Written Statement of the

National Governors Association

On

*Federalism Implications of Treating States as Stakeholders*

To The

House Committee on Oversight and Government Reform

February 27, 2018

The National Governors Association ("NGA") appreciates the opportunity to submit written comments for the record in today's hearing of the House Oversight and Investigations Committee about the implications to federalism of treating States as stakeholders.

Established more than 100 years ago, the NGA is the bipartisan organization for the nation's governors. NGA assists governors on domestic policy and state management issues, and provides a forum for governors to speak with a unified voice to our federal partners in the Executive, Legislative, and Judicial branches.

We begin with several main points:

- Governors believe that a strong, cooperative relationship between the states and federal government is vital to best serve the interests of all.

- Governors believe that federal action should be limited to those duties and powers delegated to the federal government under the Constitution. We favor the preservation of state sovereignty when our federal partners legislate or regulate activity in the states.

- Governors believe that federal preemption should be the exception, not the rule because it often poisons the well for healthy intergovernmental collaboration.

**Principles for State-Federal Relations**

To ensure the proper balance between state and federal action and to promote a strong and cooperative state-federal relationship, governors encourage federal forbearance. Forbearance involves limiting federal action to situations where constitutional authority for such action is clear. It curbs federal action to challenges that are truly national in scope. It also carefully balances federal action with each state's ability to deliver resources and approaches to common challenges. Unless constitutionally prohibited, federal action should not set preemptive ceilings but rather provide a floor for additional state action.

Regarding federal preemption, governors recognize the need for federal intervention should states fail to act collectively on issues of legitimate concern. Preemption of state laws, however, should be the exception rather than the rule. This is especially true in areas of primary state responsibility, including, but not limited to: education, insurance regulation, criminal justice, preservation of the dual banking system, preservation of state securities regulation, and the management of state personnel programs.

NGA also urges its federal colleagues to reconsider federal-state program design, which has run the gamut from prescriptive to devolution. NGA encourages middle-ground

partnerships, not these two extremes. We believe that there are opportunities to improve collaboration and cooperation in program design to provide maximum flexibility and opportunity for innovation, as well as foster administrative efficiency and cross-program coordination.[1]

**The "Federalization" of Federalism?**

Governors believe that a strong, cooperative relationship between the states and federal government is vital to best serve the interests of all.

Federalism is a dynamic, not static doctrine. It recognizes that, while dual sovereignty governs our nation, federal and state power derives from the people. In practice, however, the ebb and flow of power among those sovereigns during federalism's modern historical arc triggers the need for regular adjustments, where appropriate, to maintain optimum balance.

Today's hearing invites a candid conversation about whether, and to what extent, federalism has, in practice, become "federalized," shifting our dual sovereign relationship away from States-as-Partner, to one of States-as-Stakeholder. The federal agency rulemaking process offers a window into this question.

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[1] NGA Permanent Policy at Section 2.3 (2016) outlines specific principles to help design federal-state programs including:

- States should be actively involved in a cooperative effort to develop policy and administrative procedures.
- The federal government should respect the authority of states to determine the allocation of administrative and financial responsibilities within states in accordance with state constitutions and statutes. Federal legislation should not encroach on this authority.
- Legislation should authorize and appropriate sufficient funds to meet identified program objectives.
- Federal assistance funds, including funds that will be passed through to local governments, should flow through states according to state laws and procedures.
- States should be given flexibility to transfer a limited amount of funds from one grant program to another, or to administer related grants in a coordinated manner.
- Federal funds should provide maximum state flexibility without specific set-asides.
- States should be given broad flexibility in establishing federally mandated advisory groups, including the ability to combine advisory groups for related programs.
- Governors should be given the authority to require coordination among state executive branch agencies, or between levels or units of government, as a condition of the allocation or pass-through of funds.
- Federal government monitoring should be outcome-oriented.
- Federal reporting requirements should be minimized.
- The federal government should not dictate state or local government organization.

Executive Order 13132 ("EO 13323"), first issued in 1999 and renewed on a bipartisan basis by successive administrations, directs all non-independent federal agencies and departments to evaluate proposed rulemakings for their effects on federalism.[2] EO 13132 calls for federal consultations with state and local governments, and requires federal agencies to provide a federalism impact statement whenever proposed regulations would have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."[3] In practice, however, the application of EO 13132 has been uneven, with only some, but not all federal agencies and departments maintaining internal guidance to evaluate the effect of proposed agency actions and rulemakings on federalism.[4]

The Administrative Conference of the United States ("ACUS"), a federal advisory body, released recommendations in 2011 for federal agencies and departments to help guide the federal-state relationship on regulatory preemption.[5] The recommendations, which were aspirational, not obligational, included one calling for federal agencies to "reach out to appropriate State and local officials early in the [rulemaking] process when they are considering preemptive rules."[6]

For States and local governments, this recommendation raises the question, "to what end?" When a federal agency proposes a draft regulation that would have a preemptive effect on state and local governments, the affected parties often file comments with the intent to modify the draft rule and mitigate the preemption. Instead of providing state and local officials with new equipment to improve the odds of mitigating, let alone overcoming a federal preemptive rulemaking, optimally at the conceptual stage, the ACUS recommendation simply reminds sub-federal stakeholders to be alert to the pending preemption.

ACUS also explained that their goal with these recommendations was "not to favor or disfavor preemption".[7] Unfortunately, the ACUS recommendations may have been an opportunity missed to help move the intergovernmental relationship closer to partnership because by remaining neutral on preemption, ACUS endorsed the status quo.

Federal officials may desire partnership with States and local governments, but, in practice, statutory and administrative rules limit it. States are often petitioners in rulemakings, offering formal comments to proposed rules based on self-interest, governed by filing deadlines and *ex parte* procedures. The federal "notice-and-comment"

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[2] Exec. Order No. 13132, 64 Fed. Reg. 153 (Aug. 10, 1999).
[3] Id. at §6(c)(2) and §1(a).
[4] Sharkey, C., Federal Agency Preemption of State Law (Executive Summary), https://www.acus.gov/sites/default/files/documents/Executive-Summary_Dec_20.pdf (Last visited Feb. 22, 2018).
[5] Recommendation 2010 – Agency Procedures for Considering Preemption of State Law, 76 Fed. Reg. 81 (Jan. 3, 2011).
[6] Id. at 83 (Recommendation 5.d.)
[7] Id. at 82.

rulemaking process itself can invite procedural challenges that may thwart the desired collaborative intergovernmental relationship.

Governors support a vibrant and strong partnership with Congress and the Administration to maintain and promote a balanced federal system. But, until a pragmatic strategy developed through intergovernmental collaboration among committed champions from across the levels of government emerges that roadmaps revisions, for instance, to long-standing administrative procedures that guide federal rulemakings, the federal call for "partnership" risks a less-than-satisfying answer.

We encourage this Committee specifically, and the Congress generally, not to pass on important opportunities to go bold and help promote the intergovernmental partnership.

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