Attorneys General of the States of California, Arizona, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, and Vermont, the Commissioner of the New Jersey Department of Environmental Protection, the Secretary of the New Mexico Environment Department, the Secretary of the Commonwealth of Pennsylvania Department of Environmental Protection, the Attorney General of the District of Columbia, and the Corporation Counsel of the City of New York

July 1, 2008

The Honorable Nicole R. Nason
Administrator
National Highway Traffic Safety Administration
U.S. Department of Transportation
West Building
1200 New Jersey Avenue, SE
Washington, DC 20590

RE: Notice of Proposed Rulemaking (NPRM) for Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011–2015
[Docket No. NHTSA-2008-0089]

Comments Regarding NHTSA's Views on Preemption

Dear Administrator Nason:

We are submitting these comments of the Attorneys General of the States of California, Arizona, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, and Vermont, the Commissioner of the New Jersey Department of Environmental Protection, the Secretary of the New Mexico Environment Department, the Secretary of the Commonwealth of Pennsylvania Department of Environmental Protection, the Attorney General of the District of Columbia, and the Corporation Counsel of the City of New York regarding the preemption views of the National Highway Traffic Safety Administration (NHTSA) that are discussed in NHTSA's notice of proposed rulemaking for corporate average fuel economy (CAFE) standards for passenger cars and light trucks for model years 2011 through 2015. *See* 73 Fed. Reg. 24,352 (May 2, 2008). Many of us are separately submitting comments on the standard-setting issues in NHTSA's notice. Together, these officials represent over 38% of the Nation's population.

In the notice of proposed rulemaking, NHTSA states its view that state carbon dioxide emission standards are preempted by federal law. 73 Fed. Reg. at 24,478-79. This is an unwarranted attack on California's motor vehicle greenhouse gas emission standards, which have also been adopted by or are being considered by sixteen other States. The States have adopted these standards because they are a meaningful, feasible, and cost-effective way to help address global warming. California and the other States strongly disagree with and object to

NHTSA's views on preemption of state emission standards, and the appropriateness of NHTSA expressing its views in the context of this rulemaking.

NHTSA's view on preemption has no bearing on these CAFE standards. The U.S. Environmental Protection Agency (EPA) has not granted California a waiver of preemption, pursuant to Clean Air Act section 209(b), 42 U.S.C. § 7543(b), for California's motor vehicle greenhouse gas emission standards. Without a waiver, California's regulations need not be considered by NHTSA under 49 U.S.C. § 32902(f) and are wholly irrelevant to the fuel economy standards at issue here. Moreover, even if California had a waiver, it is the courts – not NHTSA – that will balance the provisions of two federal statutes (the Energy Policy and Conservation Act and the Clean Air Act) to determine whether these state emission standards are preempted or are enforceable. Thus, there is no reason for NHTSA to discuss preemption in the context of this rulemaking.

NHTSA has already acknowledged in the courts that the question of preemption is not properly before it. In its brief filed in the U.S. Court of Appeals for the Ninth Circuit in *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2007), NHTSA argued that any challenge to its preemption position (on state greenhouse gas emission standards) could not be brought because a waiver had not been granted. *See* Brief of Respondents, *Center for Biological Diversity* at 125-31. NHTSA argued that this disagreement about preemption was "hypothetical, as EPA has not granted a waiver of the Clean Air Act's preemption." *Id.* at 128 (emphasis in original). NHTSA also argued that its position on preemption would create no injury to California – it would have no effect – "in the absence of a waiver." *Id.* The agency concluded that "EPCA preemption will be properly presented, if at all, *only* if EPA determines that it is appropriate to grant a waiver of the Clean Air Act's conceded preemptive effect on California's regulations." *Id.* at 129 (emphasis added). The agency also stressed its subsidiary role on the question of preemption: "[T]he validity of those state regulations will be litigated in the Central Valley case, where the court will properly consider the effect of NHTSA's preemption analysis. . . . NHTSA's explanation of the preemptive effect of EPCA and the CAFE standard does not by itself alter the validity of the state regulations." *Id.* at 130-31. The Ninth Circuit accepted NHTSA's own argument, and did not reach the preemption issue. *Center for Biological Diversity*, 508 F.3d at 514 n.1. There is no reasoned way for NHTSA to take a contradictory position now.

In addition, two federal courts have already determined that NHTSA's preemption position on the merits is simply wrong. *See Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F.Supp.2d 1151 (E.D. Cal. 2007), *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295 (D.Vt. 2007). Among other things, the agency fails to give proper weight to California's role under the Clean Air Act, Congress's acknowledgment of that role in enacting 49 U.S.C. § 32902(f), Congress's preservation of that role in enacting the broad savings clause of the Energy Independence and Security Act of 2007 (Pub. L. No. 110-140, § 3, 121 Stat. 1492, 1498 (codified at 42 U.S.C. § 17002)), and the Supreme Court's decision in *Massachusetts v.*

EPA, 127 S. Ct. 1438 (2007).

It is ironic that NHTSA places its expansive views on preemption under the heading "Executive Order 13132 Federalism." That Executive Order was issued to protect state authority from federal agencies that are overly ambitious in defining the scope of preemption. Section 2(i) explains that "[t]he national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government." 64 Fed. Reg. 43,255, 43,256 (Aug. 4, 1999). Executive Order 13132 requires that federal agencies not only consult with the States on preemption issues, but also that they defer to the States and restrict preemption to the "minimum level necessary." 64 Fed. Reg. at 43,257-58. While NHTSA has made several statements about preemption in the Federal Register and asked the U.S. Department of Justice to file two amicus briefs on this point, it has never actually consulted with the States on this issue. And no observer would characterize NHTSA's preemption position as deferential to the States or narrowly drawn. NHTSA has failed to comply with the letter or the spirit of this Executive Order.[1]

NHTSA not only expresses its views on preemption in the preamble, but also proposes to take the unusual step of including an appendix in the Code of Federal Regulations on its position. It is unclear what the agency hopes to accomplish by doing so. NHTSA's current views on preemption are already a matter of public record. Whatever the purpose of the appendix, NHTSA should explain to the public, with citation to the relevant legal authorities, why the agency is considering an issue not relevant to this rulemaking, and taking a position directly at odds with the efforts of multiple states and before two federal appellate courts. It is worth emphasizing that NHTSA has no authority to adopt a regulation on preemption; it only has authority to adopt fuel economy standards. Placing this preemption material in an appendix with the intent to give it some regulatory status is inconsistent with the governing requirements of federal law:

> Appendices are not regulatory text and do not carry the force and effect of law. In fact, the Office of [the] Federal Register specifically prohibits an appendix from containing regulatory requirements:
>
> > Rules and proposed rules. Use an appendix to improve the

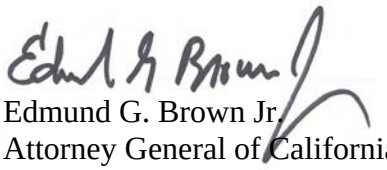
1. NHTSA asserts that this rulemaking is not discretionary, and therefore Executive Order 13132 does not apply. 73 Fed. Reg. at 24,479. This is reminiscent of an argument that the Ninth Circuit dismissed. *Center for Biological Diversity*, 508 F.3d at 545. In fact, NHTSA does have some discretion in how it sets the CAFE standards at issue here, and moreover there is surely nothing that mandates that NHTSA comment on preemption.

> quality or use of a rule but not to impose requirements or restrictions.
>
> *Use an appendix to present:* (a) Supplemental, background, or explanatory information which illustrates or amplifies a rule that is complete in itself; or (b) Forms or charts which illustrate the regulatory text.
>
> You may not use the appendix as a substitute for regulatory text. Present regulatory material as an amendment to the CFR, not disguised as an appendix.
>
> *Material in an appendix may not:* (a) Amend or affect existing portions of CFR text; or (b) Introduce new requirements or restrictions into your regulations.

73 Fed. Reg. 2,326, 2,330 (Jan. 14, 2008); emphasis in original and quoting National Archives and Records Administration, Office of the Federal Register, Federal Register Document Drafting Handbook at 7.9 (October 1998).

Because the issue of preemption has nothing to do with the substance of these fuel economy rules, and in the end will be decided by the courts, it is a distraction diverting the agency's resources and needlessly injecting acrimony between the agency and the States. We *strongly* urge NHTSA to withdraw the preemption discussion from the rule and allow the States to focus on the substance of the rules.

Sincerely,



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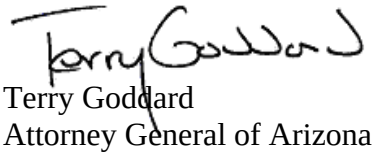
Attorney General of California



Terry Goddard
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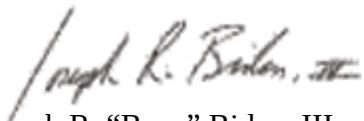

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Lisa P. Jackson
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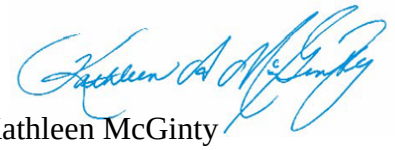

Kathleen McGinty
Secretary of the Commonwealth of
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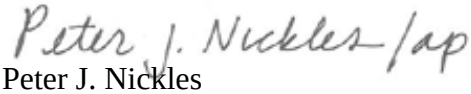

Peter J. Nickles
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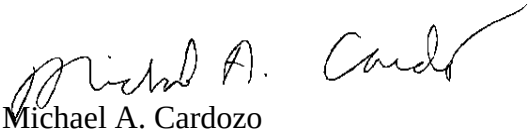

Michael A. Cardozo
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cc: Docket Management Facility