



The Honorable David Clark
Majority Leader, Utah House of Representatives

Standing Committee Chair,
National Conference of State Legislatures

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Good morning. I would like to thank Chairman Waxman, Ranking Member Davis and the members of the House Oversight and Government Reform Committee for inviting me here this morning to speak to you about the preemption crisis facing states today. My name is David Clark and I am the Majority Leader of the Utah House of Representatives and the current Chair of the National Conference of State Legislatures Standing Committees. NCSL is a bipartisan organization representing the legislatures from the 50 states and the U.S. Territories. I ask that my written testimony be accepted and incorporated into the record.

NCSL is troubled by the growing trend in Congress, the federal agencies and now the United States Supreme Court to pass legislation, promulgate rules and render decisions that have a substantial detrimental impact on states because of their intrusively preemptive nature. NCSL has tracked these preemptions in our Preemption Monitor, a publication that we initiated to alert state legislators nationwide to the alarming number of federal legislative, regulatory and judicial preemptions. As a result of federal preemption, a significant part of the policy jurisdiction of state legislatures and of city and county officials has been lost or compromised. States and localities cannot legislate in response to their citizens' needs when the federal government has preempted the policy field. What is lost is the capacity for regional and local self-government.

The cornerstone policy of NCSL is our Federalism policy. Set forth in this policy resolution are the building blocks for a sound and robust state-federal partnership. The NCSL Federalism policy makes several important observations about the role of the states and federal government in our federal system of which we should all take note. Specifically, our policy recognizes that individual liberties can be protected by dividing power between levels of government; in other words, division of power among federal and state governments also serves

as a check on the power of each. As the Supreme Court properly stated in *New York v. United States* (1992): “When one level of government becomes deficient or engages in excesses, the other level of government serves as a channel for renewed expressions of self-government.”

Our Federalism policy also recognizes the importance of state innovation and creativity. As Justice Brandeis wrote in his dissenting opinion in the case of *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting):

“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” Finally, our federalism policy speaks to the role of federal agencies in our system of government and states. Our policy states that it is inappropriate for unelected bureaucrats in federal agencies to preempt the laws of the sovereign states.

Additionally, federal agencies should not preempt state law absent clear congressional authority to do so.

NCSL believes that states are often in the best position to act quickly on a given issue and, in so acting, be more sensitive to the needs of the American people. NCSL believes that federalism allows for greater responsiveness and innovation through local self-government. State and local legislatures are accessible to every citizen. They work quickly to address problems identified by constituents –much more quickly than Congress. It is also worthy of mention that states have different ways of solving these problems. The diversity found within our state laws helps refine our democratic system. When those state policy decisions are overridden by Congress, the agencies or the Supreme Court, the results are significant to states.

Enhancing NCSL’s broad federalism policy are our policies regarding product liability and tort reform. Our product liability policy opposes federal preemption of state product liability

laws in the absence of comprehensive evidence demonstrating that state product liability laws are inadequate thereby requiring federal intervention. In fact NCSL believes that if there were uniform federal product liability laws, and state laws were indeed preempted, state tort liability laws, insurance regulations and workers' compensation laws would all be negatively impacted. NCSL's tort reform policy states that it is particularly improper for the federal government, either through legislation or agency regulation, to restrict or redefine when a citizen may access state courts. All of these policy resolutions are longstanding ones and were passed by NCSL's general membership in a bipartisan fashion. Together, they represent NCSL's core belief that states should maintain authority over areas of product liability and general tort law and that the three branches of the federal government should tread carefully when it comes to preemption of state authority in these areas.

NCSL is committed to the goal of restoring balance to our dual system of government by inviting Congress to reexamine some of its own recent preemptive actions. We also call upon Congress to provide appropriate oversight and scrutinize some of the more recent federal agency actions that have frustrated this policy goal. We also ask Congress to pass legislation to reverse the disturbing trend of regulatory and judicial preemptions of state laws. We at NCSL hope that this hearing will serve as an important first step toward repairing the damage that has been done to states through ill-considered preemptive actions.

Agency Actions and State Implications

In recent years, agency preemptions of state law without legislative foundation, through the rulemaking process are rampant. Everyone from the National Highway Traffic Safety Administration (NHTSA) to the Internal Revenue Service seems to be jumping onto the preemption bandwagon. Perhaps the most insidious preemptions have occurred at the Food and

Drug Administration. Every state has well developed bodies of product liability and consumer protection laws that may even date back prior to the establishment of FDA as an agency. Indeed, product liability and consumer protection issues have always been subjects reserved to the states to figure out. In Utah, there are various protections for citizens who are harmed by defective products. These statutes can be found in the Utah Product Liability Act contained in Title 78, Chapter 15 of the Utah Code. This portion of our Code was first enacted in 1977, but caselaw on issues of product liability date back to at least 1953. Over the last fifty-five years, the Utah legislature has refined our product liability statutes and our state courts have addressed issues of product liability, further refining our state common law. As a result, there is a robust body of product liability laws in our state. If these laws are federally preempted, more than a half century of discussion and debate on what laws best meet the needs of Utah's citizens and businesses will be totally lost. Cases decided by the Utah Supreme Court such as *Schaerrer v. Stewart's Plaza Pharmacy, Inc.*, 2003 UT 43; 79 P.3d 922; 485 Utah Adv Rep 16; 2003 Utah LEXIS 105 *Grundberg v. Upjohn* , 813 P.2d 89; 160 Utah Adv. Rep. 20; 1991 Utah LEXIS 44, *Barson v. E. R. Squibb & Sons*, 682 P.2d 832; 1984 Utah LEXIS 799, and *Reeves v. Geigy Pharmaceutical, Inc.*, 764 P.2d 636; 95 Utah Adv. Rep. 19; 1988 Utah App LEXIS 177 would have been barred, and the further evolution of product liability law in our state would be halted. Is this what was contemplated by our Founding Fathers?

There have been recent rulemakings by FDA that have undermined entire bodies of state consumer protection laws. An example of this type of rulemaking in which NCSL was unfortunately involved occurred in December, 2005. At this time, the FDA determined that it was time to finalize a rule on prescription drug labeling which had lain dormant for five years. NCSL was aware of this rule, but did not submit comments because the original language of this

NPRM expressly stated that there would be no federalism implications because the proposed rule would not preempt state law. See, Federal Register, Vol. 65, No. 247, p. 81103, December 22, 2000. Because of the express statement of non-preemption, the consultation requirements of Executive Order 13132, the Executive Order on Federalism, were not triggered. Executive Order 13132 is a guidance document to agencies and “requires” them to consult with elected officials or their representative national organizations to discuss preemptive impact of proposed rules with the goal of minimizing the preemptions.

On December 30, 2006, NCSL learned that the FDA planned to finalize its rule and include a policy statement that the provisions of the prescription drug labeling rule would preempt state product liability laws. NCSL approached FDA officials and asked for three things: a consultation meeting pursuant to the Federalism Executive Order, a copy of the proposed language, and that the FDA re-open the comment period to allow NCSL to file formal comments on this very significant and preemptive change. The FDA ignored the first request. The second and third requests were denied. However, it is interesting to note that during this rule’s 5-year dormancy period, the FDA had allowed certain pharmaceutical companies to submit comments pertaining to preemption after the expiration of the comment period. States, however, were not given the same deference, and the FDA finalized this rule in mid-January, 2006. Perhaps the most shocking aspect of this rulemaking is that the preemption of state law took place not through an act of Congress, but rather by unelected federal bureaucrats who basically usurped state tort law policy over the objections of the states. Last year, an unsuccessful legislative attempt to undo the impact of this rule was made in S. 1082, the “Prescription Drug User Free Act of 2007 (PDUFA) which was part of The Food and Drug Administration Revitalization Act. Unfortunately, just before passage, language was stripped from all ten House drafts of the

PDUFA legislation which, if included, would have provided a safeguard against FDA preemption of state laws and would have undone the FDA Prescription Drug Labeling Rule preamble preemption which I discussed above.

Mr. Chairman and committee members, creative solutions to public problems can be achieved more readily when states are accorded due respect. Uniformity for uniformity's sake does not justify preemption.

NCSL believes that the preemption of state product safety and consumer protection laws is tantamount to an unfunded federal mandate on the states. Federal preemption is not just an affront to state policy choices. It also carries a price tag for the states. If citizens of my state of Utah cannot go to state court to obtain redress for injuries suffered as a result of a defective product or a file a failure to warn case against a drug company their only recourse is to turn to the state for help through my states' social service agencies. The cumulative result of this is a financial burden on Utah and every other state as well. Here's an example of how the cost of preemption plays out in the states. NCSL was involved in a NHTSA rulemaking that proposed to preempt state wrongful death laws in vehicle rollover cases. To thwart this proposed rule, NCSL contracted with the Pacific Institute for Research and Analysis to conduct an analysis of how much a federal preemption of this nature would cost states. The ensuing report found that the financial burden placed on State governments as a result of the preemption provision contained in the NHTSA rule would be between \$49 and \$71 million per year, primarily as a result of increased state-paid medical and disability costs.

Proposed Solutions to Excessive Preemptions

In 1999, NCSL and other state and local government national associations worked closely with the Clinton Administration to revise and refine the Federalism Executive Order,

Executive Order 13132. Although the Federalism Executive Order is a noble first step in increasing agency awareness and accountability for preemptive regulations, as my testimony has shown, it does not go far enough for one main reason: an executive order is a guidance document that does not carry the weight of statute and, therefore, cannot be enforced. There are no consequences for its violation. There is no incentive for agencies to adhere to the Federalism Executive Order's requirements in any meaningful way. NCSL has found that in the years following the effective date of the Federalism Executive Order, overall agency adherence to its provisions has been spotty at best. As I have illustrated, agencies like the FDA have, at times, chosen to ignore its requirements altogether. Other agencies, like the Department of Homeland Security and the Department of Health and Human Services, choose to circumvent it by issuing interim rules so that the Federalism Executive Order cannot be applied; and independent agencies, like the Consumer Product Safety Commission, are expressly exempted from its requirements.

NCSL believes that the Federalism Executive Order should be codified into statute to protect elected state policymakers from the uninformed actions of unelected federal agency bureaucrats. Additionally, we believe that the provisions of this new law should be extended to legislative actions undertaken by Congress. Specifically, NCSL would like to see a new piece of congressional legislation that contains the following principles:

1. **Partnership and enhanced consultation.** NCSL supports provisions to provide for consultation with state and local elected officials or their representative national associations prior to the consideration of any legislation or federal regulations that would interfere with or intrude upon historic and traditional state and local rights and responsibilities.

2. **Rule of Construction.** NCSL supports provisions to ensure that, absent any explicit statement of intent to preempt or absent any irreconcilable conflicts with state law, any ambiguities would be construed in favor of state law.
3. **Enforcement.** NCSL supports provisions to ensure congressional and agency accountability and enforcement. The point of order in the Unfunded Mandates Reform Act (UMRA) has made members of Congress increasingly aware of potential impacts of federal laws and regulations on state and local taxpayers. We believe that a mechanism to ensure this recognition regarding preemption in both the legislative and the regulatory arenas is critical.
4. **Legislative Report.** NCSL supports efforts to include a federalism assessment in every committee and conference report. This will help members appreciate the potential impact on our levels of government, our taxpayers, and our programs.
5. **Agency Impact Statement.** Early in the rulemaking process, it is essential to codify the provisions of the Federalism Executive Order to ensure that every federal agency engages in a meaningful consultation process with elected state and local officials or their national associations, as well as with other impacted stakeholders. This will help to determine the potential impact of final administrative rules on our partnership.

NCSL recognizes that passing this type of broad legislation will be no easy task and in the alternative suggests that bills like the Medical Device Safety Act of 2008 cosponsored by Representative Pallone and the Chair of this Committee, Representative Waxman, is an important first step toward reversing the troubling trend of agency and judicial preemptions of

state law. This legislation is supportive of state product safety laws and reinstates the primacy of state laws for product safety. The bill recognizes that some decisions, such as how to protect people from defective products, are best made by the state legislatures, not by the federal government. NCSL applauds your leadership and willingness to support the states in achieving a more harmonious federalism system.

NCSL believes that these recommendations, taken in the cumulative, will benefit everyone – state and local governments, the federal government and the general public -- because they foster greater transparency, greater cooperation between governmental units and more information sharing all around. NCSL is prepared to work with you, Chairman Waxman, Ranking Member Davis and members of the House Oversight and Government Reform Committee, to make these policy considerations a legislative reality. I believe that this type of legislation will serve to strengthen and fortify the intergovernmental partnership. My hope is that with your leadership, legislation to address the states' concerns on preemption will be introduced soon so that it can successfully make its way through the legislative process during this session. Thank you for this opportunity to testify.