information to the community at large, emergency response personnel, government compliance agencies, and health professionals -- as well as to workers. Accordingly, defendant-intervenors have collected a significant number of affidavits from representatives of each of these categories of information recipients -- state and federal officials, including those directly responsible for the administration of the Right To Know program; physicians and toxicologists; local public health officers; firefighters; and emergency response coordinators for the State -- to fully explain the importance of the Act's non-worker provision. Moreover, a portion of these affidavits set forth the uses of the information provided by the Act and particularly detail the methods by which persons other than workers will be protected. The district court even recognized that "[t]aken together [these] affidavits demonstrate the rationale for the Right To Know Act." JA 10.

This construction of the scope of federal preemption is further confirmed by the precise language of the OSHA Hazard Communication rule. Contrary to plaintiffs' assertion, the rule does not broadly encompass the issue of "the evaluation and communication of hazards in the workplace." (Chamber of Commerce Br. at 25). Rather, the rule concerns only the occupational safety and health "issue of evaluating and communicating hazards to employees in the manufacturing sector," 29 C.F.R. §1910.1200(a)(2) (emphasis added);\* therefore, under Section 18, states are only precluded from enacting statutes and regulations governing the evaluation and communication of "chemical hazards to employees in the manufacturing sector." Section 18 and OSHA's rule do not provide any basis for a sweeping mandate that preempts any state law that touches upon the workplace. Rather, federal law is only concerned with any effort by the State to regulate ~~the~~ evaluation and communication of chemical hazards to employees in the manufacturing sector.

Third, OSHA itself recently emphasized the limited preemptive scope of its Hazard Communication rule during a colloquy at the oral argument in United Steelworkers of America v. Auchter, No. 83-3554 (March 18, 1985):

MR. WHITE (ATTORNEY FOR OSHA):  
Thank you, Your Honor. May it please the court, let me begin by dispensing essentially I believe with Massachusetts' argument. We do not contend, the government does not contend, in any way that the Hazard Communications Standard pre-empts or has any effect on public nonoccupational right-to know laws.

THE COURT: You too disagree with Judge Debevoise?

\* The preamble of the rule states that "it is designed to enhance employer and employee awareness of the safety and health hazards associated with chemical substances," 48 Fed. Reg. 53327; there is no mention of any broader intent at any point in the entire preamble. 48 Fed. Reg. 53280-53340.

MR. WHITE: Well, while that case was decided in the context of the New Jersey law, and we have not reviewed the New Jersey law, with specific respect to that law we're not prepared to take a position. But generally we would agree that the Occupational Safety and Health Act and this particular standard does not pre-empt public right-to-know laws.

THE COURT: The two situations probably are not in any way distinguishable. There is a pending New Jersey statute, community right-to-know law.

MR. WHITE: If that's the case, then indeed we would take issue with Judge Debevoise.

Tr. at 18 [emphasis added].\*

Consequently, neither Congress nor OSHA ever contemplated that the Hazard Communication rule would restrict the State's ability to promote non-occupational health and environmental concerns even if these problems originate in the workplace or involved the same subjects regulated by the OSHA rule. The contrary view adopted below in the lower court's holding, in effect erroneously "impute[s] to Congress a purpose to paralyze with one hand what it sought to promote with the other." Weinberger v. Hynson, Westcott and Dunning, Inc., 412 U.S. 609, 631 (1973).

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\* The Chamber of Commerce states that OSHA has interpreted its preemptive language "to provide that severable provisions of a 'community right to know law' are 'not immune from preemption simply because they are enveloped in a law that at the same time manifests a broader purpose.'" (Chamber of Commerce Br. at 20). This is a flat misreading of OSHA's brief in United Steelworkers of America v. Auchter, No. 83-3554, which explicitly and solely refers to severable portions of a right to know act "that are workplace or employee-specific." Br. at 88. Thus, notwithstanding the Chamber of Commerce's legerdemain, OSHA's consistent position is that federal preemption is limited.

The Fragrance Materials plaintiffs and Pennsylvania amici also assert that the "relating to" language in Section 18(h) is "evidence of a sweeping preemptive intent." Br. at 10-11; Am. Curiae Br. at 12. However, they fail to cite any case considering the OSH Act to support this conclusion, and instead rely on decisions interpreting other federal statutes. Again, the assertions of the broad preemptive effect of Section 18 are based on the wrenching of statutory language from its proper context.

First, Section 18(b) plainly does not preempt any state regulation of the workplace, but only a state occupational safety and health standard relating to an occupational health and safety issue with respect to which a federal standard has been promulgated. Since state hazard communication provisions designed to inform or protect the public, emergency response personnel and state government agencies are patently not occupational standards, the terms of Section 18 are not even applicable to these portions of the New Jersey Right To Know Act.

Second, the cases relied upon by plaintiffs construe far more expansive preemption language than that found in Section 18. For example, the ERISA preemption provision states that the Act "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. §1144(a). Not only is "[t]he breadth of [the] preemptive reach apparent from that section's language," Shaw v. Delta Air Lines, Inc., 51 U.S.L.W. 4968, 4971, 103 S.Ct. 2890, 2900 (1983), but also the legislative history of ERISA unequivocally demonstrates that Congress "meant to establish pension plan regulation as exclusively a federal concern." Alessi v. Raybestos Manhattan, Inc., 451 U.S. 504, 523 (1981). Similarly, the broad language of the Federal Railroad Safety Act and its legislative history reflect an intent "to preempt



the field of rail safety." Nat'l Ass'n of Regulatory Utility Comm'rs v. Coleman  
542 F.2d 11, 13 (3rd Cir. 1976).

In contrast, the OSH Act, its legislative history and OSHA's construction of the Hazard Communication rule reveal a considerably more circumscribed view of preemption in the occupational health and safety area. (Br. of Defendant-Intervenors/Appellants at 21-25). Moreover, plaintiffs are unable to point to any single instance where a court or OSHA has construed Section 18, even with the "relating to" language, in the sweeping manner they suggest. The plaintiffs strive mightily, but vainly, to construct a broad preemptive scope for the Hazard Communication rule that is unsupported by a careful study of the OSH Act and the express language in the rule.

In sum, a proper application of preemption principles reveals that the only portions of the New Jersey Right To Know Act expressly preempted by the federal rule are the provisions that seek to regulate the dissemination of information on hazardous substances to employees in the manufacturing sector. On the other hand, since the non-occupational portions of the Act are outside of the scope of Section 18, they are not expressly preempted and must remain in full force and effect.\*

The district court, however, employed a blunderbuss rather than a scalpel in invalidating the entire Right To Know Act insofar as it applies to manufacturing sector employees. In reaching this result, the lower court stated that "[t]he workplace and non-workplace regulatory

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\* As defendant-intervenors have already explained at length, the non-occupational provisions of the Act are also not impliedly preempted by the OSH Act or Hazard Communication rule. (Br. of Defendant-Intervenors/Appellants at 32-35).

schemes are inextricably intertwined." JA 41.

In part, this conclusion is predicated upon the district court's erroneous assumption that a state "non-workplace regulatory plan" cannot utilize the same elements as a workplace "regulatory foundation" which was designed to and does cover precisely the same occupational health and safety issues as are the subject of the Hazard Communication Standard." JA 41. The flaws in the district court's understanding of the preemptive effect of the OSH Act and Hazard Communication rule are discussed at length above.

However, the lower court's conclusion is troublesome for other reasons. The court, in effect, established a test to gauge the extent of preemption that, to defendant-intervenor's knowledge, is unprecedented in preemption law. This test vests in federal courts the broad authority to invalidate portions of a state law that, standing alone, could not be preempted under the Constitution, but still can be invalidated through a process of reasoning that amounts to "guilt by association." It also conflicts with the basic principle that state law should be preempted "only to the extent necessary to protect the achievement of the aims of the [federal act]," Merrill Lynch, Pierce, Fenner and Smith v. Ware, 414 U.S. 117, 127 (1973). In short, the district court's approach is strikingly at odds with the responsibility of a federal court to apply preemption sparingly and narrowly "so as to leave to the States as much of their police power as a fair reading of the statute allows." Penn Terra Ltd. v. Dept. of Environ. Resources, 733 F.2d 267, 273 (3rd Cir. 1984). Consequently, the district court's judgment striking down both the occupational and non-occupational portions of the Right To Know Act should be reversed.

#### IV.

THE DISTRICT COURT ERRED IN FAILING  
TO INVOKE THE STRONG PRESUMPTION OF  
SEVERABILITY TO PRESERVE THE PROVISIONS  
OF THE NEW JERSEY RIGHT TO KNOW ACT THAT  
COMMUNICATE HAZARDOUS SUBSTANCE INFORMA-  
TION TO THE PUBLIC, EMERGENCY RESPONSE  
PERSONNEL, STATE GOVERNMENT OFFICIALS  
AND MEDICAL PERSONNEL

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At the very least, the district court was compelled to determine whether the principle of severability could preserve the legitimate non-workplace objectives of the Act. However, as defendant-intervenors have explained, (Br. of Defendant-Intervenors/Appellants at 36-47), the lower court utterly failed to apply this well-established doctrine to the New Jersey Right To Know Act.

Plaintiffs seek to justify this omission of the district court by asserting that it is "amply supported by the interdependent structure of the Right To Know Act." (Chamber of Commerce Br. at 22). For example, plaintiffs point to Section 5 of the state law which, according to plaintiffs, creates the workplace hazardous substance list. N.J.S.A. 34:5A-5. Specifically, plaintiffs rely on the requirement that "[t]his list contains all those 'substance[s] which the [D]epartment [of Health] . . . determines to pose a threat to the health or safety of an employee'." N.J.S.A. 34:5A-5 a(3). [Emphasis added] (Brief at 22). Plaintiffs then note that the workplace hazardous substance list incorporates the environmental hazardous substance list. N.J.S.A. 34:5A a(2).<sup>\*</sup> Apparently, plaintiffs are arguing that any reliance on or reference to employee health and safety and other purposes in a provision of the

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\* Section 5 also incorporates those hazardous substances identified in and regulated by specific OSHA standards, 29 C.F.R. Part 1910, Subpart Z, and which are "contained in a mixture . . . ." N.J.S.A. 34:5A-5 a(1).

State Act is tainted by the occupational purpose and must be preempted. Based upon this alleged invalidity of the workplace list, plaintiffs attempt to show how a multitude of other provisions are keyed to the list and, accordingly, must also fall. Id. at 22-23.

This argument is not supported by logic or a careful reading of the New Jersey Act. First, the list does not, in and of itself, communicate any information to employees. Rather, it is simply a "list of hazardous substances" developed by the state. Surely, the New Jersey Legislature can conclude that substances which threaten worker safety and health have the potential to harm "the public health, safety and welfare," N.J.S.A. 34:5A-2 (Legislative findings and declarations) [emphasis added] and that these substances should be identified to "local health, fire, police, safety and other government officials . . . in order to adequately plan for, and respond to, emergencies, and enforce compliance with applicable laws and regulations concerning these substances." Id. Viewed in this light, the workplace hazardous substance list is designed to effectuate all of the Act's purposes.

Second, the definition of "hazardous substance" contained in the state law further demonstrates that the State was concerned with identifying in the workplace list any potentially harmful material which is located in the workplace. N.J.S.A. 34:5A-3(m) provides in relevant part:

"Hazardous substance" means any substance, or substance contained in a mixture, included on the workplace hazardous substance list developed by the Department of Health pursuant to section 5 of this act, introduced by an employer to be used, studied, produced, or otherwise handled at a facility.

Third, plaintiffs' apparent contention that "[t]he special health hazard list is derived from the workplace list," (Chamber of Commerce Br. at 22), and that, as a result, the list has an employee protection purpose, is contradicted by the plain language of this provision.

N.J.S.A. 34:5A-5(b) provides:

The department [of health] shall develop a special health hazard substance list comprising hazardous substances which, because of their known carcinogenicity, mutagenicity, teratogenicity, flammability, explosiveness, corrosivity, or reactivity pose a special hazard to health and safety, and for which an employer shall not be permitted to make a trade secret claim.  
[Emphasis added].

Quite obviously, there is not even a particular reference to employee protection here. Again, the state has evidenced a clear intention to attempt to identify the universe of harmful substances which might adversely affect the state's residents. N.J.S.A. 34:5A-2.

In short, there is no "interdependent structure" which would preclude the application of the doctrine of severability\* to the Right To Know Act. The district court's failure to do so constitutes reversible error.

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\* In a related vein, amici state that "the dominant purpose of the [Right To Know] Act is worker protection," (Br. at 22), and therefore principles of severability should not be applied to the New Jersey law. Further, amici characterize all other purposes of the Act as "ancillary" and cite the funding provision of the law, N.J.S.A. 34:5A-26, as the primary support for their position.

Amici's argument requires little, if any, attention. A simple reading of the "Legislative findings and declarations," set forth in defendant-intervenors initial brief to the Court at 31, clearly indicates that employee exposure is but one of many purposes of the challenged legislation. In fact, the worker communication purpose of the statute is mentioned only once in the four paragraph statement of findings.  
Id.


### CONCLUSION

For the reasons stated above and in the original brief of defendant-intervenors, the Order and Final Judgment of the district court on the preemption issue should be reversed, and the cases should be remanded with directions to enter an order and judgment limiting the preemptive effect of the OSHA Hazard Communication rule to those provisions of the Right To Know Act which relate to the communication of hazard information to employees in the manufacturing sector. Alternatively, the Order and Final Judgment of the district court on the preemption issue should be reversed, and the cases should be remanded for appropriate hearings and factual findings on the actual conflict and severability issues. The Order and Final Judgment on the trade secrets issue should be affirmed.

Respectfully Submitted,

JOSEPH H. RODRIGUEZ,  
PUBLIC ADVOCATE


By: RICHARD E. SHAPIRO, ESQUIRE

  
BY: RICHARD A. GOLDBERG  
Assistant Deputy Public Advocate  
Department of the Public Advocate  
Division of Public Interest Advocacy  
CN-850  
Trenton, NJ 08625

REITMAN, PARSONNET, MAISEL & DUGGAN

By:   
BENNET D. ZUROFSKY, ESQUIRE  
744 Broad Street - Suite 1807  
Newark, NJ 07102

PUBLIC INTEREST LAW CENTER OF PHILADELPHIA

By:   
JEROME BALTER, ESQUIRE  
1315 Walnut Street - Suite 1632  
Philadelphia, PA 19107

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