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STATEMENT OF

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PRESIDENT OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS

OF THE UNITED STATES SENATE

REGARDING FEDERALISM AND PREEMPTION OF STATE LAW

May 5, 1999

Mr. Chairman and Members of the Committee:

Good morning. I am Dan Blue, a member of the North Carolina House of Representatives and President of the National Conference of State Legislatures (NCSL). Today, I am presenting testimony on behalf of the nation's state legislators, of both parties and from all 50 states and the American commonwealths and territories.

I appear today also as part of the so-called Big Seven, the coalition of major state and local organizations that includes NCSL, the National Governors' Association, the National League of Cities, the Council of State Governments, the National Association of Counties, the International City/County Management Association, and the United States Conference of Mayors. The Big Seven are united in calling on Congress to pass a package of six bills dealing with state-federal relations, including the Regulatory Right to Know Act (S.59), the Regulatory Improvement Act (S.746), an Act Establishing a Congressional Office of Regulatory Affairs (S. 1675 from last year), the Federal Financial Assistance Improvement Act (S. 468), the Mandate Information Act (Section 5 of H.R. 350; also to be included in a Senate anti-preemption bill), and the Government Partnership Act (still in the drafting stage). I want to thank the several members of this committee who have agreed to sponsor or co-sponsor one or more of these important bills.

The focus of my testimony today will be on the last and in many respects the most important of these six bills, The Government Partnership Act. Passage of this bill is important because it deals with what NCSL and the Big 7 see as the most vexing of our current problems in state-federal relations. I am referring to the problem of federal preemption of state and local law.

Federal preemption of state and local law presents a very serious challenge to our constitutional system of federalism. This challenge results first from the propensity of federal courts, agencies, and the Congress to preempt state law without careful consideration of the consequences of such action. Second, it results from agencies and courts acting to preempt state laws in circumstances where it is not at all clear that Congress intended to authorize preemption.

Every year, new federal statutes, administrative rules, and court decisions preempt or displace state laws. Interest groups that have been unsuccessful in pursuing their agendas at the state level increasingly are tempted to "forum shop" and come to Washington, D.C., seeking federal preemption to reverse state legislative or court action. Too often, these interest groups are successful in undoing the work of sponsors of state legislation who may have labored for months or years to pass a bill.

The cumulative effect of such federal preemption of state law is to reduce the effectiveness of state and local governments. One of the advantages of federalism is that 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. The large number of state and local legislatures encourages innovation. A new policy is tested in one jurisdiction. If it works, other jurisdictions try it. If a mistake is made, it can quickly be corrected. But, if the policy jurisdiction of a state or locality has been preempted, then it cannot respond and it cannot innovate.

The most insidious consequence of preemption, in other words, is its impact in the future. Because of preemption, the policy jurisdiction of state legislatures, particularly in the area of business and economic regulation, shrinks every year. There is almost no movement in the opposite direction, in which Congress withdraws from a policy field while leaving states free to legislate. Legislation withdrawing the federal government from fields of economic regulation ordinarily includes language preempting state regulation of the affected industry.

Conversely, when the federal government imposes a new economic regulation, courts and agencies often find that the "scheme of federal regulation is so pervasive" that it has "occupied the field" thus barring even non-conflicting state regulation. Where there has been a finding of "field" preemption, state regulation will be barred even when state standards are simply more stringent than or supplementary to federal standards or even when state law merely touches tangentially on the same subject as federal legislation.

Now, if you are not a state legislator but perhaps a member of Congress, then you may ask what is the harm and indeed are there not benefits to a centralization of legislative and regulatory authority, particularly as it affects business and economic activity. Let me suggest that the harm done is considerable.

Federal regulatory agencies are not always successful in their mission of protecting the public. Moreover, over the past twenty years there has been something of an abdication by the federal government in such fields as consumer, environmental, and public health and safety protection. And, federal regulation, is often sluggish, bogged down in the elaborate federal

administrative process and able to respond only slowly to the demands of the public. Federal agencies, in other words, frequently are surpassed in performance by state officials who often can act quickly and effectively to protect their citizens.

States can act more quickly and aggressively because the structure of state administrative law is simpler and allows for swift decision-making. Also, state regulators are often more responsive to public opinion. For example, in most states, a popularly elected Attorney General is responsible for enforcement of antitrust, environmental, and consumer protection laws. State agencies, especially when they work cooperatively, also may have more law enforcement resources than comparable federal agencies. I would point in particular to the effectiveness of cooperative efforts of state attorneys general in addressing public health, consumer protection, and antitrust issues.

Indeed, it is often the effectiveness of state law enforcement and of state law remedies that results in efforts here in Washington D.C. to preempt the states. And for this reason, I believe it is important not just to state legislators but to all Americans that you pass legislation to limit federal preemption of state law.

All of us should be concerned about the cumulative and long-term effects of federal preemption of state law, for the simple reason that it undermines the effectiveness of state and local government. Justice Brandeis's saw about the states being the "laboratories of democracy" is both a cliché and a fundamental truth. There is a reason why policy innovations often arise at the state level. Americans expect their state and local governments to act quickly and efficiently

to meet their needs. They expect that state and local officials will do what it takes to solve a problem - that we will find a way. State legislators and city council members know this as well as anyone. We are the frequent recipients of the proverbial midnight phone calls from outraged constituents who have a problem and want it fixed and fixed now. Well, the truth is state legislators and city councils are not able to respond quickly and effectively if their authority has been preempted.

Let me stop and make clear at this point that I am not and NCSL is not challenging the wisdom of the Supremacy Clause. Nor am I suggesting that Congress's policy jurisdiction ought to be sharply limited. I do not suggest that we ought to return to the Articles of Confederation or that we ought to return to a pre-Civil War or pre-New Deal conception of states' rights, in which the federal government and this Congress is reduced to a passive role, unable to respond to social and economic problems with appropriate domestic legislation, which may, where there is a direct conflict, appropriately preempt state laws and regulations under the Supremacy Clause. Rather, I am making a proposal for modest changes in congressional process and federal law that, I believe, will resolve the current problem of snowballing and out-of-control federal preemption.

All we need is simple legislation that ensures three things:

- Before it acts to preempt state law, Congress will be well-informed about the implications of such action;

- Congress will establish an internal process for making it much more clear to agencies and the courts when it intends to preempt and what the limits are on the scope of such preemption; and
- Congress will provide guidance to agencies and courts, in the form of a strict rule of construction, so that court decisions and agency rules preempt state law only when there is a clear statement of congressional intent.

As a practical matter, the need for greater clarity in congressional intent goes to the heart of the problem. A review of the case law, I think, will bear me out when I say that most preemption cases do not involve an "actual conflict" between federal and state law. In other words, the cases do not ordinarily turn on explicit provisions in federal law providing for preemption or on circumstances where it is physically impossible for an individual or corporation to comply with both state and federal laws. As a 1991 report of the Appelate Judge's Conference notes: "Supremacy Clause cases typically call on the courts to discern or infer Congress's preemptive intent." The report goes on to say that: "By their very nature, implied preemption doctrines authorize courts to displace state law based on indirect and sometimes less than compelling evidence of legislative intent. This indirectness in turn suggests a greater potential for unpredictability and instability in the law."

The largest part of the preemption problem results from courts and in particular administrative agencies, in effect, reading preemption into the statute based on some theory that it is implied. For this reason, I urge this committee to pass legislation ensuring a process under the rules of the House and Senate for making it clear when Congress intends to preempt and to

provide for "a rule of construction" to guide courts and agencies in their reading of federal statutes. This should limit overly-creative theories, based for example on such loose notions of implied preemption as the pervasive nature of federal regulation, the peculiarly federal nature of the interests at stake, allegations that state law "stands as an obstacle," or the "scope of authority" granted to a federal administrative agency.

In conclusion, I want to emphasize that NCSL would like to see anti-preemption legislation move forward on a bipartisan basis. Members of both parties should support a bill that ensures a more thoughtful legislative process and that limits unjustified federal displacement of state law based on creative theories of preemption by implication. Such legislation would strengthen our system of federalism. It would also strengthen the role of Congress. Most important of all, passage of anti-preemption legislation would assure the American people that their states and local governments will continue to play a role in regulating the local economy in a way that protects the public interest.

Mr. Chairman, members of the committee, I thank you for this opportunity to testify.

BIBLIOGRAPHICAL SKETCH

DANIEL T. BLUE, JR.

Daniel T. Blue, Jr. is the President of the National Conference of State Legislatures.

Dan was born in Lumberton, North Carolina to Daniel T. Blue, Sr. and Allene Morris Blue on April 18, 1949. He excelled in school and later attended North Carolina Central University, where he earned BS degree in Mathematics. While there, he emerged as a leader in academics and campus politics. Blue furthered his career by attending Duke University School of Law, where in graduated in 1973.

Hired by one of North Carolina's leading law firms, Sanford, Adams, McCullough & Beard, Blue became one of the first blacks to integrate the state's major law firms. However, a desire to own his own practice inspired him to form a practice with several associates in 1976. Today, he serves as managing partner of that firm, Thigpen, Blue, Stephens and Fellers, in Raleigh.

A flourishing political career ensued. In 1980, Blue was elected to the North Carolina House of Representatives, representing Wake County. Since then, he has been reelected eight times and has held several positions in the House, including chairman of a Judiciary and an Appropriations Committee. He served as Chairman of the Legislative Black Caucus from 1984-89.

On January 30, 1991, Dan Blue was elected Speaker of the North Carolina House of Representatives, and was reelected to this office January of 1993. Since 1995, he has served as a member of the Appropriations, Judiciary, Commerce, and Redistricting Committees, and as a leader in the House Democratic Caucus.

Mr. Blue has been recognized throughout the state and country as one of the America's outstanding political leaders. He has served on the executive committees of the Southern Legislative Conference, and the State and Local Legal Center, and was elected president-elect of the National Conference of State Legislatures in August 1997. In addition, he has served twice as Chairman of the Clinton/Gore Campaign for North Carolina. Mr. Blue is the recipient of eight honorary doctorate degrees. He currently serves as a member of the Board of Trustees of Duke University, and as a Director of First Union National Bank of North Carolina. He has been recognized by numerous organizations, churches and civic groups for his many contributions to the community, state and nation.

Dan Blue resides in Raleigh with his wife, Edna Earle Smith. They have three children, Daniel III, a Duke Law/MBA student, Kanika, a Yale Law student, and Dhamian, a junior at Duke. The family attends Davie Street Presbyterian Church where he serves as an Elder. Among his interests and hobbies are reading, education policy and team sports.