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Congressional Preemption of State Laws and Regulations

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CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS

PREPARED FOR

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CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS

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EXECUTIVE SUMMARY

Republican leaders in Congress and President Bush have long claimed to respect the role of states as laboratories of democracy. These claims were an important element of the midterm elections in 1994 that led to Republican control of Congress. And they were an important part of George W. Bush's presidential campaign in 2000. After the 2000 election, President Bush pledged to support the nation's governors and affirmed his view that the role of the federal government is "not to impose its will on states and local communities."

At the request of Rep. Henry A. Waxman, this report evaluates the legislative record of the Republican-controlled Congress and President Bush on a key aspect of state authority: federal preemption of state and local laws. The report is based on a comprehensive list assembled by the Special Investigations Division of the preemptive legislation passed by the House and Senate over the last five years.

The report documents that there exists a wide gulf between the pro-states rhetoric of Republican leaders and the actual legislative record. Rather than ceding power to the states, the Republican-controlled Congress and President Bush have repeatedly preempted state authority and centralized policy-making in Washington.

Key Findings

Over the past five years, the House and the Senate have voted 57 times to preempt state laws and regulations. These votes have resulted in 27 laws, signed by the President, that preempt state authority. Some of this legislation contains multiple distinct preemptive provisions. Over the last five years, the House and the Senate have passed 73 separate preemptive provisions, and 39 of these have become law.

An examination of this legislation reveals that Congress and the President have routinely backed federal legislation that usurps traditional state powers. The reach of the preemptive legislation is broad and its intrusiveness is deep. Literally hundreds of state laws have been or would be overridden.

The House and Senate have passed legislation that would preempt states from regulating sources of air pollution, setting health insurance standards, and protecting consumers from contaminated food. Areas of traditional state prerogatives, such as local land use decisions and the issuance of drivers' licenses, have been federalized, and states have been blocked from protecting their citizens from emerging threats, such as unsolicited "spam" email. Last year, Congress passed — and the President flew through the night to sign — legislation to override the judgment of a state court in an individual family's private end-of-life decision.

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Most of the preemptive federal legislation passed by the House and the Senate over the last five years falls into four general categories:

- ***Usurping State Choices on Social Policies.*** The House and Senate have voted ten times to preempt states in the area of social policy. Congress has enacted laws that override state decisions regarding abortion, gun control, and school prayer. The House has passed legislation that would displace state laws regarding parental notification for teens seeking abortions. In the case of Terri Schiavo, Congress passed legislation and issued subpoenas to overturn the judgment of state courts and prevent the removal of Ms. Schiavo's feeding tubes.
- ***Preventing States from Protecting Health, Safety, and the Environment.*** The House and the Senate have voted 15 times to override state health, safety, and environmental laws. Congress has enacted laws that bar states from regulating emissions from lawnmowers, requiring the use of clean-burning gasoline, or controlling the siting of electricity transmission lines and liquefied natural gas terminals. The House has passed legislation that would preempt state food safety laws and block states from requiring health insurers to offer basic services such as mammography screening and maternity care. In these areas, the traditional approach of enacting a federal "floor," which establishes minimum federal standards but allows states to adopt more stringent requirements, has been reversed in favor of the creation of a federal "ceiling."
- ***Overriding State Consumer Protection Laws.*** The House and the Senate have voted ten times to abrogate state consumer protection laws. One law passed by Congress preempts strong anti-spam laws in several states, while another law limits state authority to enact identity theft and financial privacy laws.
- ***Seizing Power from State Courts.*** The House and the Senate have voted 27 times to strip state courts of traditional areas of jurisdiction. Congress has enacted laws that transfer class action cases to the federal courts and provide liability immunity to vaccine manufacturers, gun manufacturers and dealers, rental car agencies, manufacturers of homeland security products, and private airport screeners. The House has passed bills that would extend liability protections to hospitals and physicians, fast-food restaurants, and manufacturers of dietary supplements.

Extensive though it is, the preemptive federal legislation described in this report underestimates the full extent of recent legislative efforts to override state laws. The enumeration of preemptive bills in the report does not include preemptive legislation that is brought to the floor of the House or the Senate by Republican leaders, but defeated, such as the proposed constitutional amendment to ban gay marriages that the Senate Majority Leader brought to the floor in July 2004 and has rescheduled for floor consideration in June 2006. It also does not count

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preemptive legislation reported by committees of jurisdiction but not yet considered on the House or Senate floor.

I. INTRODUCTION

The political system of the United States is based on a federal structure in which the powers of government are divided between a central federal authority and the states that make up the union. The founding fathers recognized that the “federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.”¹ Thomas Jefferson asserted in his first inaugural address that state governments provided “the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican tendencies.”²

Allowing states to adopt their own solutions to local and even national problems can have multiple advantages. States are closer to their residents than the federal government, enabling them to craft policy approaches tailored to local circumstances. Justice Brandeis coined the concept of states as “laboratories of democracy,” writing that 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.”³

In 1994, Republicans came to power in the House of Representatives claiming to be the party that supported returning power to the states while shrinking the size of the federal government. Since then, Republican leaders in Congress have repeatedly promised to transfer authority to the states. These sentiments were echoed by then-Governor Bush during his campaign for president. Upon his election in 2000, there was widespread expectation that President Bush would increase federal deference to state and local authority.

Just two weeks after the 1994 elections that gave Republicans a majority in the House of Representatives, *USA Today* ran an article with the headline, “Shifting Power to States a Top Gingrich Goal.”⁴ Newt Gingrich, the soon-to-be House Speaker, told Republican governors: “Tell us how much you’re prepared to take back (from the federal government) and we’ll send it.”⁵ Newly elected Senator Mike DeWine of Ohio wrote in the *Columbus Dispatch*: “Congress is about to put in motion mechanisms that will ... alter the relationship between the states

¹ James Madison, *Federalist No. 10* (Nov. 1787).

² Thomas Jefferson, *First Inaugural Address* (March 4, 1801).

³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (U.S. 1932).

⁴ *Shifting Power to States a Top Gingrich Goal*, *USA Today* (Nov. 18, 1994).

⁵ *Id.*

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and Washington to a degree that only the most ardent Reaganites ever imagined.”⁶

In August 1995, Rep. Tom Delay, then the Majority Whip in the House, reiterated these claims, stating on the House floor: “If there was one message coming from the last election, it is that the American people are fed up with Washington dictating to them how they are going to live, how they are going to spend their State funds, and how they are going to do business in their own States.”⁷

When Texas Governor George W. Bush was elected President in 2000, Governor Tom Ridge of Pennsylvania, who subsequently became the Secretary of Homeland Security, opined that “George is more inclined than the current administration to trust state legislators and governors — Democrats and Republicans — to make decisions.”⁸ Governor Michael O. Leavitt of Utah, who subsequently became the Administrator of the Environmental Protection Agency and then the Secretary of Health and Human Services, said he believed that the new administration would be pervaded by a philosophy favoring the devolution of power to the states.⁹

At a meeting in Crawford, Texas, with Republican governors shortly after he was elected, President Bush said: “While I believe there’s a role for the federal government, it’s not to impose its will on states and local communities. It’s to empower states and people and local communities to be able to realize the vast potential of this great country.”¹⁰ Just one month after his inauguration, President Bush predicted: “When the history of this administration is written, it will be said the nation’s governors had a faithful friend in the White House.”¹¹

There are several ways to measure whether the Republican-controlled Congress and President Bush have kept their commitment “not to impose [their] will on states and local communities.” A series of outstanding articles by investigative reporters have assessed one important issue: whether federal regulations issued by the executive branch have overridden state and local laws or regulations. These articles have found that “through arcane regulatory actions and legal opinions, the Bush administration is providing industries with an unprecedented degree of protection at the expense of an individual’s right to sue and a state’s right to regulate,”¹² that “officials appointed by President Bush have moved in

⁶ *Revolutionary Changes Coming in Federal-State Relationship*, Columbus Dispatch (Dec. 30, 1994).

⁷ *Statement of Rep. Tom Delay*, Congressional Record, H8375 (Aug. 3, 1995).

⁸ *Shifting of Power from Washington is Seen Under Bush*, New York Times (Jan. 7, 2001).

⁹ *Id.*

¹⁰ *President-Elect George W. Bush Meets with 19 Republican Governors to Discuss His Agenda*, NBC Nightly News (Jan. 6, 2001).

¹¹ Remarks by the President at National Governors’ Association Meeting (Feb. 26, 2001) (online at www.whitehouse.gov/news/releases/2001/02/20010226-8.html).

¹² *Industries Get Quiet Protections from Lawsuits*, Los Angeles Times (Feb. 19, 2006);

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recent months to neuter the states,”¹³ and that these preemptive efforts are “often done under the radar screen.”¹⁴

At the request of Rep. Henry A. Waxman, this report examines a key related question: whether federal legislation, as opposed to regulation, has preempted state and local laws or regulations. The report provides an evaluation of the legislative record on preemption over the last five years. Except for an 18-month period between June 2001 and January 2003, when Democrats had a narrow majority in the Senate, Republicans have controlled both bodies of Congress and the executive branch throughout this five-year period.

II. SCOPE AND METHODOLOGY

This report identifies legislation that has been enacted into law or has been passed by either the U.S. House of Representatives or the U.S. Senate that preempts state laws and regulations or seizes authority from state courts. It covers the period from January 3, 2001, when the 107th Congress convened, to May 31, 2006, 17 months into the 109th Congress.

The primary test for preemption used in the report is whether a federal law overrides state laws and regulations by barring the state from acting in an area or establishing federal law that displaces state laws or regulations. The report also considers as preemptive federal laws that impose limitations on state courts or that transfer authority from the state courts to federal ones.

To identify preemptive legislation, the Special Investigations Division consulted with the Congressional Budget Office, which examines the preemptive impact of legislation under the Unfunded Mandates Reform Act. CBO provided a list of laws passed by Congress that CBO identified as preempting state authority, as well as a list of legislation passed by either the House or the Senate that CBO identified as containing preemptive language when reported from congressional committees. The Special Investigations Division also reviewed the Congressional Record for references to preemption, examined reports prepared by the Congressional Research Service on the subject of preemption, and requested lists of preemptive legislation from staff of House committees.

In addition to these government sources, the Special Investigations Division spoke with and reviewed materials produced by organizations that have expressed concerns about federal preemption of state authority, including the National Conference of State Legislatures, the National Governors Association, U.S. Public Interest Research Group, and Consumer’s Union.

¹³ “*Silent Tort Reform*” Is Overriding States’ Powers, New York Times (Mar. 10, 2006).

¹⁴ *GOP Gives More Power to Federal Government*, Boston Globe (May 1, 2005).

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The report provides an enumeration and description of the preemptive legislation that has been (1) enacted into law or (2) passed by the House or the Senate, but not enacted into law, over the last five years. To prevent double counting, a bill that is enacted into law is counted only one time in the Congress in which the bill becomes law, unless either the House or the Senate passed a version of the legislation that contained additional preemptive provisions that were dropped from the final law. In the latter circumstance, House or Senate passage of the additional preemptive provisions is counted as an instance of House or Senate passage of preemptive provisions that were not enacted into law. Bills that are passed by the House or the Senate in multiple Congresses are counted as separate instances of House or Senate passage of preemptive legislation in each Congress in which they are passed.

Prior to the release of this report, there was no publicly available compilation of preemptive legislation enacted into law or passed by the House or the Senate. At the request of Rep. Waxman, the staff will maintain a publicly accessible database of this legislation online at www.democrats.reform.house.gov.

III. FINDINGS

The report finds that across a wide range of issues, the Republican-controlled Congress has repeatedly passed — and President Bush has repeatedly signed — bills that preempt state laws and regulations and seize jurisdiction from state courts. Despite the Republican rhetoric of devolving power to the states, the practice of the Congress and the President over the last five years has been to displace state and local policy judgments with mandates from Washington.

Over the past five years, the House and the Senate have voted 57 times to preempt state authority. The total number of preemptive provisions passed by the House or the Senate is greater than 57 because some of the bills contain multiple preemptive provisions. In total, the House and the Senate have passed 73 distinct preemptive provisions over the last five years.

These votes to preempt state authorities have resulted in the enactment of 27 laws, signed by the President, that override state law. In total, these 27 laws include 39 distinct preemptive provisions.

The preemptive bills passed by the House and the Senate nullify a wide array of state laws and regulations and significantly erode the authority of state courts. Some of the bills federalize traditional state authorities, such as state land-use decisions and issuance of state drivers' licenses. Others prevent the states from protecting their citizens from emerging threats, such as computer spyware or the growing problem of unsolicited email.

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Some of the preemptive bills are narrow in scope but represent an unprecedented intrusion into purely state and local matters, such as the law that stripped Florida state courts of jurisdiction over the end-of-life decisions of the Schiavo family. Other bills would overturn a huge swath of existing state laws and regulations, such as the House-passed bill that would block state regulation of food safety. Some of the bills advance the interests of large Republican campaign contributors, such as the law that preempts state regulation of information-sharing among affiliates of large financial institutions. Others impose social values held by a minority of Americans on communities across the nation.

Most of these preemptions have occurred in areas where the Republican leadership's policy preferences differ from the policies adopted by state governments or the decisions of state courts. In particular, as summarized below, the majority of the bills preempting state authorities fall into one of the following categories: (1) social policy; (2) health, safety, and environmental laws; (3) consumer protections; and (4) authority of state courts.

The preemptive provisions have drawn repeated opposition from organizations representing state governors, state legislators, and other state officials. The National Conference of State Legislatures reports that "pressure is mounting for Congress and the White House to support federal usurpation of state authority" and that these preemptions "curtail state creativity and state authority, and they often seek uniformity when uniformity is not necessarily the most effective means for resolving issues."¹⁵

In most cases, the preemptive provisions have been controversial in Congress, although there have been a few that were noncontroversial or bipartisan in nature.

The report does not quantify the total number of state laws and regulations that have been overturned by the Congress, as that information is generally not available. However, the aggregate number is in the hundreds, if not thousands. Partial data on preempted state laws is available for 6 of the 27 preemptive laws enacted over the last five years. These 6 laws have overridden at least 92 state laws or regulations. Partial data is also available for 6 preemptive bills passed by the House or the Senate but not enacted into law. Together, these 12 laws and bills have overridden or would override at least 314 state laws or regulations.

A. Usurping State Choices on Social Policy

Over the past five years, the House and the Senate have passed ten bills that override state and local decisions on social policy. Seven of these bills have been enacted into law.

¹⁵ National Conference of State Legislatures, *Preemption Monitor*, Vol. 2, Issue 2 (April 2006).

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A striking example occurred in March 2005, when the Republican-controlled Congress took the extraordinary step of overriding multiple state court decisions in order to interfere with one family's end-of-life decisions. Over the course of just a few days, Congress enacted — and the President flew through the night from Crawford, Texas, to sign — legislation that transferred jurisdiction over the removal of the feeding tube of Terri Schiavo from the state courts to a federal court.¹⁶ The legislation nullified repeated decisions made in state courts regarding Ms. Schiavo's feeding tube and gave the federal district court the authority to consider the case anew.

In a parallel effort, House Republicans sought to override the state court decisions to remove Ms. Schiavo's feeding tube by demanding her presence before Congress. On March 18, 2005, Rep. Tom Davis, the Chairman of the House Government Reform Committee, issued subpoenas to Ms. Schiavo, her husband, and hospice officials.¹⁷ The subpoenas required doctors and hospice officials to maintain “all medical and other equipment that provides nutrition and hydration to Theresa Marie Schiavo — in its current and continuing state of operations.”¹⁸

On several occasions, Congress has acted to preempt state authority regarding the provision of abortion. In November 2003, President Bush signed the Partial-Birth Abortion Ban Act, which makes it a crime for a physician to perform a “partial-birth abortion.”¹⁹ This law, which has been stayed pending court review, would override the decisions of voters in several states who rejected bans on partial-birth abortions. It would also preempt several state laws that affirmatively grant women the right to decide whether to have an abortion pre-viability.

In April 2005, the House passed the Child Interstate Abortion Notification Act, which would preempt a range of state laws regarding parental notification and waiting periods prior to the provision of an abortion.²⁰ The bill would establish new federal requirements for parental notification and waiting periods that physicians must follow when providing abortions to out-of-state teens, regardless of the laws in place in the state in which the abortion is performed.

Other laws passed by Congress and signed by the President preempt state laws that regulate gun ownership and the right to carry a concealed weapon. The Law Enforcement Officers Safety Act, which became law in July 2004, preempts state

¹⁶ Pub. L. No. 109-3 (2005).

¹⁷ Subpoena to Mrs. Theresa Marie Schiavo (Mar. 18, 2005); Subpoena to Mr. Michael Schiavo (Mar. 18, 2005); Subpoena to Dr. Victor Gambone (Mar. 18, 2005); Subpoena to Dr. Stanton Tripodis (Mar. 18, 2005); Subpoena to Ms. Annie Santamaria, Director, Hospice of the Florida Suncoast (Mar. 18, 2005).

¹⁸ Subpoena to Ms. Annie Santamaria, Director, Hospice of the Florida Suncoast (Mar. 18, 2005).

¹⁹ Pub. L. No. 108-105 (2003).

²⁰ H.R. 748.

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laws that prohibit retired law enforcement officers from carrying concealed weapons. The Protection of Lawful Commerce in Arms Act, which became law in October 2005, preempts state court actions involving gun manufacturers and dealers.²¹ In September 2004, the House passed the District of Columbia Personal Protection Act, which would have repealed the District of Columbia's gun control laws, including the District's gun registration requirements and its ban on carrying concealed weapons.²²

In January 2002, the President signed the No Child Left Behind Act. One provision of this law prohibits states and local school districts from adopting policies that would interfere with prayer in public schools, unless the school prayers would violate the federal Constitution.²³

B. Preventing States from Protecting Health, Safety, and the Environment

Since the Republicans took control of the White House and both houses of Congress in 2001, there has been a pronounced policy shift with respect to federal protections for public health, public and worker safety, and the environment. Many existing regulations have been modified to reduce perceived burden on the regulated industries, while pending new regulations have been slowed or adopted in a less stringent forms.

Perceiving a policy vacuum in these areas at the federal level, states have become more active. States have adopted laws and regulations more stringent than federal requirements in areas ranging from reducing the greenhouse gas emissions that cause climate change to improving health insurance coverage. For example, in 2005, seven Northeast states developed a Regional Greenhouse Gas Initiative. As described by acting New Jersey Governor Richard Codey, "In the absence of federal leadership, these states have come together to take real steps to cut carbon dioxide emissions."²⁴

The congressional response has been to repeatedly preempt state laws and regulations related to public health, safety, and the environment. Over the last five years, the House and the Senate have voted 15 times to override state laws or regulations addressing public health, public safety, or the environment. Five of these bills have become law.

Federal law has traditionally been a "floor" in the health, safety, and environmental area, mandating minimal federal protections but allowing states to

²¹ Pub. L. No. 109-92 (2005).

²² H.R. 3193, 108th Cong. (2004).

²³ Pub. L. No. 107-110 (2002).

²⁴ *Seven Northeast States Launch Regional Greenhouse Gas Initiative*, Environmental News Service (Dec. 20, 2005).

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adopt more stringent requirements. Over the last five years, the traditional federal floor has been turned into a federal “ceiling” that sets the maximum requirements applicable to regulated industries and bars states from adopting more stringent requirements.

One of the areas where state and local decision-making has traditionally received great deference involves local land-use decisions, particularly where proposed land uses may cause a threat to public safety or the environment. Yet despite this longstanding deference to state and local authorities, the Energy Policy Act of 2005 (EPAAct), which the President signed in August 2005, contains multiple preemptions of state land use and environmental authorities.²⁵ EPAAct allows the Department of Energy to authorize siting of electric transmission lines over the objections of states and localities. EPAAct authorizes federal courts to give eminent domain authority, a traditional state authority, to private utilities operating under federal permits, allowing these power companies to seize private property for transmission lines despite local opposition. And EPAAct strips states of their authority over siting of liquefied natural gas terminals, notwithstanding the significant public safety and environmental concerns associated the construction and operation of these facilities.

The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, which the President signed in May 2005, contains a similar preemption. It allows the Secretary of Homeland Security to waive all state and local laws applicable to the construction of “barriers and roads” near international borders.²⁶

Several other provisions enacted into law infringe upon states’ authority to protect public health by controlling local sources of air pollution. A rider in the Consolidated Appropriations Act of 2004, which was enacted in January 2004, stripped states (other than California) of their authority to limit emissions from small engines, such as those used in lawnmowers and other equipment, which can be a major source of air pollution.²⁷ A provision in the 2005 EPAAct severely limited states’ authority under the Clean Air Act to require oil companies to provide cleaner-burning gasoline.²⁸

Other health and safety preemptions have been passed by the House in the 109th Congress, but not yet enacted into law. In March 2006, the House passed the National Uniformity for Food Act, which would preempt state laws and regulations related to food safety and food labeling.²⁹ Although states have

²⁵ Pub. L. No. 109-58 (2005).

²⁶ Pub. L. No. 109-13, Section 102 (2005).

²⁷ Pub. L. No. 108-199, Division G, Title IV, Section 428 (2004).

²⁸ Pub. L. No. 109-58, Section 1541 (2005).

²⁹ H.R. 4167.

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traditionally taken the lead in protecting the public from adulterated foods, the legislation would preempt state authority in this area unless the state standards are identical to federal ones. Another provision in the legislation would bar states from requiring warning labels alerting consumers to health risks from foods.

While states could theoretically petition the federal Food and Drug Administration for permission to keep a law, there are no limits on FDA's ability to reject a petition and no funding provided for FDA to review such petitions. The bill is estimated to overturn approximately 200 existing state and local food safety laws, as well as blocking future laws.³⁰ Thirty-nine state attorneys general opposed these provisions because "prohibiting state and local leadership and action in this area is a serious mistake."³¹

In July 2005, the House passed the Small Business Health Fairness Act of 2005, which would preempt state laws governing small group health insurance plans.³² State laws and regulations currently require health insurers to provide access to important health services, such as access to mammography screening, emergency services, maternity care for expectant mothers, and well-baby care for infants. State laws and regulations also protect individuals and small groups from unlimited insurance premium increases, allow the right to external review in the case of denied claims, and minimize the likelihood of fraud and abuse.³³ Under the House-passed legislation, however, "Association Health Plans" certified by the Department of Labor would be exempt from these state requirements. The National Association of Insurance Commissioners wrote to Congress that the bill would "adversely impact consumers" by creating health insurance plans that operate "outside the authority of state regulators and beyond the reach of proven state consumer protections and solvency laws."³⁴

C. Overriding State Consumer Protection Laws

Historically, states have often taken the lead in passing laws and regulations that provide consumer protection. As with laws aimed at protecting health, safety, and

³⁰ The Center for Science in the Public Interest and National Resources Defense Council, *Shredding the Food Safety Net: A Partial Review of Food Safety and Labeling Laws Congress is Poised to Effectively Kill with H.R. 4167* (Mar. 2006) (online at <http://www.cspinet.org/new/pdf/shredding.pdf>).

³¹ Letter from 39 Attorneys General to Members of Congress (Mar. 1, 2006) (online at http://www.waxman.house.gov/pdfs/food_safety_naag.pdf).

³² H.R. 525.

³³ BlueCross BlueShield Association, *Association Health Plans: No State Regulation Means Loss of Protections for Consumers, Small Employers, and Providers* (May 2005).

³⁴ Letter from Catherine J. Weatherford, Executive Vice President and CEO of National Association of Insurance Commissioners, et. al. to Chairman John A. Boehner (Mar. 11, 2005) (online at http://www.naic.org/documents/govt_rel_issues_ahp_letters_0503_weatherford_morrison_praeger.pdf).

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the environment, federal laws in the area of consumer protection have generally provided a “floor,” mandating minimal federal protections but allowing states to adopt more stringent requirements. Over the last five years, however, the House and the Senate have voted 10 times to preempt state authority to protect consumers. Five of these bills have become law.

In December 2003, Congress passed the CAN-SPAM Act.³⁵ The goal of this legislation was to restrict the recent rise in unsolicited email. However, the Act preempted stronger anti-spam laws that had been enacted in California, Delaware, and other states. Whereas the California and Delaware laws banned all unsolicited email and required consumers to “opt in” to any email solicitations, the CAN-SPAM Act adopted the weaker approach of requiring consumers to “opt out” of email solicitations.³⁶ The National Association of Attorneys General opposed the preemptive provisions in the law because the CAN-SPAM Act has “so many loopholes, exceptions, and high standards of proof, that it provides minimal consumer protections.”³⁷

In November 2003, Congress passed the Fair and Accurate Credit Transactions Act (FACT Act), which amended the Fair Credit Reporting Act (FCRA).³⁸ The FACT Act made permanent temporary preemptive provisions in FCRA and added several new areas in which states cannot enact consumer protections more stringent than those in federal law. These preemptive provisions limit state authority to protect consumers from identity theft and safeguard their financial privacy.

In May 2005, the House passed the SPY Act, which would establish minimal federal requirements to address the emerging threat posed by computer spyware and would preempt any state laws that regulate spyware.³⁹ States were the first to pass legislation in this area, and to date 14 states have enacted laws that regulate spyware or create criminal penalties for those who install spyware on computers. All of these laws would be preempted by the SPY Act.

D. Seizing Power from State Courts

The Republican-controlled Congress and President Bush have been particularly active in legislating restrictions on the authority of state courts. In the United States, virtually all tort law is state law, and most tort claims are decided by state

³⁵ Pub. L. No. 108-187 (2003).

³⁶ *Bush OKs SPAM Bill, But Critics Not Convinced*, CNET News (Dec. 16, 2003).

³⁷ Letter from Internet Committee of the National Association of Attorneys General to House Speaker Hastert et. al. (Nov. 3, 2003) (online at http://www.epic.org/privacy/junk_mail/spam/agltrs877.pdf).

³⁸ Pub. L. No. 108-159 (2003).

³⁹ H.R. 29.

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courts.⁴⁰ Even when federal courts have jurisdiction to hear tort cases, they are obligated to apply state law to state claims.⁴¹ Despite the tradition of state jurisdiction over these lawsuits, the House and the Senate have passed 27 bills to strip jurisdiction from state courts. Thirteen of these bills have become law.

In February 2005, in what House Majority Leader Tom Delay described as the “first step of the new Congress towards fulfilling our mandate to reform America's legal system,”⁴² Congress enacted legislation to preclude state courts from hearing class action lawsuits, many but not all of which are tort cases. This law, the Class Action Fairness Act, eliminates state court jurisdiction over class action cases in which the total amount in dispute exceeds \$5 million and in which any plaintiff lives in a different state than any defendant.⁴³ According to the National Conference of State Legislatures, the legislation “undermines our system of federalism, disrespects our State court system, and clearly preempts carefully crafted State judicial processes which have been in place for decades regarding the treatment of class action lawsuits.”⁴⁴

Eight times over the past five years, Congress has enacted laws that grant immunity to favored defendants in state court actions. The Department of Defense Appropriation Act for 2006, which the President signed in December 2005, strips state courts of jurisdiction to hear liability suits against drug and vaccine manufacturers who make products designated as pandemic flu “countermeasures.”⁴⁵ The Protection of Lawful Commerce in Arms Act, which the President signed in October 2005, prohibits lawsuits against gun manufacturers and sellers, as well as firearm trade associations, for damages resulting from the criminal or unlawful use of a firearm.⁴⁶ The SAFETEA-LU Act, which the President signed in August 2005, includes a provision that blocks lawsuits against rental car agencies in cases of accidents involving rental vehicles.⁴⁷ The Homeland Security Act of 2002, which the President signed in November 2002, provides extensive legal immunity to sellers of “qualified anti-

⁴⁰ Federal courts cannot decide tort cases unless certain criteria for federal jurisdiction are met. Federal courts have jurisdiction over civil actions that deal with a federal question that arises out of the U.S. Constitution, acts of Congress, or treaties (28 U.S.C. § 1331); exceed \$75,000 and are between parties residing in different states (28 U.S.C. § 1332); are initiated by the U.S. government (28 U.S.C. § 1345); or are brought against the U.S. government (28 U.S.C. § 1346).

⁴¹ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

⁴² *Statement of Rep. Tom Delay*, Congressional Record, H589 (Feb. 15, 2005).

⁴³ Pub. L. No. 109-2 (2005).

⁴⁴ Letter from National Conference of State Legislatures to U.S. Senators (Feb. 2, 2005) (online at <http://www.citizen.org/documents/NCSLClassActionLetter2-05.pdf>).

⁴⁵ Pub. L. No. 109-148 (2005).

⁴⁶ Pub. L. No. 109-92 (2005).

⁴⁷ Pub. L. No. 109-59, Section 10208.

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terrorism technologies,” manufacturers of smallpox vaccines, and “federal flight deck officials.”⁴⁸

In both April 2003 and April 2005, the House passed a liability waiver for oil companies that produce MTBE, a toxic component of gasoline that has contaminated drinking water supplies across the country.⁴⁹ The MTBE liability waiver would undermine more than 100 lawsuits by states, counties, towns and water agencies for cleanup assistance.⁵⁰ According to the American Metropolitan Water Agencies, the effect of the liability waiver would be to shift \$32 billion in cleanup costs from industry to state and local taxpayers.⁵¹

In July 2005, the House passed the HEALTH Act of 2005, which would preempt state laws governing health care lawsuits.⁵² The bill would strip state courts of their traditional roles in health care litigation by mandating the use of a restrictive federal statute of limitations, capping noneconomic damages at \$250,000, setting restrictions on the payment of attorney contingency fees, and eliminating state joint liability laws.

In October 2005, the House passed legislation that would grant broad liability protection to food manufacturers, distributors, marketers, and retailers in lawsuits relating to weight gain, obesity, and health conditions associated with weight gain or obesity. Not only would this bill prevent future litigation, but it would also require state courts to dismiss litigation currently pending before them.⁵³

E. Other Preemptive Proposals

This report focuses on preemptive legislation enacted into law or passed by the House or the Senate. It does not comprehensively examine other legislative efforts by Republican leaders or President Bush to override state authority. As a result, the report underestimates the full extent of the preemption agenda of the Republican-controlled Congress and the President.

⁴⁸ Pub. L. No. 107-296 (2002).

⁴⁹ See H.R. 6, Energy Policy Act of 2005, §1502, as passed House; H.R. 6, Energy Policy Act of 2003, §17102, as passed House.

⁵⁰ See Letter from Douglas Holtz-Eakin, Director, Congressional Budget Office to Chairman David Dreier, Committee on Rules (Apr. 19, 2005) (noting that “CBO anticipates that precluding existing and future claims based on defective product would reduce the size of judgments in favor of state and local governments over the next five years”) (online at <http://www.cbo.gov/ftpdocs/62xx/doc6297/hr6.pdf>).

⁵¹ American Metropolitan Water Agencies, *Cost Estimate To Remove MTBE Contamination From Public Drinking Water Systems In The United States* (Jun. 20, 2005) (online at www.amwa.net/mtbe/amwa-mtbecostest.pdf).

⁵² H.R. 5.

⁵³ H.R. 554.

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On several occasions, the Republican Majority Leader in the Senate has brought preemptive proposals to the Senate floor, but has been defeated in his attempt to secure passage. A leading example is the proposed amendment to the U.S. Constitution to bar same sex marriage in the United States.⁵⁴ The Supreme Court has long recognized that it is the traditional role of states to regulate marriage.⁵⁵ Notwithstanding this traditional state role, Republican Majority Leader Bill Frist sought a Senate vote in July 2004 to pass a constitutional amendment to prevent states from making their own determination about whether to recognize same sex unions. This proposal did not garner the 60 votes needed to defeat a filibuster.⁵⁶ As a result, it is not included in the enumeration of preemptive legislation in the report. Senator Frist is expected to bring the marriage amendment before the Senate again this year.

Similarly, this report does not include the preemptive legislation considered on the floor of the Senate during “Health Week” in May 2006. During that week, Senate Majority Leader Frist called for debate and a vote on the Medical Care Access Protection Act of 2006 and the Healthy Mothers and Healthy Babies Access to Care Act of 2006, both of which would preempt the authority of state courts over medical malpractice lawsuits.⁵⁷ The Majority Leader also called for debate and a vote on the Health Insurance Marketplace Modernization and Affordability Act of 2005, which would exempt many health insurance plans from state laws and regulations.⁵⁸ All three of these bills were defeated when they failed to garner enough votes to defeat a filibuster.

The report also does not include preemptive proposals that have been reported by congressional committees, but not yet scheduled for floor consideration. A recent example is the Financial Data Protection Act, which the Financial Services Committee reported in May 2006.⁵⁹ The bill would preempt laws in at least 22 states that require financial institutions to disclose the loss of personal data, as well as laws in at least 12 states that allow consumers to block access to their credit records.⁶⁰ Although this legislation has substantial support among Republican leaders in Congress — and may yet be scheduled for floor action — it is not on the list of 57 preemptive bills passed by the House or the Senate.

⁵⁴ S.J. Res. 1 (introduced Jan. 24, 2005); H.J. Res. 39 (introduced Mar. 17, 2005).

⁵⁵ *See Loving v. Virginia*, 388 U.S. 1, 7 (1967) (“the state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power”) (internal citations omitted).

⁵⁶ U.S. Senate, Roll Call Vote on the Motion to Invoke Cloture on the Motion to Proceed to Consider S. J. Res. 40 (July 14, 2004) (48 ayes, 50 nos).

⁵⁷ S. 22; S. 23.

⁵⁸ S. 1955.

⁵⁹ H.R. 3997.

⁶⁰ *Data Brokers Press for U.S. Law*, The Los Angeles Times (Dec. 26, 2005).

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In addition, the report excludes preemptive legislation that has been proposed by the Bush Administration, but has not passed the House or the Senate. An example here is the Stockholm and Rotterdam Toxics Treaty Act of 2005, which would implement the Stockholm Convention on persistent organic pollutants.⁶¹ An Assistant Secretary of State testified in March 2006 that the Administration “strongly support[s]” the bill, which contains provisions limiting states’ authority to regulate these dangerous substances.⁶² The bill is not included in the count of preemptive legislation in this report because it has not yet been considered on the House or the Senate floor.

Taken together, the preemptive legislation enacted into law, the preemptive bills that have passed the House and the Senate, and the additional legislative proposals to preempt state authority paint a picture of the Republican-controlled Congress and President Bush that is markedly different from the public rhetoric of Republican leaders in Washington. Rhetorically, Republican leaders have promised to respect state authorities and devolve power from Washington. In practice, the Congress and the President have repeatedly acted to usurp state authorities and impose policy decisions dictated in Washington upon the states.

IV. DETAILED LIST OF PREEMPTIVE LAWS AND BILLS

A. Preemptions Passed into Law from 2001 to 2006

1. Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Pub. L. No. 109-148)

Preemption of State Tort Law Regarding Injuries from Certain Drugs and Vaccines

On December 30, 2005, President Bush signed into law the Department of Defense Appropriations Act for 2006, which significantly limits state court jurisdiction over a broad set of claims of injuries from drugs and vaccines. Specifically, Title V, Division C grants sole jurisdiction to federal courts over claims of injuries from any “covered countermeasure” against a pandemic or epidemics, which can include both vaccines and treatments.⁶³ The law gives the Secretary of Health and Human Services broad authority to declare a drug or

⁶¹ H.R. 4591.

⁶² Testimony of Claudia A. McMurray, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, U.S. Dept. of State, House Committee on Energy and Commerce, Subcommittee on Environment and Hazardous Materials, *Hearing on Legislation to Implement the POPs, PIC, and LRTAP POPs Agreements* (Mar. 2, 2006).

⁶³ Pub. L. No. 109-148 (2005); 42 U.S.C. §§ 247d-6d, 247d-6e.

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vaccine a covered countermeasure with the attendant liability protection. It also makes it difficult to bring a claim of injury and receive compensation.

These provisions limit state authority over tort claims against drug and vaccine manufacturers, which, with a few specific exceptions, are generally brought in state courts. The provisions also fail to provide any meaningful compensation to people who may be injured by these pharmaceutical products.

2. Science, State, Justice, Commerce, and Related Agencies Appropriations Act for 2006 (Pub. L. No. 109-108) Preemption of State Authority to Access Firearms Data

On November 22, 2005, President Bush signed into law the Science, State, Justice, Commerce and Related Agencies Appropriations Act of 2006, which includes a provision that limits states' and localities' use of the Firearms Trace System database maintained by the Bureau of Alcohol Tobacco and Firearms. This database tracks firearms associated with criminal activities and accidents. Prior to passage of this provision, the database was used by state and local officials seeking to identify the manufacturers of guns that are used repeatedly and disproportionately in violent crimes or are prone to cause accidental damages.⁶⁴

The provision bars states and localities from using the Firearms Trace System for anything other than criminal investigations and it only allows the requesting state or locality to have access to data pertaining to firearm information collected within their own jurisdiction.⁶⁵ The law explicitly bars state and local investigators from using any data in the system for civil suits.⁶⁶ An identically worded provision was included in the Consolidated Appropriations Act of 2005, and is discussed in part IV.A.9.

3. Protection of Lawful Commerce in Arms Act (Pub. L. No. 109-92) Preemption of State Authority to File Civil Liability Actions Against Gun Manufacturers

On October 26, 2005, President Bush signed the Protection of Lawful Commerce in Arms Act into law. This law prevents civil liability actions against gun manufacturers, including those filed by states and local municipalities, save for six exceptions relating to the willful violation of certain state or federal laws. The suits that are covered under the law include suits challenging inappropriate and suggestive advertising practices; suits involving practices and procedures that

⁶⁴ U.S. Department of State, *Background Paper: Alcohol, Tobacco, and Firearms Program on Tracing Illegal Small Arms* (June 2, 2001) (online at www.state.gov/t/pm/rls/fs/2001/3773.htm).

⁶⁵ Pub. L. No. 109-108, Title I (2005).

⁶⁶ *Id.*

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make the illegal distribution of weapons more likely to occur; and suits faulting gun manufacturers for failure to add adequate safety features.⁶⁷ The law applies retroactively so as to effectively terminate any civil action currently awaiting judgment in various levels of the judicial system.

The legislation was strongly opposed by the United States Conference of Mayors, among others, who objected to the preemption of state laws and raised concerns that this would impede cities' efforts to shut down "kitchen table" dealers.⁶⁸

4. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. No. 109-59) Preemption of Rental Car Vicarious Liability Statutes

On August 10, 2005, President Bush signed the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA-LU) into law. This large transportation bill includes a provision, inserted on the floor of the House by Rep. Sam Graves, that preempts state vicarious liability laws by prohibiting the owner of a vehicle to be "held liable under the law of any State" for accidents that occur when the car is driven by a renter or lessee and the owner is not found to be negligent.⁶⁹

At the time the legislation was enacted, sixteen states had vicarious liability statutes that allowed rental car companies to be found liable for accidents caused by negligent drivers.⁷⁰ Often enacted in states with large tourism industries and a large number of out-of-state car renters, such as California, New York, and Florida, these laws ensured that victims could receive compensation if they were harmed in an accident caused by an uninsured driver in a rental car.

The preemptive provision in the legislation was opposed by the National Conference of State Legislatures. NCSL argued that this was an area of state responsibility that did not require federal involvement. In addition, NCSL noted that the "pros and cons of this type of legislation were fully considered in the

⁶⁷ *A New Push to Grant Gun Industry Immunity From Suits*, New York Times (Apr. 4, 2003).

⁶⁸ United States Conference of Mayors, *Gun Immunity Considered by Congress* (May 9, 2005) (online at http://www.usmayors.org/uscm/us_mayor_newspaper/documents/05_09_05/guns.asp).

⁶⁹ Safe, Accountable, Flexible, Efficient Transportation Equity Act, Pub L. No. 109-59 § 10208 (2005).

⁷⁰ Letter from Michael Balboni, Chair, National Conference of State Legislatures Committee on Law and Criminal Justice to Senate Majority Leader Bill Frist and Senate Minority Leader Harry Reid (Apr. 26, 2005).

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states,” while the “federal effort to preempt state laws has been orchestrated without the benefit of input from the states.”⁷¹

5. Energy Policy Act of 2005 (Pub. L. No. 109-58)

Preemption of State Authority to Address Environmental Issues

On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005 (EPAct), which contains several distinct provisions preempting different aspects of state authority. The law preempts states and localities in the exercise of their traditional authorities over local land use decisions, siting liquefied natural gas facilities, and pollution control.

Preemption of State Authority over Transmission Lines

EPAct transfers the authority to approve the siting of certain transmission lines from state and local governments to the federal government. States and localities have long exercised this authority to protect the environment, address local land use preferences, and ensure reliable power service. EPAct shifts this authority to the Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC).

Under section 1221 of EPAct, DOE may designate “national interest electric transmission corridors” within which state and local authority to deny or condition transmission line permit requests is severely limited. If a state denies a permit, places certain conditions on a permit, or has not acted on a permit within one year for any reason, including lack of information provided by the applicant, FERC can step in and issue the permit.

In addition, the section intrudes on long-standing state and local eminent domain authority. Under section 1221, electric utilities that have received a permit from FERC to construct a power line over state objections can petition a federal court for the right to exercise the power of eminent domain over private property in order to construct new transmission lines.

This section directly conflicts with the policy of the National Governors Association on the siting of transmission lines, which states:

Governors oppose preemption of traditional state and local authority over siting of electricity transmission networks. Governors recognize that situations exist where better cooperation could improve competition and reliability. Governors are willing to engage in a dialogue with the federal

⁷¹ *Id.*

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government and industry to address these situations in a manner that does not intrude upon traditional state and local authority.⁷²

Preemption of State Authority over Liquefied Natural Gas (LNG) Terminals

EPAct shifts the authority over siting onshore liquefied natural gas (LNG) facilities from states to the federal government. Previously, states had the authority to site LNG facilities in a manner that guarded the state's interests in land use, public safety, and environmental protections.⁷³

Section 311 of EPAct grants FERC exclusive authority to approve or deny the siting, construction, expansion, and operation of onshore LNG terminals. State efforts to protect public safety or to address ratepayer and environmental concerns are preempted. While the law requires FERC to consult with state and local governments regarding safety concerns, they have no role in the final decision. State and local governments also lose the ability to impose penalties for safety violations at LNG facilities. The Act purports to preserve the rights of states under three specific environmental laws — the Coastal Zone Management Act, the Clean Air Act, and the Federal Water Pollution Control Act — but only to the extent that section 311 does not specifically provide otherwise.⁷⁴

This provision has significant practical implications for state authority. Sixteen applications for onshore LNG terminals are pending before FERC, and an additional nine potential locations for onshore LNG terminals have been identified by the LNG industry.⁷⁵ Each of these applications raise significant safety concerns, including the possibility of a highly destructive explosion in the event of a terrorist attack.⁷⁶ Yet state governments now have no authority to

⁷² National Governors Association, *NR-18: Comprehensive National Energy and Electricity Policy* (2003).

⁷³ Prior to the passage of EPAct, FERC attempted unilaterally to assert jurisdiction over LNG facilities and was sued by the state of California since the FERC action deviates from the plain language of the Natural Gas Act. *Californians for Renewable Energy Inc. & California Public Utilities Commission v. Federal Energy Regulatory Commission*, 9th Cir. Nos. 04-73650 & 04-75240.

⁷⁴ See NOAA, *Implications of the Energy Policy Act of 2005 (Pub. L. No. 109-58) Provisions Relating to the Coastal Zone Management Act* (Sept. 23, 2005) (“some state CZMA enforceable policies that NOAA previously approved that would specifically apply to LNG or LNG-type facilities would likely no longer be enforceable”).

⁷⁵ E.g. Federal Energy Regulatory Commission, *Existing and Proposed North American LNG Terminals* (Mar. 8, 2006) (online at <http://www.ferc.gov/industries/lng/indus-act/terminals/exist-prop-lng.pdf>); Federal Energy Regulatory Commission, *Potential North American LNG Terminals* (Mar. 7, 2006) (online at <http://www.ferc.gov/industries/lng/indus-act/terminals/horizon-lng.pdf>).

⁷⁶ Sandia National Laboratories, *Guidance on Risk Analysis and Safety Implications of a Large Liquefied Natural Gas (LNG) Spill Over Water* (Dec. 2004).

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require any safety precautions or even to prosecute known violations of federal safety requirements.

This provision was opposed by state officials from both West Coast and East Coast states, as well as by the National Governors Association.⁷⁷

Limitation on State Authority to Require Clean Fuels for Motor Vehicles

EPAct sharply limits states' powers to require cleaner burning motor vehicle fuels. This law runs contrary to the Clean Air Act's long-standing recognition of states' authority to adopt more stringent pollution controls than the federal government. Prior to the adoption of EPAct, the Clean Air Act allowed states to require that gasoline and diesel fuel meet state "clean fuel" standards that are more stringent than federal standards if the states can demonstrate that the more stringent state standards are necessary for an area to meet the health-based air quality standards.⁷⁸

Section 1541 of EPAct bars EPA from approving — and hence bars a state from adopting — a new requirement for cleaner burning fuel unless: (1) the fuel would not increase the total number of fuel formulations in existence in 2004 and (2) use of the same fuel is already required elsewhere in that petroleum distribution district. In practice, this would block state requirements for any new and innovative type of clean burning fuels. It would also stop some areas from requiring clean burning fuel formulations that are used in other parts of the country. Section 1541 also allows EPA to suspend existing state clean fuel requirements under vaguely defined "extreme and unusual fuel and fuel additive supply circumstances."⁷⁹

This repeal of state clean fuel authorities was strongly opposed by state and local air pollution officials. According to these officials, requiring cleaner burning gasoline or diesel fuel is often one of the most cost-effective and least burdensome ways for states and localities to clean up their air and meet the health-based national air quality standards.⁸⁰ They stated that the provision

⁷⁷ See, e.g., Letter from Governors Schwarzenegger (R-CA), Romney (R-MA), Blanco (D-LA), Carcieri (R-RI), Codey (D-NJ) and Minner (D-DE) to Chairman Domenici and Senators Bingaman, Alexander, and Dorgan (May 25, 2005); Letter from Raymond C. Schepach, National Governors Association, to Chairman Domenici and Senator Bingaman (June 21, 2005).

⁷⁸ See CAA § 211(c)(4)(C); 42 U.S.C. 7545(c)(4)(c).

⁷⁹ Pub. L. No. 109-58 § 1541(a) (2005).

⁸⁰ See State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials, *Air Pollution Topics — Vehicles and Fuels* (online at www.4cleanair.org/TopicDetails.asp?parent=27#docs-Fuels).

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would “sharply curtail current state authority” that is “critical to protecting ... citizens from air pollution.”⁸¹

6. Emergency Supplemental Appropriation Act for Defense, the Global War on Terror, and Tsunami Relief of 2005 (Pub. L. No. 109-13)

On May 11, 2005, President Bush signed into law the Emergency Supplemental Appropriation Act for Defense, the Global War on Terror, and Tsunami Relief. This Act includes two preemptive provisions: one that limits state authority over drivers’ licenses and one that preempts state authority to make land use decisions.

Preemption of State Driver’s License and Personal Identification Regulations

The REAL ID Act of 2005 was enacted into law as part of the Emergency Supplemental Appropriation Act for Defense, the Global War on Terror, and Tsunami Relief. This law imposes numerous standards and procedures for issuing drivers’ licenses and personal identification cards. If the federally mandated requirements for issuance are not met, the noncompliant states’ IDs are not eligible for “official purposes,” and thus citizens of noncompliant states are prohibited from “accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary of Homeland Security shall determine.”⁸²

This federal law preempts state law in at least four instances. First, section 202(c) preempts state verification standards and replaces them with new federal standards.⁸³ Second, section 202(c)(2)(B) requires that a state verify the applicant’s legal status and issue licenses and IDs only to those legally in the United States. Previously, states were able to determine on a state-by-state basis which categories of people were eligible for such cards, and many did not require the lawful presence of a license or ID holder.⁸⁴

⁸¹ Letter from S. William Becker, Executive Director, State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officials to Chairman Joe Barton (Apr. 11, 2005).

⁸² Pub. L. No. 109-13 at Division B, § 201 (2005).

⁸³ Section 202(c) establishes minimum document requirements and issuance standards for federal recognition. It requires that before a state can issue a license or ID, a state will have to verify with the issuing agency, the issuance, validity and completeness of: (1) a photo identity document, except that a non-photo identity document is acceptable if it includes both the person's full legal name and date of birth, (2) documentation showing the person's date of birth, (3) proof of the person's social security account number or verification that the person is not eligible for a social security account number, and (4) documentation showing the person's name and address of principal residence.

⁸⁴ As of September 13, 2005, the following states did not require lawful presence as a condition of a drivers’ license: Alaska, Delaware, the District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Washington.

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Third, section 202(c)(2)(C) establishes a system of temporary driver's licenses and ID cards that can be issued to applicants falling into six categories. These IDs must be issued with a clearly visible expiration date equal to the period of time of the applicant's stay, and in the case of an indefinite stay, must expire in one year. Renewal of these ID cards is subject to approval by the Department of Homeland Security. Any similar provisions that existed under state law are preempted by the REAL ID Act.⁸⁵ Finally, section 202(d) establishes thirteen other requirements for driver's license and personal ID issuance that require states to adopt new procedures and practices.⁸⁶

The National Governor's Association, the American Association of Motor Vehicle Administrators, the National Conference of State Legislatures, and the Council of State Governments joined in opposition to the REAL ID Act, arguing that it "would impose technological standards and verification procedures on states, many of which are beyond the current capacity of even the federal government."⁸⁷ Recently, Governor Mike Huckabee, the chairman of the National Governors Association, described the requirements of the law as "absolutely absurd," pointing out that "the time frame is unrealistic; the lack of funding is inexcusable."⁸⁸ The New Hampshire House of Representatives passed legislation in 2006 that would bar the state from participating in REAL ID, but the bill failed in the state Senate.⁸⁹

Preemption of State Authority over Local Land Use Decisions

Section 102 of the Emergency Supplemental Appropriation Act provides that the Secretary of the Department of Homeland Security can "in his sole discretion" waive all local, state, and federal laws and regulations to "ensure expeditious construction of the barriers and roads" near international borders.⁹⁰ A waiver requires no prior public notice or process, and is effective upon publication in the *Federal Register*.⁹¹

In the seventeen states with international borders, this provision gives the Secretary the power to eliminate the authority of the states, as well as local governments, to regulate barrier or road projects in the border area. States and

Alison Smith, *Summary of State Laws on the Issuance of Driver's Licenses to Undocumented Aliens*, CRS Report for Congress (Sept. 13, 2005).

⁸⁵ Michael John Garcia, Margaret Mikyung Lee, and Todd Tatelman, *Immigration: Analysis of the Major Provisions of the REAL ID Act of 2005*, CRS Report for Congress, 41 (May 25, 2005).

⁸⁶ *Id.* at 42.

⁸⁷ Letter from Raymond C. Scheppach, Executive Director, National Governors Association et. al. to Senate Majority Leader Frist and Senate Minority Leader Reid (Mar. 17, 2005).

⁸⁸ *Mandate for ID Meets Resistance From States*, The New York Times (May 6, 2006).

⁸⁹ *New Hampshire Ends Rebellion Against REAL ID*, The Associated Press (May 12, 2006).

⁹⁰ Pub. L. No. 109-13 at Division B, § 102 (2005).

⁹¹ *Id.*

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localities would be unable to ensure that such projects consider or mitigate conflicts with local land uses or minimize damage to the local environment. Even if an adversely affected state or community objected to a proposed federal project and set forth less destructive alternatives, the Secretary could ignore those objections.

State officials and environmental groups strongly opposed this federal override of state authority to regulate local land use. Among other effects, section 102 allows the Secretary to proceed with a controversial proposal to construct a fourteen mile security barrier south of San Diego, California, while ignoring numerous environmental and land use laws that California state agencies enforce. In objecting to this proposal, the California Coastal Commission, a state agency, cited the adverse environmental effects of filling a valley with millions of cubic yards of soil, as well as the resulting increased erosion and impacts on the downstream estuary.⁹²

7. A Bill to Provide for the Relief of the Parents of Theresa Marie Schiavo (Pub. L. No. 109-3)

Seizure of State Court Jurisdiction over End of Life Decisions

On March 21, 2005, the President signed into law Pub. L. 109-3, a bill to “provide for the relief of the parents of Theresa Marie Schiavo”. The law provided that a federal district court could consider the family dispute regarding the medical treatment of Terri Schiavo *de novo*, “notwithstanding any prior state court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings.”⁹³ At the time the law was enacted, Florida state courts had repeatedly upheld the decision of Ms. Schiavo’s husband to remove Ms. Schiavo from life support.⁹⁴ The new federal law empowered the federal court to review the evidence that led to the Florida state court decisions, as well as any new evidence, and make an independent federal determination about whether Ms. Schiavo’s feeding tube could be removed.

In a parallel effort, House and Senate Republicans attempted to override the state courts’ decisions to remove Ms. Schiavo’s feeding tube by demanding her presence before Congress. On March 18, 2005, the House Government Reform Committee issued subpoenas to Ms. Schiavo, her husband, and hospice officials, and the Senate issued a letter asking Ms. Schiavo and her husband to appear at a

⁹² See California Coastal Commission, Revised Staff Report and Recommendation on Consistency Determination 7 (Feb. 18, 2004); see also *State Rejects U.S. Border Barrier Plan*, Los Angeles Times (Feb. 19, 2004); *Border Fence Plan Runs into a Barrier*, USA Today (Apr. 20, 2004); *Border Protections Imperil Environment*, San Francisco Chronicle (Feb. 27, 2006).

⁹³ Pub. L. No. 109-3 at § 2 (2005).

⁹⁴ See *In re Schiavo*, 780 So. 2d 176, 180 (Fla. Dist. Ct. App. 2001) (upholding the trial court’s decision to discontinue Terri Schiavo’s feeding and hydration).

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separate hearing.⁹⁵ Senate Majority Leader Frist made the intent of these actions clear, stating, “Federal criminal law protects witnesses called before official Congressional committee proceedings from anyone who may obstruct or impede a witness’ attendance or testimony.”⁹⁶

These efforts to federalize the end-of-life decisions of the Schiavo family were not successful. On March 18, 2005, the Florida state court judge overseeing the case refused to enforce the Government Reform Committee subpoenas and ordered Ms. Schiavo’s feeding tube removed.⁹⁷ Three days later, upon the passage of Pub. L. No. 109-3, a federal district court judge denied Ms. Schiavo’s parents’ request to reinsert the feeding tube, finding that “Theresa Schiavo’s life and liberty interests were adequately protected by the extensive process provided in the state courts.”⁹⁸ This decision was upheld by the federal circuit court and the Supreme Court, which refused to hear an appeal.⁹⁹

8. Class Action Fairness Act of 2005 (Pub. L. No. 109-2) Preemption of State Court Authority Over Class Action Lawsuits

On February 18, 2005, President Bush signed into law the Class Action Fairness Act, which constricts the authority of state courts by expanding the conditions for removal of class action suits to federal courts. Before passage of the law, class actions involving state-law claims could only be removed to federal court in one of two ways: (1) if all named members of the class and all defendants were from different states or (2) if all class members were claiming more than \$75,000. The expanded provisions for removal now require only that one of the class members and one of the defendants be citizens of different states or that the entire amount at stake be more than \$5 million.¹⁰⁰ The law also allows for removal to federal court cases in which a state attorney general is acting as a class representative to protect citizens, such as senior citizens or working poor.¹⁰¹

⁹⁵ Subpoena to Mrs. Theresa Marie Schiavo (Mar. 18, 2005); Subpoena to Mr. Michael Schiavo (Mar. 18, 2005); Subpoena to Dr. Victor Gambone (Mar. 18, 2005); Subpoena to Dr. Stanton Tripodis (Mar. 18, 2005); Subpoena to Ms. Annie Santamaria, Director, Hospice of the Florida Suncoast (Mar. 18, 2005); Letter from Senator Michael B. Enzi to Mrs. Theresa Marie Schiavo and Mr. Michael Schiavo (Mar.17, 2005).

⁹⁶ Statement of Senator William Frist (March 18, 2005) (online at http://frist.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1881&Month=3&Year=2005).

⁹⁷ *Despite Congress, Woman’s Feeding Tube Is Removed*, The New York Times (Mar. 19, 2005).

⁹⁸ *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1388 (M.D. Fla. 2005).

⁹⁹ *See, e.g. Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225 (11th Cir. 2005) (affirming the District Court decision); *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1282 (11th Cir. 2005) (denying a rehearing en banc); *Schiavo, ex rel. Schindler v. Schiavo*, 544 U.S. 945 (U.S. 2005) (denying Supreme Court consideration).

¹⁰⁰ 28 U.S.C § 1453.

¹⁰¹ *Id.*

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Fifteen state attorneys general wrote that the legislation “will inappropriately usurp the primary role of state courts in developing their own state tort and contract law, and will impair their ability to establish consistent interpretations of those laws.”¹⁰²

9. Consolidated Appropriations Act, 2005 (Pub. L. No. 108-447) Preemption of State Authority to Access Firearms Data

On December 8, 2004, President Bush signed into law the Consolidated Appropriations Act for 2005. This law includes a provision that limits states’ and localities’ use of the Firearms Trace System database maintained by the Bureau of Alcohol Tobacco and Firearms. An identical provision was included in the Science, State, Justice, Commerce, and Related Agencies Appropriations Act for 2006 and is discussed in part IV.A.2.

10. Internet Tax Nondiscrimination Act (Pub. L. No. 108-435) Prevention of State Taxation of Internet Access and Commerce

On December 3, 2004, President Bush signed into law the Internet Tax Nondiscrimination Act, which preempts state authority to levy taxes on the internet and certain telecommunications services. In 1999, Congress passed the Internet Tax Freedom Act, which created a four-year preemption of state authority to levy taxes on variety of internet services in order to give e-commerce a short grace period to develop and grow into a viable part of the market.¹⁰³ The law explicitly did not apply to telecommunications services, which remained available for state taxation.¹⁰⁴

The Internet Tax Nondiscrimination Act substantially expands the preemptive effect of the pre-existing law. First, it extends the bar on state taxation of internet services for an additional four years. Second, it adds new language expanding the scope of the preemption by limiting state authority to tax telecommunications services delivered over the internet.

The effect of this preemption is to bar states from accessing a rapidly growing revenue base. Using numbers generated by the telecommunications industry, the Center for Budget and Policy Priorities estimates that the telecommunication industry generates nearly \$12 billion in tax revenue to states annually.¹⁰⁵ With

¹⁰² Letter from Attorneys General Eliot Spitzer et. al. to Senate Majority Leader Frist and Minority Leader Reid (Feb. 7, 2005).

¹⁰³ Pub. L. No. 105-277 (1998); *see also Cable or Phone? Difference Can be Taxing*, New York Times (Apr. 5, 2004).

¹⁰⁴ Pub. L. No. 105-277 (1998).

¹⁰⁵ Center for Budget and Policy Priorities, *A Permanent Ban on Internet Access Taxation Risks Serious Erosion of State and Local Telephone Tax Revenue as Phone Calls Migrate to the Internet* (Feb. 11, 2004) (online at www.cbpp.org/2-11-04sfp.htm).

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the rapid move from traditional land line technology to internet-based technologies, this state revenue base could be imperiled. These concerns are shared by the National Governors Association, and the Multi State Tax Commission, as well as the Congressional Budget Office.¹⁰⁶

11. Ronald W. Reagan National Defense Authorization Act for FY 2005 (Pub. L. No. 108-375)

Preemption of State and Local Open Government Laws

On October 24, 2004, the President signed into law the Defense Authorization Act for 2005, which preempts state law by barring states and localities from releasing certain data generated by commercial satellites. Specifically, the Act bars state and local agencies, as well as federal agencies, from releasing any “land remote sensing” data that under the Land Remote Sensing Policy Act may only be sold to the government, including “any imagery and other product that is derived from such data.”

12. Prevention of Child Abduction Partnership Act (Pub. L. No. 108-370)

Preemption of State Court Authority over Certain Private Organizations

On October 25, 2004, President Bush signed into law the Prevention of Child Abduction Partnership Act, which preempts state tort law by limiting the liability of private entities that operate under the direction of the State Department and work to prevent child abductions.¹⁰⁷ Specifically, the Act amends the International Child Abduction Remedies Act to offer the National Center for Missing and Exploited Children and other similar organizations the same protections given the State Department in child abduction cases.¹⁰⁸

13. Law Enforcement Officers Safety Act of 2004 (Pub. L. No. 108-277)

Preemption of State Authority Regarding Concealed Firearms

On July 22, 2004, President Bush signed into law the Law Enforcement Officers Safety Act, which preempts state gun safety laws with respect to current and former law enforcement officers. Prior to the passage of this law, states had

¹⁰⁶ E.g., Multistate Tax Commission, *Revenue Impact on State and Local Governments of Permanent Extension of the Internet Tax Freedom Act* (Sept. 24, 2003) (online at www.mtc.gov/ITFAestimates092403.pdf); House Judiciary Committee, Subcommittee on Commercial and Administrative Law, Testimony of Michigan Governor John Engler, *Hearing on H.R. 1552 and H.R. 1675, both entitled the “Internet Tax Nondiscrimination Act”*, 107th Cong., (June 26, 2001).

¹⁰⁷ Pub. L. No. 108-380 (2004).

¹⁰⁸ *Id.* at § 2.

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authority to control many aspects of firearm transport, including the authority to ban concealed weapons.¹⁰⁹

The Law Enforcement Officers Safety Act authorizes current, off duty, and retired law enforcement officers to carry concealed weapons in any state in the United States. The only requirement imposed by the law is that the law enforcement officer be currently employed or have retired in good standing and be in control of his or her faculties.¹¹⁰ This law preempts states authority to regulate the manner in which individuals carry firearms within state borders. No state will be able to prevent current or former law enforcement officers from carrying a concealed firearm within their state and across state borders.

The International Association of Chiefs of Police (IACP) objected to overriding state law in this area.¹¹¹ Ronald Ruecker, the Superintendent of the Oregon State Police and the Fourth Vice President of the International Association of Chiefs of Police, testified:

“IACP has consistently opposed any federal legislative proposals that would either pre-empt and/or mandate the liberalization of an individual state’s laws that would allow citizens of other states to carry concealed weapons in that state without meeting its requirements. The IACP believes it is essential that state governments maintain the ability to legislate concealed carry laws that best fit the needs of their communities.”¹¹²

14. Project BioShield Act of 2004 (Pub. L. No. 108-276) Preemption of State Court Authority Regarding Certain Federal Contractors

On July 21, 2004, President Bush signed the Project Bioshield Act of 2004, which exempts certain federal contractors from state and federal tort liability. The Act allows the Secretary of Health and Human Services to contract with private companies “for the purpose of performing, administering, or supporting” the research, development, and administration of vaccines and other “countermeasures” for bioterrorism, chemical, and nuclear attacks.¹¹³ The

¹⁰⁹ 18 U.S.C. § 926A; e.g., *Compromise Gun-Control Bill Clears Senate, Goes to Reagan; Some Concerns of Policies Are Addressed*, The Washington Post (May 7, 1986); *Meese Goes Toe to Toe with Straw Men*, The Washington Post (Jul. 27, 1986).

¹¹⁰ 18 U.S.C. §§ 926A-C.

¹¹¹ Testimony of Superintendent of the Oregon State Police, and the Fourth Vice President of the International Association of Chiefs of Police Ronald Ruecker, House Committee on Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, *Hearing on the Law Enforcement Officers Safety Act of 2003* (June 15, 2004).

¹¹² *Id.*

¹¹³ Pub. L. No. 108-276 (2004).

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preemptive provisions in the law provide that these contractors will have the protection of the Federal Tort Claims Act, which gives them qualified immunity from lawsuits and requires that any lawsuits against them be brought against the U.S. government in federal court rather than state court.

15. Consolidated Appropriations Act, 2004 (Pub. L. No. 108-199) Bar on State Authority to Issue Rules Curbing Small Engine Emissions

On January 23, 2004, President Bush signed into law the Consolidated Appropriations Act of 2004, which bars states from adopting rules to limit air pollution from small engines, such as the engines used in lawn mowers, outboard engines, and personal watercraft, among other applications. Section 428 of the Act provides that “no state (excluding California) or any political subdivision thereof may adopt or attempt to enforce any standard or other requirement applicable to spark-ignition engines smaller than 50 horsepower.”¹¹⁴

Prior to enactment of this law, the federal Clean Air Act gave California the authority to set emission standards for small engines if such standards are at least as protective as the federal standards, and authorized other states to adopt the California standards. The effect of section 428 is to prohibit states from adopting the California standards. State air regulators opposed the law, calling it a “preemptive strike on states’ and localities’ ability to clean up the air.”¹¹⁵

16. CAN-SPAM Act of 2003 (Pub. L. No. 108-187) Preemption of State Laws Regulating Unsolicited Email Spam

On December 16, 2003, President Bush signed the CAN-SPAM Act, which preempts laws passed in 38 states to address the growing influx of unsolicited commercial e-mail. Specifically, the CAN-SPAM Act preempts any state law that “expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.”¹¹⁶

The federal protections in the CAN-SPAM Act are weaker than the restrictions on spam email in many of the state laws preempted by the Act. For example,

¹¹⁴ Pub. L. No. 108-199, Division G § 428 (c)-(d) (2004).

¹¹⁵ *Senate Proposal Would Limit State Authority to Curb Small Engine Emissions*, InsideEPA (Sept. 3, 2003); *see also State Officials Fume Over Senate Small Engine Emissions Deal*, InsideEPA (Dec. 4, 2003); *Deal Upholds California’s Small Engine Standards*, Environmental News Service (Nov. 24, 2003); Letter from R. Steven Brown, Executive Director of the Environmental Council of the States to Hon. Ted Stevens, Chairman of the Senate Appropriations Committee (Sept. 4, 2003).

¹¹⁶ Pub L. No. 108-187 (2003).

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California's anti-spam law required consumers to "opt-in" to email lists rather than opt-out as CAN-SPAM requires. The National Association of Attorneys General opposed the CAN-SPAM Act because the legislation had "so many loopholes, exceptions, and high standards of proof, that it provides minimal consumer protections and creates too many burdens for effective enforcement."¹¹⁷

17. Fairness to Contact Lens Consumers Act (Pub. L. No. 108-164) Preemption of State Authority to Regulate Prescribers of Contact Lenses

On December 6, 2003, President Bush signed the Fairness to Contact Lens Consumers Act, which establishes federal requirements regarding the purchase of contact lenses and preempts more restrictive state laws. The Act requires contact lens prescribers to give patients a copy of their prescription and verify its accuracy to any third-party seller chosen by the patient. The Act also prohibits prescribers from requiring patients to buy contact lenses as a condition of getting a copy of the prescription, and it prohibits withholding the prescription until payment is received for services performed by the prescriber (unless such payment is required in all cases). As part of this new federal scheme for contact lens regulation, the Act preempts any state or local laws that impose more restrictive rules on contact lens prescribers or sellers.

According to the Congressional Budget Office, the Act preempted five existing state laws that had more restrictive requirements for verifying prescriptions.¹¹⁸

18. Fair and Accurate Credit Transactions Act of 2003 (Pub. L. No. 108-159) Preemption of Some State Credit Reporting and Identity Theft Laws

On December 4, 2003, President Bush signed the Fair and Accurate Credit Transactions Act, which makes permanent temporary preemptions enacted in the 1996 amendments to the Fair Credit Reporting Act and creates new preemptions of state law.

The Federal Credit Reporting Act is the primary federal law regulating the use, accuracy, and privacy of consumer credit reports.¹¹⁹ Originally passed in 1970, FCRA ensures that consumers have access to the information that lenders and others use to judge their credit-worthiness. As originally enacted, FCRA set a floor for consumer protection, allowing the states to create additional protections for consumer access to information, and consumer privacy. In 1996, however, the law was amended to create seven areas of regulation in which states were

¹¹⁷ Letter from Internet Committee of the National Association of Attorneys General to House Speaker Hastert et. al. (Nov. 3, 2003).

¹¹⁸ Congressional Budget Office, *Cost Estimate H.R. 3140, Fairness to Contact Lens Consumers Act* (Oct. 15, 2003).

¹¹⁹ 15 U.S.C. § 1681.

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temporarily preempted from enacting their own laws.¹²⁰ These areas included prescreening of consumer reports, deadlines for consumer credit reporting agencies to respond to disputed information in a credit report, the content of consumer credit reports, the exchange of information among affiliated corporations, and obligations placed on persons who provide information to consumer reporting agencies. These preemptions were scheduled to expire in January 2004.

The Fair and Accurate Credit Transactions Act of 2003 (FACT Act) makes permanent all of the preemptive provisions in FCRA that were scheduled to expire and creates several additional preemptions. Among these new preemptions, section 151(a) of the FACT Act establishes requirements for information to be provided to victims of identity theft and preempts state laws in this area. Section 214 prohibits, with some exceptions, affiliate companies from sharing credit reports for the purpose of marketing solicitations and preempts state laws in this area. Other provisions in the FACT Act address preventing identity theft, including requiring the truncation of credit card account numbers on electronically printed receipts, the placement of fraud alerts on consumer credit reports, and free annual disclosure of credit reports. Subject to certain exemptions, these provisions also preempt similar state laws.¹²¹

California is particularly affected by the preemptions in the FACT Act. In 2003, California enacted the Financial Information Privacy Law. This law required that financial institutions allow customers the opportunity to “opt out” before sharing share nonpublic information with affiliate companies. After passage of the FACT Act, a federal court ruled that California’s law was preempted.¹²²

19. Partial-Birth Abortion Ban Act of 2003 (Pub. L. No. 108-105) Preemption of State Laws Regarding Abortion

On October 5, 2003, President Bush signed the Partial-Birth Abortion Ban Act, which makes it a crime for a physician to perform a “partial-birth abortion.” This law, which has been stayed pending court review, would override the decisions of voters in three states who rejected similar bans in statewide referenda.¹²³ In

¹²⁰ Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Title II, Subtitle D, Chapter 1 (1996) (adopting the Consumer Reporting Reform Act, H.R.561, 104th Cong. (1995)).

¹²¹ Pub. L. No. 108-159 (2003); *see also* Consumers Union, *2003 Changes to the Fair Credit Reporting Act: Important Steps Forward at a High Cost* (online at <http://www.consumersunion.org/creditmatters/creditmattersupdates/001636.html>).

¹²² *Am. Bankers Ass’n v. Lockyer*, Slip Copy, 2005 WL 2452798 (E.D. Cal. 2005).

¹²³ These states are Colorado, Maine, and Washington. *See* Center for Reproductive Rights, *So Called “Partial-Birth Abortion” Ban Legislation: By State* (Feb. 2004) (online at http://www.crlp.org/pdf/pub_bp_pba_bystate.pdf).

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addition, the law would preempt the laws of several states that affirmatively support a woman's right to choose.¹²⁴

20. An Act to Amend the Consumer Product Safety Act to Provide that Low-speed Electric Bicycles are Consumer Products Subject to Such Act (Pub. L. No. 107-319)

Preemption of State Regulation of Electric Bicycles

On December 4, 2002, President Bush signed Pub. L. No. 107-319, which preempts any state laws or regulations that require electric bicycles to meet the safety standards of motor vehicles.

21. Real Interstate Driver Equity Act of 2002 (Pub. L. No. 107-298)

Prohibition on some State Licensing and Fee Requirements

On November 26, 2002, President Bush signed into law the Real Interstate Driver Equity Act, which prevents states from imposing licensing and fee requirements on ground transportation carriers that provide prearranged interstate service, so long as the carriers are properly licensed in their home state and meet federal interstate transportation requirements.

22. Homeland Security Act of 2002 (Pub. L. No. 107-296)

Preemptions of State Court Authority and State Open Government Laws

On November 25, 2002, President Bush signed into law the Homeland Security Act, which includes several provisions that preempt state court authority through limitations on tort liability and a separate provision that overrides state and local open government laws.

Preemption of State Court Authority Regarding Vaccines

Section 304 of the Homeland Security Act immunizes manufacturers and administrators of smallpox vaccines from state tort liability. This new vaccine is anticipated to have significant side effects, with the CDC estimating that about one of every one million people vaccinated against smallpox will die, and several others will suffer severe medical complications.¹²⁵ Under the Homeland Security Act, individuals injured by the vaccine cannot bring any legal action against the manufacturers or administrators in any state court. The Act permits individuals to

¹²⁴ The states with this type of law are California, Connecticut, Maryland, Maine, Nevada, and Washington. The Connecticut law, for instance, provides that “[t]he decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician.” Conn. Gen. Stat. Ann. § 19a-602(a) (1990).

¹²⁵ Centers for Disease Control, *Frequently Asked Questions About Smallpox Vaccine* (December 29, 2004) (online at <http://www.bt.cdc.gov/agent/smallpox/vaccination/faq.asp>).

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bring suit against the federal government, in federal court, under the Federal Torts Claims Act. But these actions are difficult to sustain because of the many restrictions on government liability under the FTCA.

Preemption of State Court Authority Regarding Anti-Terrorism Technologies

Subtitle G, known as the SAFETY Act, provides legal immunity to suppliers of “qualified anti-terrorism technologies” designated by the Secretary of Homeland Security. Qualified technologies are products or services designed to prevent, detect, identify, deter, or limit the harm of terrorism. They can include a wide array of products, ranging from detection devices to medical products. Even services, such as security, can be considered qualified technologies.

Under Subtitle G, state tort law involving qualified anti-terrorism technologies is preempted. In place of state tort law, Subtitle G creates a limited federal cause of action against suppliers of these technologies for claims arising out of an act of terrorism. The federal cause of action provides a “government contractor” defense for suppliers, prevents the award of punitive damages, and limits liability to the amount of liability insurance held by the supplier.

Preemption of State Court Authority Regarding Liability of Air Transportation Security Companies

Section 890 limits the liability of air transportation security companies and their affiliates from claims relating to the terrorist attacks of September 11, 2001. Under section 890, these companies can only be held liable up to the amount of liability insurance that they held on the date of the attacks.

Preemption of State Court Authority Regarding Air Carrier Liability

Section 1201 limited the liability of air carriers for acts of terrorism through the end of 2003. This section extended a provision of the Air Transportation Safety and Stabilization Act, scheduled to expire in March 2002, that capped the liability of airline carriers for a terrorist act at \$100 million and barred punitive damages.¹²⁶

Preemption of State Court Authority Regarding Federal Flight Deck Officers

Section 1402 removes any claims against pilots authorized to carry firearms as “federal flight deck officers” from state courts and limits the liability of these pilots. Under this section, federal flight deck officers are immune from all personal liability, except in cases of gross negligence, arising from the federal officer’s defense of an aircraft from criminal violence or air piracy. The provision renders federal flight deck officers employees of the federal government for tort

¹²⁶ See Pub. L. No. 107-42 (2001).

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purposes, and it provides that claims against them be made in federal court under the Federal Tort Claims Act.

Preemption of State and Local Open Government Laws

Title II, the “Critical Infrastructure Information” title of the Act, creates a new preemption of state and local open government laws. These provisions of the Act exempt from public disclosure any information that is voluntarily provided to the federal government by a private party if the information relates to the security of vital infrastructure. In addition, the Act bars states and localities from releasing any of this critical infrastructure information provided to them by federal agencies under their own open government laws. According to the Act, states and localities cannot distribute or disclose the information without the written consent of the private entity that submitted the information to the government.

23. No Child Left Behind Act of 2001 (Pub. L. No. 107-110) Preemption of Some State and Local Authority over Education.

On January 8, 2002, President Bush signed the No Child Left Behind Act, which extends the federal role in education policy by requiring states to meet new accountability standards and face consequences for failing to meet “adequate yearly progress” targets. In addition, three sections effectively preempt state and local authority to set school policies.

Section 9524 of the Act requires all federally funded local education agencies to allow constitutionally permitted prayer in public schools. Specifically, local educational agencies must annually “certify in writing to the State educational agency involved that no policy of the local educational agency prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools.”

Section 9525 prohibits federally funded elementary and secondary schools from denying Boy Scouts organizations equal access to school campuses. According to this section of the Act, schools must give the Boy Scouts and other “patriotic society” organizations at least the same access to schools and students as is offered to other organizations. This effectively preempted the policies of school districts, such as Minneapolis, Minnesota, that stopped the Boy Scouts from distributing recruiting materials based on the organization’s statement that “homosexual conduct is inconsistent with the values espoused in the scout oath and law.”¹²⁷

¹²⁷ *Minneapolis Schools OK Scout Materials; A Federal Law Requires Schools to Give Boy Scouts the Same Access to Schools as Other Community Groups or Lose Federal Money*, Minneapolis Star Tribune (Nov. 5, 2005).

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Section 9528 requires federally funded schools to provide military recruiters with information about students in secondary and post-secondary school, unless the student or a parent declines consent. The section further requires local education agencies to provide “military recruiters the same access to secondary school students as is provided generally to post secondary educational institutions or to prospective employers of those students.” Almost 90% of high schools in Connecticut, Rhode Island, Vermont, Massachusetts, and Maine limited recruiters’ access to students prior to the passage of the No Child Left Behind Act.¹²⁸ This provision effectively preempted the decisions of those schools.

24. National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107)

Preemption of State Authority over Transportation Projects

On December 28, 2001, President Bush signed the National Defense Authorization Act for Fiscal Year 2002. A provision of this law overrides state laws that might impede the construction of a toll road through the Camp Pendleton Marine Base in San Clemente, California.¹²⁹ According to the House Committee report, the provision in this Act would “limit the effect of state law enacted after January 1, 2002, that would directly or indirectly prohibit or restrict the construction or approval” of this road.¹³⁰ The road in question is controversial because it could destroy pristine coastal watershed and critical habitat for many endangered species and is opposed by many California governmental officials, including Attorney General Bill Lockyer.¹³¹

Since the passage of this law, other efforts have been made to preempt state laws and override federal environmental laws in order to construct this road.¹³² One such effort, a provision in the House version of the Defense Authorization Act for FY 2003, is discussed in part IV.B.26.

25. Aviation and Transportation Security Act (Pub. L. No. 107-71)

Preemption of State Liability Law for Certain Volunteers

¹²⁸ *Bill Could Boost Recruiting at Schools*, Los Angeles Times (Nov. 2, 2001).

¹²⁹ The 1999 Defense Authorization Act gave the Navy the authority to “grant an easement, in perpetuity, to the Foothill/Eastern Transportation Corridor Agency ... over a parcel of real property at Marine Corps Base, Camp Pendleton, California ... to construct, operate, and maintain a restricted access highway.” Pub. L. No. 105-261 (1998).

¹³⁰ House Committee on Armed Services, *National Defense Authorization Act for Fiscal Year 2002*, 104th Cong. (Sept. 4, 2001) (H. Rept. 107-194).

¹³¹ *See, e.g., State Beach in Path of Route for Toll Road*, San Diego Union-Tribune (Dec. 7, 2005); *Groups Uniting to Battle O.C. Toll Road Plans*, Los Angeles Times (Sept. 20, 2004).

¹³² *See Route for New Tollway Goes Through D.C., Sacramento*, Los Angeles Times (Dec. 18, 2005).

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On November 19, 2001, President Bush signed into law the Aviation Security Act, which preempts state court authority over certain tort claims related to emergencies on airplanes. Section 44944 of the law preempts state court authority by granting a blanket exemption from liability for individuals who attempt to provide emergency assistance during in-flight emergencies. The liability exemption applies as long as the aid is not given “in a manner that constitutes gross negligence or willful misconduct.”¹³³

26. USA Patriot Act of 2001 (Pub. L. No. 107-56)

Two Preemptions of State Court Authority

On October 26, 2001, President Bush signed the USA PATRIOT Act, which preempts state liability law in two specific areas. Section 358 amends the Fair Credit Reporting Act to preempt state laws regarding privacy of credit records and to protect credit reporting agencies from state liability law. This section requires consumer reporting agencies to disclose credit reports to authorized government agencies investigating terrorism, and it provides that agencies providing information based on “good-faith reliance upon a certification of a governmental agency ... shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.”¹³⁴

Section 507 amends the General Education Provisions Act in a way that preempts state liability laws. The section requires educational institutions to turn over educational records if sought by the U.S. Attorney General in a written application to a court of competent jurisdiction. In such cases, the section provides that “[a]n educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.”¹³⁵

27. Air Transportation Safety and System Stabilization Act (Pub. L. No. 107-42)

Two Preemptions of State Court Authority

On September 22, 2001, President Bush signed into law the Air Transportation Safety and System Stabilization Act, which included two preemptions of state liability laws. Section 201(b) created a temporary cap on the liability for air carriers for terrorist acts committed after September 11. The section provided that air carriers would be liable for only \$100 million in damages and would be exempt from punitive damages, for any losses suffered due to a terrorist act that occurred during the 180 day period following the passage of the Act. This

¹³³ Pub. L. No. 107-71 (2001).

¹³⁴ USA PATRIOT Act of 2001, Pub. L. No. 107-56 § 358.

¹³⁵ *Id.* at § 507.

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liability cap was scheduled to expire in March 2002, but was extended until the end of 2003 in the Homeland Security Act of 2002, which is discussed in part IV.A.21.¹³⁶

Section 408 limited the liability of airlines for claims arising out of the hijackings of September 11, 2001. This section created an exclusive federal cause of action for these claims, eliminating state court authority. In addition, it restricted any damages from a liability claim to the amount of the airlines' liability coverage.

B. Bills that Passed either the House or the Senate from 2001 to 2006

1. Comprehensive Immigration Reform Act of 2006 (S. 2611) Preemption of local authority to require day labor centers

On May 25, 2006, the Senate passed S. 2611, the Comprehensive Immigration Reform Act of 2006, which includes a provision that would strip states and localities of their authority to require businesses to provide day laborer centers. These centers provide shelter and basic amenities for day laborers while they assemble on the streets, waiting for offers of work. Under section 301, no state or local government could require a private business to “provide, build, fund or maintain a shelter, structure, or designated area for use by day laborers at or near its place of business” as a condition for “conducting, continuing, or expanding a business.”¹³⁷

2. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) Preemption of local authority to require day labor centers

On December 16, 2005, the House passed H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, which includes a provision that would strip states and localities of their authority to require businesses to provide support to day laborer centers. Section 708 of this bill includes language identical to that in section 301 of S. 2611, which is described above.

3. National Uniformity for Food Act (H.R. 4167) Preemption of State Food Safety Laws

On March 8, 2006, the House passed the “National Uniformity for Food Act of 2005” (H.R. 4167), which would preempt hundreds of state laws to protect food safety.¹³⁸ States have traditionally been the primary guardians of food safety, and

¹³⁶ Pub. L. No. 107-296 § 1201 (2002).

¹³⁷ S.2611 § 301.

¹³⁸ This bill was brought to the House floor and passed without any committee hearings.

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state and local governments conduct 80% of food safety inspections.¹³⁹ Under the bill, this long-standing system would be overturned.

H.R. 4167 would preempt state laws protecting food safety in two distinct ways. First, it would bar states from maintaining or establishing substantive food safety laws, such as standards for adulterated foods and tolerance levels for poisonous or deleterious substances in food, unless those laws were identical to federal law.¹⁴⁰ Second, the bill would also stop states from simply requiring warning labels alerting consumers to health risks associated with foods, such as the presence of potentially life-threatening allergens, unless the state requirements are identical to federal law.¹⁴¹ The bill contains a purported exception to both preemptions, in that a state could retain or adopt a law if it petitioned FDA and FDA approved the requirement.¹⁴² However, there are virtually no limits on FDA's discretion to reject a state petition, and there are no funds provided for FDA to implement the burdensome task of reviewing hundreds of state and local food safety petitions.¹⁴³

H.R. 4167 is estimated to preempt approximately 200 state and local food safety laws, as well as many other laws that would have otherwise been adopted.¹⁴⁴ It was strongly opposed by 39 state attorneys general, state governors, the Association of Food and Drug Officials, the National Association of State Departments of Agriculture, and dozens of public health, consumer and environmental groups.¹⁴⁵

4. Gasoline for America's Security Act of 2005 (H.R. 3893)

Two Preemptions of State Authority to Protect the Environment

On October 7, 2005, the House passed H.R. 3893, the "Gasoline for America's Security Act of 2005," which would preempt state authority in two distinct areas: (1) siting and operation of oil refineries on federal lands within a state and (2) requirements for clean-burning gasoline to reduce air pollution.

¹³⁹ Letter from the Association of Food and Drug Officials to Rep. Mike Rogers (Dec. 5, 2005) (online at http://www.waxman.house.gov/pdfs/letter_afdo_12.5.05.pdf).

¹⁴⁰ Sec. 2(a), H.R. 4167 (establishing a new section 403A(a)(6) of the FFDCA).

¹⁴¹ Sec. 2(b), H.R. 4167 (establishing a new section 403B of the FFDCA).

¹⁴² *Id.*

¹⁴³ According to CBO, it will cost FDA \$100 million over the course of five years to implement H.R. 4167. Congressional Budget Office, *Cost Estimate: H.R. 4167, National Uniformity for Food Act of 2005* (Feb. 27, 2006) (online at <http://www.cbo.gov/ftpdocs/70xx/doc7050/hr4167.pdf>).

¹⁴⁴ The Center for Science in the Public Interest and National Resources Defense Council, *Shredding the Food Safety Net: A Partial Review of Food Safety and Labeling Laws Congress is Poised to Effectively Kill with H.R. 4167* (Mar. 2006) (online at <http://www.cspinet.org/new/pdf/shredding.pdf>).

¹⁴⁵ Letters of opposition (online at http://www.waxman.house.gov/issues/health/food_safety_hr_4167_letters_opposition.htm).

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This bill was opposed by the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the National Conference of State Legislatures, the attorney generals of nine states, the State and Territorial Air Pollution Program Administrators, the Association of Local Air Pollution Control Officials, and others.¹⁴⁶

Preemption of State Authority over Siting and Operation of Oil Refineries on Federal Lands

Sections 101 and 102 would allow the Department of Energy (DOE) to override state and local permitting authorities for oil refineries located on federal lands. Large industrial facilities, such as oil refineries, are subject to a variety of local, state, and federal land use and environmental laws, which are usually administered by the states or localities. These include zoning requirements, limits on air and water pollution, requirements for safe handling of toxic chemicals, waste disposal provisions, and other requirements designed to protect the economy, health, and environment of the local communities.

Sections 101 and 102 would direct the President to facilitate building new oil refineries on federal lands, and would block states and localities from ensuring that the facilities meet local laws and regulations, such as local land use requirements, pollution limits, and mandates for safe operation. The provisions would direct DOE to set deadlines for requests to site, expand, or operate an oil refinery and requires states and localities to meet those deadlines. If a state or locality misses a DOE deadline, the refinery developer would be able to go directly to the federal court of appeals to obtain a court order for state action. The provisions would not only circumvent the state and local permitting processes, it would also remove jurisdiction over any disputes from state court to federal court.

A provision within section 102 would impose a novel approach to attorney's fees that would further disadvantage any state or locality seeking to regulate a new or expanded refinery. This provision would award attorney's fees to the prevailing party in litigation only in cases defending the award of a refinery permit, not the denial of a permit. If an oil company were to sue a state for denying or delaying a permit and lose, the company would not pay attorney's fees to the state. But if a state or locality were to sue the federal government for improperly granting a permit and lose, the state would have to pay the federal government's attorney's fees.

¹⁴⁶ Letter from the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the National Conference of State Legislatures, to U.S. Representatives (Oct. 2005); Letter from the Attorney Generals of New York, California, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, Vermont, and Wisconsin, to Speaker J. Dennis Hastert and Democratic Leader Nancy Pelosi (Oct. 6, 2005); Letter from Nancy L. Seidman, President of STAPPA and John A. Paul, President of ALAPCO to U.S. Representatives (Oct. 6, 2005).

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Preemption of State Authority to Require Cleaner Burning Gasoline

Section 107 would largely eliminate states' authority to require cleaner-burning gasoline as a way to reduce local air pollution. The provision would accomplish this by further tightening the restrictions on state adoption of clean-burning fuels imposed by the Energy Policy Act of 2005 (EPAct). While the EPAct, as a practical matter, blocked states from requiring new fuel formulations that are not already required in another state, this provision would also bar states from requiring the use of some existing fuel formulations by limiting the total number of fuels that a state could require to four types of gasoline and two types of diesel fuel. The six fuel types would be set by EPA, not the states. The provision would also erect new hurdles for a state's adoption of any of the six approved fuel formulations.

5. Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act for Fiscal Year 2006 (H.R. 3058) Preemption of District of Columbia Gun Laws

On June 30, 2005, the House passed the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act for 2006, which included a provision that would have weakened the District of Columbia's gun control laws. Section 948, inserted as an amendment on the floor by Rep. Souder, would have prohibited the District of Columbia from enforcing a local law that requires any guns stored in a home to be disassembled and unloaded.¹⁴⁷

This provision was opposed by District of Columbia officials, including Mayor Anthony Williams, who testified before the Government Reform Committee: "As Mayor of the District of Columbia, it is my responsibility to do what I think is best to provide for the public safety of our citizens. Any attempt at the federal level to pass a law or otherwise replace my judgment and our City Council's judgment with that of officials elected elsewhere is an indignity to the democratic process and our citizens."¹⁴⁸ A more extensive repeal of the District's gun laws passed the House in 2004, and is discussed in part IV.B.18.

6. Department of Homeland Security Authorization for Fiscal Year 2006 (H.R. 1817) Preemption of State and Local Open Government Laws

¹⁴⁷ H.R. 3058, Sec. 948 (109th Cong.).

¹⁴⁸ Testimony of District of Columbia Mayor Anthony A. Williams, Committee on Government Reform Hearing, *Under Fire: Does the District of Columbia's Gun Ban Help or Hurt the Fight Against Crime?* (June 28, 2005).

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On May 18, 2005, the House passed the Homeland Security Authorization Act for 2006, which includes a section that would preempt state open government laws. Subtitle D of this bill would require the Secretary of Homeland Security to complete a prioritization of the nation's critical infrastructure, review the security plans of the prioritized infrastructure, and recommend changes to those plans. Section 334 would exempt from state and local open government laws all information "generated, compiled, or disseminated by the Department of Homeland Security" for this subtitle and provided to state and local governments.

7. Child Interstate Abortion Notification Act (H.R. 748) Preemption of State Abortion Laws

On April 27, 2005, the House passed the Child Interstate Abortion Notification Act of 2005, which would effectively preempt a range of state laws regarding parental notification and waiting periods prior to the provision of an abortion. The bill would create new parental notification and waiting period requirements for teens who travel out of state for abortions and establish criminal penalties for physicians who do not comply with these requirements. Under the bill, whenever a minor crosses the border for abortion services, the physician would be required to ensure written parental notification or, if this is "not possible after a reasonable effort has been made," to send notice by certified mail. In addition, even if the parents are present and have given consent, physicians would be required to enforce a 24 hour waiting period prior to providing an abortion.

The bill also provides that any person other than a parent or legal guardian who transports a teenager across a state line for an abortion, as well as the physician who performs the abortion, must comply with the notification requirements of the state in which the teen resides.

These new restrictions are more stringent than the laws of many states, and they apply regardless of the laws of the state in which the abortion is performed. The bill would effectively preempt the laws of the 26 states and the District of Columbia that do not require a waiting period, and the 16 states and the District of Columbia that do not require parental notification.¹⁴⁹

8. Personal Responsibility in Food Consumption Act of 2005 (H.R.554) Preemption of State Court Authority Over Certain Tort Claims

On October 19, 2005, the House passed the Personal Responsibility in Food Consumption Act, which would strip state courts of jurisdiction over tort claims related to food consumption and obesity. The bill would eliminate state court jurisdiction by giving broad liability protection to food manufacturers, distributors, marketers, and retailers from lawsuits relating to a person's

¹⁴⁹ *State Policies in Brief*, Guttmacher Institute (May 1, 2006) (available online at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf).

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consumption of food and weight gain, obesity, or any health condition associated with a person's weight gain or obesity. The bill would not only preclude future lawsuits, but it would also dismiss pending lawsuits.

This legislation would also block lawsuits against companies that make dietary supplements that contain dangerous stimulant ingredients, even if such ingredients caused serious injuries such as heart attack, stroke, or death.

9. Small Business Health Fairness Act of 2005 (H.R. 525) Preemption of State Health Insurance Laws and Regulations

On July 26, 2005, the House passed the Small Business Health Fairness Act of 2005, which would prevent states from applying insurance regulations and consumer protection laws to certain health insurance plans offered by trade and professional associations.

Under current law, trade and professional associations may offer health insurance plans to small employers who are members of the association. These plans are regulated by the states and must abide by all applicable state laws. State laws and regulations often protect individuals and small groups from unlimited insurance premium increases, allow the right to external review in the case of denied claims, and minimize the likelihood of fraud and abuse.¹⁵⁰ State laws also ensure access to important health services, such as access to mammography screening, emergency services, maternity care for expectant mothers and well-baby care for infants.¹⁵¹

H.R. 525 provides that Association Health Plans (AHPs) certified by the Department of Labor would be exempted from state regulations and consumer protection laws. AHPs would have sole discretion to select specific items and services to be covered, potentially refusing coverage of important preventative health services.¹⁵²

The National Governors' Association wrote that this bill would "undermine our efforts" to ensure that affordable health insurance is available.¹⁵³ In addition, the AHP legislation would replace state oversight with minimal regulatory authority

¹⁵⁰ BlueCross BlueShield Association, *Association Health Plans: No State Regulation Means Loss for Protections for Consumers, Small Employers, and Providers* (May 2005).

¹⁵¹ *Id.*

¹⁵² Minority Staff, Committee on Education and the Workforce, *Minority Views: Small Business Health Fairness Act of 2005* (Apr. 12, 2005) (<http://edworkforce.house.gov/democrats/hr525views.html>).

¹⁵³ Letter from Governors Mark R. Warner and Mike Huckabee of the National Governors Association to Majority Leader Frist and Minority Leader Reid (Mar. 28, 2005).

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by the U.S. Department of Labor, which, the National Governors' Association states, "has no capacity for regulating insurance arrangements."¹⁵⁴

10. Lawsuit Abuse Reduction Act of 2005 (H.R. 420)

Preemption of State Court Authority Over Certain Lawsuits

On October 27, 2005, the House passed the Lawsuit Abuse Reduction Act of 2005, which would preempt state law by imposing federal penalties for those who file frivolous lawsuits in state courts.

The bill would amend Rule 11 of the Federal Rules of Civil Procedure, which specifies how federal courts determine if a case is frivolous and sets sanctions against the lawyers and parties involved in frivolous suits. Rule 11 was last altered in 1993 — after consultation with the Judicial Conference of the United States, Supreme Court approval, and congressional consideration — to allow a "safe harbor" of 21 days within which a party can withdraw an inappropriate claim before sanctions are imposed and to give judges discretion in levying sanctions.¹⁵⁵ H.R. 420 would reassert the pre-1993 sanctions, eliminate the safe harbor period for Rule 11 filings, and would, for the first time, require state courts to apply Rule 11 in certain cases. The bill would mandate that state courts apply Rule 11 in cases in which the action "substantially affects interstate commerce."¹⁵⁶

The American Bar Association wrote to House Members opposing the legislation, arguing that this bill would violate the basic foundations of federalism: "State rules relating to venue and jurisdiction should be developed at the state level and supported by extensive study, vetted publicly, and made subject to comment by the legal profession. To do otherwise would violate our long-established principles of federalism."¹⁵⁷

11. SPY Act (H.R. 29)

Preemption of State Efforts to Regulate Spyware

On May 23, 2005, the House passed the SPY Act, which would preempt state laws that regulate computer spyware. Spyware is software placed on a computer without the user's knowledge that can take control of the computer, track or collect the online activities or personal information, or cause advertising messages to pop up on users' computer screens.

¹⁵⁴ *Id.*

¹⁵⁵ Letter from Leonidas Ralph Meecham, Secretary, Judicial Conference of the United States to F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary (May 17, 2006).

¹⁵⁶ H.R. 420, Sec. 3.

¹⁵⁷ Letter from Michael S. Greco, President, American Bar Association, to Members of the House of Representatives (Oct. 10, 2005).

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The states took the lead in passing legislation to combat spyware. To date, 14 have enacted laws that regulate spyware or create criminal penalties for those who install spyware on others' computers.¹⁵⁸ All of these laws would be preempted by the SPY Act.

12. I-SPY Act (H.R. 744)

Preemption of Certain Civil Actions in State Courts

On May 23, 2005, the House passed the I-SPY Act, which would create a limited preemption of state tort law. The bill would establish criminal penalties for those who use spyware for illegal purposes. It would also preempt civil actions that are based on violations of this new federal criminal law in state courts. It does not, however, prevent a state from passing a similar law, nor does it prevent any lawsuits that are premised on existing state laws.¹⁵⁹

13. Energy Policy Act of 2005 (H.R. 6)

Preemption of State Authority to Address Environmental Issues

On April 21, 2005, the House passed the Energy Policy Act of 2005. This House version of the energy bill contained several preemptive provisions that were removed from the bill during the conference with the Senate. These provisions did not become law. Preemptive provisions that did become law are discussed in part IV.A.5.

Preemption of State Court Authority Over MTBE Liability

Section 1502 of the House-passed EPA Act would have limited the authority of state courts and impeded state and local attempts to recoup pollution cleanup costs by establishing a "safe harbor" for MTBE producers from product liability lawsuits.

The oil industry has used methyl tertiary butyl ether, commonly known as "MTBE," as a gasoline additive for decades. When released into the environment, MTBE can contaminate groundwater and is difficult and expensive to clean up.¹⁶⁰ Across 36 states, more than 2,300 water supply systems are contaminated by MTBE.¹⁶¹ This has prompted many states and local

¹⁵⁸ See, National Conference of State Legislatures, *2005 State Legislation Relating to Internet Spyware or Adware* (online at <http://www.ncsl.org/programs/lis/spyware05.htm>); National Conference of State Legislatures, *2004 State Legislation Relating to Internet Spyware or Adware* (online at <http://www.ncsl.org/programs/lis/spyware04.htm>).

¹⁵⁹ H.R. 744, Sec. 2.

¹⁶⁰ E.g., Environmental Protection Agency, *Achieving Clean Air and Clean Water: The Report of the Blue Ribbon Panel on Oxygenates in Gasoline* (Sept. 17, 1999) (online at www.epa.gov/otaq/consumer/fuels/oxypanel/r99021.pdf).

¹⁶¹ American Metropolitan Water Agencies, *Cost Estimate To Remove MTBE Contamination From Public Drinking Water Systems In The United States* (June 20, 2005) (online at

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governments to bring product liability suits to force MTBE producers to clean up the contamination.

The effect of section 1502 would be to establish a “safe harbor” for MTBE producers by providing that MTBE may not be deemed to be a defective product. This would have limited traditional state court jurisdiction over products liability claims. Also, by eliminating liability claims on the grounds that have been successful to date, this likely would have blocked states’ ability to recover cleanup costs from the responsible oil companies.¹⁶²

According to the Congressional Budget Office, the provision was expected to undermine more than 100 lawsuits by states, counties, towns, villages and water agencies for cleanup assistance.¹⁶³ This would have shifted an estimated \$32 billion in cleanup costs from industry to state and local taxpayers and ratepayers.¹⁶⁴

Preemption of State Energy Efficiency Standards

Section 135 would have preempted existing state energy efficiency standards for ceiling fans. Under the Energy Policy and Conservation Act, the Department of Energy has the authority to adopt national energy efficiency standards that preempt state standards for the same products. For products without federal efficiency standards, however, state standards have often filled the gap and produced significant improvements in the energy efficiency of appliances.¹⁶⁵

This section would have established minimal requirements for ceiling fans that most fans already meet and that failed to address the energy use of ceiling fan lights, which are responsible for 70% of the fans’ energy use.¹⁶⁶ Although these requirements would not have produced any measurable energy savings, the provision would have preempted state standards for ceiling fans and ceiling fan lights as of January 1, 2006.¹⁶⁷ Also, while section 135 would have given DOE

www.amwa.net/mtbe/amwa-mtbecostest.pdf); *State Officials Losing Fight Over Energy Bill*, San Francisco Chronicle (Apr. 21, 2005).

¹⁶² See Letter from Douglas Holtz-Eakin, Director, Congressional Budget Office to Chairman David Dreier, Committee on Rules (Apr. 19, 2005) (noting that “CBO anticipates that precluding existing and future claims based on defective product would reduce the size of judgments in favor of state and local governments over the next five years”).

¹⁶³ *Id.*

¹⁶⁴ American Metropolitan Water Agencies, *supra* note 161.

¹⁶⁵ See, e.g., American Council for an Energy-Efficient Economy and Appliance Standards Awareness Project, *Leading the Way: Continued Opportunities for New State Appliance and Equipment Efficiency Standards* (Jan. 2005).

¹⁶⁶ American Council for an Energy-Efficient Economy, *House Energy Bill Seeks to Handcuff States; Senate Bill (Sec. 135) Will Save Energy and Protect the State’ Energy-Saving Role* (undated).

¹⁶⁷ *Id.*

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authority to set more stringent standards for ceiling fans, DOE would not have been not required to act.

The effect of the provision would have been to preempt stronger efficiency requirements already adopted in two states and under consideration in several others.¹⁶⁸ California Governor Arnold Schwarzenegger opposed the provision and called on Congress to “[p]reserve the ability of States to set higher energy efficiency standards than the federal level.”¹⁶⁹

Preemption of State Programs on Leaking Underground Storage Tanks

Section 1527 would have limited states’ ability to enforce environmental and safety requirements for underground storage tanks in rural areas.

Many states have established programs to “tag” underground storage tanks in order to identify ineligible storage tanks for fuel delivery.¹⁷⁰ These programs help enforce the leak prevention requirements and ensure that leaking tanks are not refilled. Under section 1527, all states would be required to have a program to tag ineligible tanks. However, the states would also be required to adopt a special exemption for rural areas or lose federal funding. Under section 1527, a state would not be able to tag an underground storage tank in a rural area if that tag would jeopardize access to fuel, unless there were “an urgent threat to public health, as determined by the [EPA] Administrator.”

In California, local fire departments can tag a tank if the owner has tampered with a leak detection alarm or has otherwise acted in a recalcitrant manner.¹⁷¹ Section 1527 would preempt this state law and those like it in other states.

Limitation on State Input on Coastal Energy Projects

Two sections would have reduced the states’ authority over the management of their own coastlines with respect to energy projects. The Coastal Zone Management Act (CZMA) provides for joint state-federal management of the nation’s coastlines. Under the CZMA, states develop comprehensive plans for the

¹⁶⁸ *Ceiling Fan Debate Highlights Controversy Over Energy Efficiency*, Associated Press (Apr. 12, 2005). Maryland and California have established standards and legislation is pending in Massachusetts, Maine, Rhode Island, New York, and Vermont. *Id.*

¹⁶⁹ *E.g.*, National Association of State PIRGs, *House Energy Bill Usurps States’ Rights* (Apr. 18, 2005); Letter from Governor Arnold Schwarzenegger to Chairman Pete Domenici and Senator Bingaman (May 13, 2005).

¹⁷⁰ House Energy & Commerce Committee, Minority Staff, *Dissenting Views on Leaking Underground Storage Tank Amendments* (Apr. 2005) (referencing data from the Government Accountability Office).

¹⁷¹ Cal. Code Regs. Title 23, Division 3, Chapter 16, Underground Tank Regulations § 2717 (June 12, 2004).

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management of state coastal areas. Once approved by the federal government, federal actions must be consistent with the state's plan, or the state can appeal them.

Section 330 would have biased the CZMA appeals process in favor of the federal government by excluding information developed by the state from being considered during any appeal. Section 330(a) specified that the federal government must use as its "exclusive record" the record compiled by the Federal Energy Regulatory Commission when considering appeals about an interstate natural gas pipeline construction project, including construction of natural gas storage facilities, LNG terminals, and other facilities. Similarly, section 330(c) specified that the federal government must use as its "exclusive record" the record compiled by the relevant federal permitting agency when considering appeals about the permitting, approval, or authorization of energy projects, including projects to explore, develop, or produce oil and gas on the outer continental shelf. These subsections would have excluded information considered during a state review of a coastal energy development project, which commonly would address state concerns such as impacts on the local environment, public safety, or economy.¹⁷² The California Coastal Commission found these provisions "directly contrary to California's strong interest in safeguarding its precious coastal resources from offshore oil and gas drilling-related activities."¹⁷³

Section 2013 would have limited the time the state and public have to comment on any appeal to 120 days for non-energy related projects. The section also gave the Secretary of Commerce 120 days to rule on any appeal after closing the record for comment. States such as California indicated that these timeframes would undermine the effectiveness of state participation, especially considering the complexity and contentiousness of the issues at stake.¹⁷⁴

14. Help Efficient, Accessible, Low-cost, Timely Healthcare Act of 2005 (H.R.5)

Preemption of State Health Care Laws

On July 28, 2005, the House passed the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2005, which would preempt a host of state laws governing lawsuits related to health care, as well as significantly limiting the jurisdiction of state courts over such lawsuits. Medical practice, product liability, and the ability to bring tort claims for personal injuries in these areas have

¹⁷² See, e.g., National Association of State PIRGs, *House Energy Bill Usurps States' Rights* (Apr. 18, 2005).

¹⁷³ Letter from Ms. Meg Caldwell, Chairperson, California Coastal Commission, to Energy and Commerce Chairman Barton and Ranking Member Dingell (Mar. 23, 2005).

¹⁷⁴ *Id.*; Letter from Mike Chrisman, CA Secretary for Resources, Cruz Bustamante, CA Lt. Gov., Alan Lloyd, Secretary of California EPA, to Reps. Waxman, Eshoo, Capps, and Solis (Apr. 4, 2005).

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traditionally been regulated by the states. In these areas, state laws have addressed a variety of issues, including licensure, insurance, court procedures, victim compensation, civil liability, and medical records.

H.R. 5 defines “health care lawsuits” to include liability claims concerning the provision of health care goods or services as well as any medical product, and it sets restrictive federal requirements for such lawsuits. For example, section 3 of the bill would provide for a restrictive federal statute of limitations; section 4 would cap noneconomic damages at \$250,000 and eliminate state joint liability laws; and section 5 would set restrictions on the payment of attorney contingency fees. Section 7 would place severe limits on the recovery of punitive damages by setting a maximum award of \$250,000, heighten the evidentiary standard for recovery, and prohibit punitive damages for any product that has been approved by FDA.¹⁷⁵

Section 11 would establish a broad preemption provision that would override all state laws that “prevent the application” of the bill. However, state laws that provide “greater procedural or substantive protections for health care providers and health care organizations from liability, loss, or damages than those provided by the Act” would be saved from preemption. This provision would protect state laws that favor doctors, hospitals, nursing homes, HMOs, pharmaceutical and medical device manufacturers, while invalidating those laws designed to safeguard the rights of consumers and patients.

Collectively, these provisions would severely impede the ability of patients to be compensated for injuries caused by medical negligence, defective products, and irresponsible insurance providers. At least 29 states enacted their own medical malpractice legislation in recent years, and many of these laws would be preempted.¹⁷⁶ The National Conference of State Legislatures (NCSL) decried H.R. 5’s “one-size-fits-all” approach to medical malpractice and called H.R. 5 a violation of its medical malpractice policy, which states that “American federalism contemplates diversity among the states in establishing rules and respects the ability of the states to act in their own best interests in matters pertaining to civil liability due to negligence.”¹⁷⁷

¹⁷⁵ The bill would allow states to “specify a particular monetary amount of compensatory or punitive damages” higher or lower than the amounts specified in the bill, however. H.R. 5 §11(c).

¹⁷⁶ Letter from the National Conference of State Legislatures to House Speaker Dennis Hastert and House Minority Leader Nancy Pelosi (Jul. 26, 2005) (online at <http://www.ncsl.org/statefed/MedMal.htm>).

¹⁷⁷ *Id.*

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15. Artists' Rights and Theft Prevention Act of 2004 (S. 1932, 108th Cong.)

Preemption of State Court Authority

On June 25, 2004, the Senate passed the Artists' Rights and Theft Prevention Act of 2004, which addressed the bootlegging of commercial movies and granted movie theater owners and staff immunity from some civil and criminal charges. The bill would have given movie theater owners and staff the right to detain for questioning or arrest, for a reasonable time, suspected lawbreakers, and it would have granted the theater owners and staff immunity from any criminal or civil charges filed because of the detention.

16. I-SPY Act of 2004 (H.R. 4661, 108th Cong.)

Preemption of Certain Civil Actions in State Courts

On October 7, 2004, the House passed the I-SPY Act, which would have established federal criminal penalties for those who use spyware for illegal purposes and preempted actions in state court based on the new federal requirements. The bill was reintroduced in the 109th Congress as H.R. 744 and is discussed in part IV.B.12.

17. Lawsuit Abuse Reduction Act of 2004 (H.R. 4571, 108th Cong.)

Preemption of State Authority Over Certain Lawsuits

On September 14, 2004, the House passed the Lawsuit Abuse Reduction Act of 2004, which would have preempted state law by imposing federal penalties for those who file frivolous lawsuits in state courts. The bill was reintroduced as H.R. 420 in the 109th Congress and is discussed in part IV.B.10.

18. District of Columbia Personal Protection Act (H.R. 3193, 108th Cong.)

Repeal of the District of Columbia's Gun Control Laws

On September 29, 2004, the House passed the District of Columbia Personal Protection Act, which would have repealed the District of Columbia's gun control laws. Washington, D.C. has one of the strongest sets of firearms laws and regulations in the nations, including a ban on handguns and semiautomatic weapons.¹⁷⁸ The U.S. District Court for the District of Columbia has upheld the District's gun ban as constitutional on two separate occasions.¹⁷⁹

¹⁷⁸ DC Official Code, 25 Stat; sec 7-2502.2; The "Regulations relative to firearms, explosives, and weapons" section of the Washington DC official code gives the mayor and the city council the authority to establish and regulate firearm laws in the city. DC Official Code, 34 Stat. 809; sec. 1-303.43.

¹⁷⁹ *See Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004); *Seegers v. Ashcroft*, 297 F. Supp. 2d 201 (D.D.C. 2004). Several states, including Illinois have gun bans of some measure that have withstood court challenges. Legal Community Against

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H.R. 3193 would have overridden District laws that ban private gun ownership, require gun registration, and prohibit carrying concealed weapons in workplaces. The bill also would have repealed a ban on residents possessing certain body armor piercing bullets. The bill was opposed by the Mayor, the City Council, the D.C. Police Department, and the U.S. Conference of Mayors.¹⁸⁰

19. SPY Act (H.R. 2929, 108th Cong.) Preemption of State Efforts to Regulate Spyware

On October 5, 2004, the House passed the SPY Act, which would have preempted state laws relating to spyware. The bill was reintroduced as H.R. 29 in the 109th Congress and is discussed in part IV.B.11.

20. Class Action Fairness Act of 2003 (H.R. 1115, 108th Cong.) Preemption of State Court Authority over Class Action Lawsuits

On June 12, 2003, the House passed the Class Action Fairness Act of 2003, which would have restricted state court authority by expanding the conditions for removal of class action suits to federal courts. A similar version of this bill became law in the 109th Congress and is discussed in part IV.A.8.

21. Volunteer Pilot Organization Protection Act of 2004 (H.R. 1084, 108th Cong.) Preemption of State Court Authority

On September 14, 2004, the House passed the Volunteer Pilot Organization Protection Act of 2004, which would have provided liability protection to volunteer nonprofit pilot organizations and pilots during benefit missions. The bill would have amended the Volunteer Protection Act of 1997, which preempts state law to protect nonprofit or government volunteers, but specifies that the liability protection does not apply if volunteers cause harm while operating a vehicle or aircraft “for which the State requires the operator or the owner of the vehicle, craft, or vessel to (A) possess an operator's license; or (B) maintain insurance.”¹⁸¹

H.R. 1084's amendment to the Volunteer Protection Act would have expanded liability protections to cover volunteers for nonprofit organizations if the volunteer “is flying in furtherance of the purpose of the organization and is operating an aircraft for which the volunteer is properly licensed and has certified to such organization that such volunteer has in force insurance for operating such

Violence, *Master List of Firearm Policies* (2004) (online at www.lcav.org/content/masterlist.asp#handgunban).

¹⁸⁰ See District Leaders Join Forces Against Gun Bill, *Associated Press* (Sept. 28, 2004); Letter from US Conference of Mayors et. al. to United States Senators (June 15, 2005).

¹⁸¹ Pub. L. No. 105-19, § 4 (4) (1997).

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aircraft.”¹⁸² In addition, it would have expanded the Act’s protection to include the nonprofit flight organization in addition to the volunteer.¹⁸³

This bill has been reintroduced in the 109th Congress and was reported favorably by the Judiciary Committee on March 15, 2005.

22. Small Business Health Fairness Act of 2003 (H.R. 660, 108th Cong.) Preemption of State Health Insurance Laws and Regulations

On June 19, 2003, the House passed the Small Business Health Fairness Act of 2003 (H.R. 660), which would have prevented states from applying insurance regulations and consumer protection laws to certain health insurance plans offered by trade and professional associations. This bill was reintroduced as H.R. 525 in the 109th Congress and is discussed in part IV.B.9.

23. Personal Responsibility in Food Consumption Act (H.R. 339, 108th Cong.) Preemption of State Court Authority Over Certain Tort Claims

On March 10, 2004, the House passed the Personal Responsibility in Food Consumption Act, which would have stripped state courts of jurisdiction over tort claims related to food consumption and obesity. This bill was reintroduced in the 109th Congress as H.R. 554 and is discussed in part IV.B.8.

24. Energy Policy Act of 2003 (H.R. 6, 108th Cong.) Preemption of State Environmental Protections

On April 11, 2003, the House passed the Energy Policy Act of 2003 (H.R. 6). Section 16012 would have preempted states’ authority over siting of interstate electrical transmission lines in a similar manner to the provisions in the Energy Policy Act of 2005. Section 17102 would have limited state court authority by waiving liability for MTBE producers, similar to the provisions in the House-passed version of the Energy Policy Act of 2005. These provisions are discussed in part IV.A.5. and part IV.B.13.

25. Help Efficient, Accessible, Low-cost, Timely Healthcare Act of 2003 (H.R. 5, 108th Cong.) Preemption of State Health Care Laws

On March 13, 2003, the House passed the HEALTH Act, which would have preempted state laws relating to health care lawsuits and would have limited state court jurisdiction over such lawsuits. This bill was reintroduced as H.R. 5 in the 109th Congress and is discussed in part IV.B.14.

¹⁸² H.R. 1084 (2004).

¹⁸³ *Id.*

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26. Bob Stump National Defense Authorization Act for Fiscal Year 2003 (H.R. 4546, 107th Cong.)

Preemption of State Authority over Transportation Projects

On May 10, 2002, the House passed the Bob Stump National Defense Authorization Act, which included a provision that would have allowed the construction of a toll road through the Camp Pendleton Marine Base in San Clemente, California, to proceed without complying with any California environmental, transportation, or public health and safety laws. This provision passed the House after a related provision was included in the FY 2002 Defense Authorization Act that exempted the toll road from state laws enacted after January 1, 2002 (discussed in part IV.A.23). According to the House Committee report, the subsequent provision was intended to “clarify that any state law that would restrict the construction of the proposed road through Camp Pendleton, California, has no effect on the authority of the Secretary of the Navy to grant the easement or on the Transportation Corridor Agency to construct and operate the road.”¹⁸⁴

27. Class Action Fairness Act of 2002 (H.R. 2341, 107th Cong.)

Preemption of State Court Authority Over Class Action Lawsuits

On March 13, 2002, the House passed the Class Action Fairness Act of 2002 which would have constricted the authority of state courts by expanding the conditions for removal of class action suits to federal courts. A similar version of this bill became law in the 109th Congress and is described part IV.A.8.

28. Internet Freedom and Broadband Deployment Act of 2001 (H.R. 1542, 107th Cong.)

Preemption of State Authority Over the Telecommunications Market

On February 27, 2002, the House passed H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, which would have restricted state authority over telecommunications services. This bill would have exempted various internet and high speed data services from provisions in the Telecommunications Act of 1996, which established competition in telecommunications market. The Act detailed numerous requirements that companies must follow to ensure competition within the telecommunications market, including a requirement that companies negotiate with states and municipalities for local franchising agreements. H.R. 1542 would have allowed companies to bypass state negotiations, thus eliminating states’ ability to require expansion to underserved areas. In addition, the bill would have removed states’ “authority to regulate the

¹⁸⁴ House Report 107-436, Bob Stump National Defense Authorization Act for Fiscal Year 2003 (May 3, 2002).

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rates, charges, terms, or conditions for, or entry into the provision of, any high speed data service, Internet backbone service, or Internet access service.”¹⁸⁵

A coalition of the nation’s largest local and state government associations, including the National Governor’s Association, wrote to Congress arguing that H.R. 1542 would disrupt long-standing state authorities “to the detriment of successful state and local economic development efforts.”¹⁸⁶ The coalition expressed concern that the “direct federal preemption of state regulatory authority” would prevent the states from ensuring that telecommunications services were accessible to all communities, especially those which are traditionally underserved.¹⁸⁷

29. Consumer Rental Purchase Agreement Act (H.R. 1701, 107th Cong.) Preemption of State Laws Over Rent-to-Own Agreements

On September 18, 2002, the House passed H.R. 1701, the Consumer Rental Purchase Agreement Act, which would have established federal standards for the maximum disclosures a rent-to-own business must share with consumers and preempted stricter state laws. Rent-to-own businesses rent high-cost items under terms that allow the item to be owned by the renter upon payment of a previously specified amount. Because the transactions are defined as leases, rather than sales, the businesses are not obligated to disclose various fees or interest rates. This enables the rent-to-own outlets to charge up to double or triple the typical retail cash price.

Many states have taken the lead in regulating these businesses, with four states — Wisconsin, New Jersey, Minnesota, and Vermont — requiring disclosures equal to typical credit transactions. Under H.R. 1701, however, any state law which affords consumers the benefits of disclosures beyond those required by the bill would have been preempted.¹⁸⁸ H.R. 1701 also would have prevented states from considering rent-to-own transactions as credit sales and thus applying credit-like regulations in the future.

Fifty-two state Attorneys General wrote to Congress explaining that consumer protection and consumer credit has historically been a matter of state regulation. They asked that Congress not “bar the States from responding to local conditions

¹⁸⁵ H.R. 1542, 107th Cong. (2001), § 232.

¹⁸⁶ Letter from the National Governor’s Association, the Council of State Governments, The U.S. Conference of Mayors, the National League of Cities, the National Association of Counties and the International City/County Management Association to The Honorable J. Dennis Hastert and The Honorable Richard A. Gephardt (Feb. 22, 2002).

¹⁸⁷ *Id.*

¹⁸⁸ H.R. 1701, 107th Cong. (2002) § 1018.

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and concerns... [so that the] goal of protecting consumers can be advanced within a federalist framework.”¹⁸⁹

After stalling in the Senate in the 107th Congress, the bill was reintroduced in the House in the 108th and 109th Congress.¹⁹⁰ A similar bill was also introduced in the Senate in the 108th and 109th Congresses.¹⁹¹

30. Community Solutions Act of 2001 (H.R. 7, 107th Cong.) Preemption of State Court Authority

On July 19, 2001, the House passed the Community Solutions Act of 2001, which would have preempted state laws by providing liability exemptions for businesses that donate equipment, facilities, motor vehicles, or aircraft to community organizations if the donated items are subsequently involved in an accident. Section 104 of the bill explicitly stated that it “preempts the laws of any State to the extent that such laws are inconsistent with this title, except that this title shall not preempt any State law that provides additional protection for a business entity.”

¹⁸⁹ Letter from 52 State Attorney Generals to the House Committee on Financial Institutions (Sept. 5, 2001).

¹⁹⁰ H.R. 1651; H.R. 996, 108th Cong. (2003).

¹⁹¹ S. 603; S. 884, 108th Cong. (2003).