Testimony of
Alexander G. Fekete
Mayor, Pembroke Pines, Florida
on behalf of
The National League of Cities

July 14, 1999

Good morning Mr. Chairman and members of the Committee, my name is Alex G. Fekete and I am the Mayor of Pembroke Pines, Florida. I am currently the Vice Chair of the Finance, Administration and Intergovernmental Relations (FAIR) Steering Committee of the National League of Cities (NLC). I am pleased to be here this afternoon to testify before you with my colleagues on what we believe is groundbreaking federal legislation, "The Federalism Accountability Act of 1999" (S. 1214). This bill embraces and preserves the cherished principle of federalism and promotes a new federal –state-local partnership with respect to the implementation of certain federal programs.

I thank the Committee for having this hearing today. I would also especially like to thank the Chairman, Senator Thompson, and his colleague, Senator Levin, for working with the members of the "Big 7" state and local government organizations to craft a bill that illustrates the cooperative and bipartisan dynamic that should exist between our levels of government. At the same time, I would like to recognize Senators Voinovich, Robb, Cochran, Lincoln, Enzi, Breaux, Roth, and Bayh in appreciation for their support in co-sponsoring this legislation. We look forward to working with the members of this Committee to achieve the true partnership envisioned in this bill.

The National League of Cities is the oldest and largest organization representing the nation's cities and towns and their elected officials. NLC represents 135,000 mayors and council members from municipalities across the country. Over 75 percent of NLC's members are from small cities and towns with populations of less than 50,000.

Whatever their size, all cities are facing significant federal preemption threats to historic and traditional local fiscal, land use and zoning authority. Whatever their size, all cities will benefit from legislation such as S. 1214. We are grateful to you for recognizing that the issue of federal preemption of state and local laws is an important one, not just to us, but to all Americans.

What brings us all here today? It is nothing less than the pervasive and imminent threat of preemption by the federal government. Let me clarify that it is not the intent of NLC to undermine the Supremacy Clause of the Constitution. In fact, I think everyone in the room today acknowledges that there are times when federal law should trump state law – when there is a direct conflict between federal and state law or when it is Congress' express intent to preempt state law. During the 1960's, for example, the nation needed the federal government to move forward with civil rights legislation that would ensure the equal treatment for all Americans under our Constitution. The problem, however, is not with our dual form of government as it was established by the Framers of the Constitution. Our concern is focussed on the frequency of federal preemption of state and local laws. Moreover, there seems to be a lack of sensitivity on the part of the federal government with regard to local government and the preemptive impact of federal legislation and regulations on local government. It is the National League of Cities' highest priority to put a meaningful check on this preemption of state and local authority. Allow me to cite a few of the invasive actions the federal government has taken in the just last few months.

First and foremost, legislation signed into law last October impedes states' and local governments' ability to tax sales and services over the Internet in the same manner as all other sales and services are taxed – despite the fact that no such limitations would apply to the federal government. There has also been a bill moving quickly through the House of Representatives called the "Religious Liberty Protection Act of 1999," which is a massive preemption of state and local zoning and land use laws. This bill, if enacted into law, would chill a city's ability to

apply neutral zoning laws that are applied uniformly to all other land uses in an entire community from being applied to religious based land uses like churches, synagogues and mosques. Local zoning and land use laws also face severe preemption in the area of takings law, with the re-introduction of takings legislation in the Senate which would allow developers to pursue takings claims in federal court without first exhausting state judicial procedures. Current law preempts municipal authority over the siting of group homes, and preempts a municipality from applying zoning, environmental, health, and safety statutes to railroads. There is no question that the most significant impacts of these preemptions will be felt at home in our nation's cities and towns through the erosion of local tax bases and through the inability to enforce local ordinances enacted for the benefit of all who live in a community.

The amount of federal preemptions is increasing yearly. It is important to note that all of this legislation was either developed or enacted with minimal to no consideration of the consequences to state and local governments. The voices of state and local governments were not heard, or worse yet, were ignored. It is for this reason that my colleagues and I are here this morning – to ensure that state and local governments are not left holding the bag as a result of uninformed federal action. But the news is not entirely bad for cities because there have been some signs that the tide of federal preemption may be changing. First, the U.S. Supreme Court issued three recent decisions that affirm states' rights and curb the power of Congress to enforce certain federal laws. The Court recognized that our Constitutional framers envisioned freedom being enhanced by the creation of two governments – federal and state. As Justice Kennedy so eloquently stated in the recent decision in Alden v. Maine, "Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. In choosing to ordain and establish the Constitution, the people insisted upon a federal structure for the very purpose of rejecting the

idea that the will of the people in all instances is expressed by the central power, the one most remote from their control." This statement is at the core of federalism and embodies the true federal –state-local relationship that is at the heart of our system of government.

In this ruling, the Supreme Court recognized that preserving the power of self-governance by states and localities is as important to the well-being of our nation as a whole, as is our federal government. The Court further recognized that sometimes a more regional or local approach to governing is needed, and that the needs of the people are sometimes better met at the local level through the enactment, application and preservation of local laws. The Federalism Accountability Act would help to restore some balance between federal, state and local governance.

Second, NLC and the other members of the "Big 7" state and local government groups have been negotiating with the Administration on a new Executive Order on Federalism. We hope this new Executive Order will serve to enhance the legislation you are considering this afternoon and promote our common goal to work together as partners. NLC, however, believes that legislation is still needed regardless of the existence of an executive order, to ensure that our unique form of federalism becomes revitalized. The reason both a strong Executive Order on federalism and this legislation are needed is because an Executive Order by itself is of limited scope. An Executive order is not law. It does not apply to the independent agencies and there is no provision for judicial accountability. In sum, from a public policy perspective, an Executive Order supporting federalism is helpful in providing guidance on the issue, but it simply does not carry the same weight as legislation. NLC appreciates the intent behind the Administration's efforts and recognizes that the goals of this Executive Order are laudable ones. I ask you, what better first steps are there toward achieving a federal –state-local partnership than by addressing the issue of federalism on all fronts of national government? Through the Supreme Court's reaffirmation of federalism in Alden v. Maine, through the Administration's Executive Order, and now by this Congress through the passage of S. 1214.

Another reason why this legislation is needed is because despite the overall success of the Unfunded Mandates Reform Act of 1995 (UMRA), there are loopholes that have led to weak enforcement. While well intentioned and certainly a positive step toward achieving greater federal accountability, UMRA "has had little effect on agency rulemaking," according to a recent General Accounting Office report. Congress now has an important opportunity to ensure that the federal government acts responsibly toward its State and local partners, in accord with the principles of federalism established by America's Founders.

Let me now turn to S. 1214. This bill provides cities nationwide with a viable means for alleviating many of the problems associated with federal preemption of local laws.

Mr. Chairman and members of the Committee, we at the local level want to help create a more dynamic federalism. We believe mutual accountability between and among the various levels of government is essential to the vitality of our federalist form of government and is in harmony with the vision our forefathers had for this country. We want to be your partners in making this vision a reality. We support and want your support for S. 1214.

S. 1214 represents one of the most important efforts to fundamentally rethink the nature and relationship of our federal system and to expand the partnership of elected governmental officials. S. 1214 contains several good tools for creating this new idea of federalism which are beneficial to cities.

Section 4 of the bill defines a public official as including the representative organizations of state and local elected officials, those being the national associations of the "Big 7" state and local government organizations. This inclusion is vital to providing cohesiveness to the consultation provision of the bill. It will make it easier to get state and local input from these national associations who can best represent the views of a cross section of their respective memberships. It also alleviates the burden on the agencies for locating all public officials from

jurisdictions that would be preempted by a proposed regulation. It streamlines and simplifies the consultation process for all involved.

Section 5 of the bill requires Senate and House committees, including conference committees, to include a statement with each committee or conference report on a bill or joint resolution that details the preemptive impact of the legislation, gives the reasons for this preemption, and explains how State or local authority will be maintained following the passage of the legislation. Where there is no Committee or Conference report, there must be a written statement by the Committee or Conference that details the level of preemption.

This section is critical to local governments. So often it is the case that a bill is passed that has severe consequences on our nation's cities because it preempts state and local law. Once such example is the Internet Tax Freedom Act of 1998. Without a committee or conference report or statement to explain the preemption and the reasons behind it, it is impossible for local governments to know whether such impacts were even considered by the Congress. Under this section of the Act, local government is assured of such deliberation.

The above provisions taken together provide for a greater accountability of our federal government. They provide the opportunity for increased input from those most directly affected by a rule or statute, and they provide opportunity for a more meaningful and balanced federalism.

Another very positive and important aspect of this bill is contained in **Section 6**, " Rules of Construction." This section will provide much-needed guidance at the federal level with respect to the age-old question of "does this federal statute or rule preempt my city's ordinance?" It clarifies instances of federal preemption by requiring that the intent to preempt be expressly stated in the statute or rule, or there is a direct conflict between the federal statute and state or local law. This section should not be interpreted as a prohibition of preemption. To the contrary, this bill recognizes that at times, preemption is appropriate. What this section attempts

to do, however, is minimize instances where the intent to preempt is not clear – thus avoiding expensive and adversarial litigation by limiting a court's ability to find that an implied preemption exists. It again makes the federal government accountable for what it does.

This section also creates a presumption against preemption of State and local law and permits cities to govern by requiring that any ambiguity in the Act be construed toward preserving State and local authority. These rules of construction therefore are of vital importance to cities.

Section 7 of the bill spells out several important requirements to ensure that state and local public officials participate in the federal agencies' rulemaking process in an early and meaningful way.

This section directs the heads of federal agencies, who are responsible for implementing this act, to appoint a "federalism officer" within each agency. The officer would execute the provisions of this Act and serve as a liaison to State and local officials and their representatives; thereby providing cities with an identifiable person who is a point of contact in the rulemaking process. Section 7 additionally requires that agency heads give notice to and consult with state and local elected officials and their representative national organizations early in the rulemaking process, and prior to the publication of a notice of proposed rulemaking, when that rule might interfere with, or intrude upon, the historic and traditional rights and responsibilities of State and local governments.

This provision of the bill requires federal agencies to stop, look, listen and think before they leap into the arena of preemption. It further provides cities with a much-needed voice in the rulemaking process, especially when those rules would have a direct and potentially debilitating impact on our nation's cities. Most importantly, it is an opportunity for local elected officials to work more closely with federal agencies, earlier in the rulemaking process. This will maximize the chance to provide meaningful input and an invaluable exchange of ideas and perspectives.

This requirement therefore is mutually beneficial to all levels of government and serves to reinforce the concept of partnership.

This section of the bill furthermore calls for a "federalism assessment" to accompany each proposed, interim final, and final rule in the Federal Register and each rule review submitted to the Office of Management and Budget, when those rules could affect State and local authority. The federalism assessment would detail, analyze, and attempt to justify the extent of the preemption of State or local authority. The assessment would describe the extent to which State or local authority would be preserved after the rule's enactment. It would additionally communicate the agency's efforts to minimize the impact on State and local governments and to consult with public officials, including the concerns of those officials and the extent to which those concerns have been satisfied. Agency heads would have to consider these assessments when promulgating, implementing, and interpreting the relevant rules.

NLC does recognize that S. 1214 as drafted applies to all federal rules and regulations. In order to ease routine rulemaking, as in the case of a city petitioning a federal agency for a 2 hour local bridge closure, we would be willing to work with the committee to establish a threshold for *de minimus* exemptions from the federalism assessment.

In the opinion of local elected officials, the aforementioned provisions would make the federal agencies really think about what they are doing before they do it. This language in the bill will make the agencies "look outside the box" for help and information, thereby avoiding unsound rules.

Critics of the current federalism legislation have raised the specter of unfettered judicial review under the proposed Rule of Construction. We reiterate, however, that this section was designed to streamline the judicial process. Currently the courts must grasp at legal straws in cases where there is neither an express federal preemption of state or local law contained in a federal statute nor a direct conflict between the federal and state or local laws. The Rule of

Construction eliminates the guesswork and makes very clear that absent express preemptive language or a direct conflict, there is no federal preemption. S. 1214 and its companion in the House, H.R. 2245, alleviate from the courts the burden of having to step into the shoes of the federal Congress to determine what Congress intended to do when writing laws. Under S. 1214, Congress must now explicitly state any intention to preempt State or local rights and responsibilities. Any remaining uncertainty in this Act or any statute or rule enacted after this Act would be resolved in favor of maintaining State and local authority.

Last, but certainly not least, **Section 9** of the bill provides cities with an overall check on the federal government's preemption activities. It requires the Director of the Office of Management and Budget (OMB) to submit to the Director of the Congressional Budget Office (CBO) information describing each provision of interim final rules and final rules issued during the preceding calendar years that preempts State or local government authority. CBO must then submit to the Congress a report on preemption through Federal statutes, rules, court decisions, and legislation reported out of committee during the previous session of Congress. Again, this extra check will help all levels of government track federal activities dealing with preemption and provides information to local governments on this critical issue.

Thank you Mr. Chairman and members of the Committee for your kind attention this afternoon. I would be happy to answer any questions.