A Communication from Office of the Attorneys General of

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Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota,
Mississippi, Montana, New York, North Dakota, Oklahoma,
Oregon, South Dakota, Tennessee, Utah, Washington,
West Virginia, and Wisconsin

December 23, 2005

National Highway Traffic Safety Administration
400 Seventh Street, NW
Washington, DC 20590

RE: Federal Motor Vehicle Safety Standards Roof Crush Resistance
Docket No. NHTSA-2005-22143

Dear NHTSA Administrator:

We, the undersigned Attorneys General, submit these Comments in response to your request for comments published in *Federal Register*, Vol. 70, No. 162, August 23, 2005, regarding NHTSA's proposal to upgrade Federal Motor Vehicle Safety Standard No. 216, *Roof Crush Resistance* [http://www.nhtsa.dot.gov/cars/rules/rulings/RoofCrushNotice/216NPRM-to-FR.html].

State Attorneys General have a long history of advocating for vehicle safety. In recent years, state Attorneys General joined together to achieve major settlements with Firestone and Ford Motor Company, respectively, regarding problems with certain Firestone tires and SUV rollovers leading to substantial injuries and deaths. We are engaged in an ongoing public education campaign to educate consumers, particularly young men, regarding the dangers of rollover when driving an SUV.

We acknowledge NHTSA's expertise in the area of motor vehicle safety standards and we support NHTSA's proposal to upgrade roof crush resistance standards. However, we understand there are concerns regarding the degree to which the new proposed standards are adequate and we encourage NHTSA to consider all public comments to ensure that the new standards will work in the real world to provide optimum protection for drivers and passengers.

Our primary concern with this proposed action is NHTSA's assertion in Section XIII, Rulemaking Analysis and Notices, subsection *F. Civil Justice Reform*, that if the proposed rule were adopted as a final rule, it would preempt all conflicting State common law requirements, including rules of tort law.

In this instance, the federal law cited by NHTSA bars States from prescribing or continuing in effect "a standard applicable to the same aspect of performance of a motor vehicle" which differs from the federal standard.[1] States are permitted to adopt their own motor vehicle safety standards by statute or regulation so long as the state standards are identical to the federal standards. Thus, we agree with NHTSA's conclusion that this law preempts all differing state statutes and regulations. However, that same law includes a savings clause providing that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."[2]

Indeed, federal agencies should not act to preempt state tort common law without very clear statutory authority. The U.S. Supreme Court has established a strong presumption against preemption of the right to a jury trial at common law. *Jacob v. City of New York*, 315 U.S. 752 (1942). The legislative history of the Motor Vehicle Safety Act leaves no doubt that Congress intended to preserve state common law tort claims and the "[l]egislative history also demonstrates that Congress did not intend to supplant all other law in the motor vehicle safety field: '[W]e have preserved every single common law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser.' 112 Cong. Rec. 19,663 (1966)." *Chamberlain v. Ford Motor* Co., 314 F. Supp. 2d 953, 960 (N.D. Cal. 2004).

NHTSA's preemption position impinges directly on state court jurisdiction in an area traditionally and historically reserved for the states. The state common law court system serves as a vital check on government-imposed safety standards. Vehicles and equipment can contain hazardous features and still meet federal minimum safety standards. NHTSA's proposal is likely to erode manufacturer incentives to assure that vehicles are as safe as possible for their intended use.

State Attorneys General represent state agencies that may have common law tort claims against vehicle or parts manufacturers for injuries suffered by state employees operating state-owned vehicles. States may also have reimbursement claims against vehicle or parts manufacturers for Medicaid funds paid for injured citizens. NHTSA's assertion would be a significant impediment to recovery in these cases.

While we respect NHTSA's expertise in this area, it is always possible that NHTSA may not receive all the information it needs to make informed decisions regarding safety standards. It is also possible for NHTSA to be mistaken regarding the degree to which a standard it adopts provides the optimum level of safety. Motor vehicle safety is a vital area of public interest and warrants complementary layers of accountability -- comprehensive, uniform federal safety standards and the flexible state common law. Congress recognized this principle in its clear carve-out for common law tort claims.

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[1] 49 U.S.C. § 30103(b).

[2] 49 U.S.C. § 30103(e).

We understand that NHTSA relies on the U.S. Supreme Court's opinion in *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000), in asserting preemption. However, NHTSA's reading of *Geier* is overbroad. *Geier* does not authorize NHTSA to preempt all state tort law in the context of any particular rule.

Geier involved a NHTSA regulation requiring manufacturers to install airbags among a choice of passive restraint systems in motor vehicles through a several-year phase-in process. The Court held that a common law tort claim alleging that all manufacturers should be required immediately to install airbags in all vehicles directly conflicted with that purpose.

The situation at hand is quite distinct from the facts in *Geier*. Here, no phase-in period is required or permitted. The key in *Geier* was that NHTSA had concluded that requiring airbags in all vehicles too soon would lead to rejection of installation or replacement by too many consumers and would impede manufacturer motivation to create more protective and less costly passive restraint devices. *Id.* at 877-81. Thus, two factors were at play in NHTSA's conclusion that a phase-in period was needed: 1) consumer resistance to airbags; and 2) the need to foster innovation in passive restraint technology. The Court reasoned that a state tort decision that all manufacturers were required immediately to install airbags in all vehicles would stand as an obstacle to the accomplishment and execution of NHTSA's means-related objectives. *Id.* at 881.

Neither factor is present here. Consumers presumably would wish for the greatest possible roof crush standards. Consumer use is not an issue. There is no choice for consumers that would negate safety gains akin to NHTSA's concern in *Geier* that consumers would reject passive restraint use if NHTSA moved too quickly to require airbags in all vehicles. In addition, nothing in NHTSA's proposed regulation will foster innovation in improving roof crush resistance. In fact, if NHTSA's statement that the regulation would preempt state tort law is upheld by the courts, NHTSA will have, by those few words, squelched manufacturer motivation to improve beyond the federal standard.

NHTSA has asserted that requiring a greater level of roof crush resistance may make some vehicles top-heavy to the point of increasing the possibility of roll-over, but that conclusion differs greatly from the circumstances present in *Geier.* If preemptive, the outcome of NHTSA's proposed regulation will be to set a single standard that cannot be exceeded by manufacturers unless NHTSA says so, even if particular manufacturers conclude that they can safely provide roof resistance standards exceeding the NHTSA standards without increasing the risk of vehicle roll over. Thus, there is no phase-in or motivation to improve roof crush resistance. In fact, the outcome of the regulation would be to destroy innovation and lessen future vehicle safety. Thus, NHTSA blanket preemption in the context of this regulation is entirely inconsistent with Congress' intent in enacting the Motor Vehicle Safety Act.

NHTSA's conclusion is also inconsistent with the express language of the Act. If this NHTSA regulation preempts state court common law actions, it is difficult to imagine a NHTSA motor vehicle safety regulation that would not be preemptive. Thus, the narrow exception for implied preemption found by the Court in *Geier* would be expanded to the point where the savings clause for common law actions in the law itself would be negated entirely. Again, this is not consistent with Congressional intent. *Geier* did not authorize NHTSA to re-write federal law.

Moreover, the Court, in *Geier*, did not hold that *every* tort claim based on an absence of airbags was implicitly preempted. To the contrary, the Court held:

> It is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption—say, because it would affect so few cars that its rule of law would not create a legal "obstacle" to 208's mixed-fleet, gradual objective. But that is not what petitioners claimed. They have argued generally that, to be safe, a car must have an airbag.

529 U.S. at 885-86. Therefore, even under the broadest possible reading of *Geier*, NHTSA's assertion that the proposed rule would preempt "all conflicting State common law requirements, including rules of tort law," is overbroad and is an inaccurate statement of the effect of *Geier* and the legal effect of a NHTSA regulation. (Emphasis added.)

In addition to NHTSA's faulty application of its preemption authority and the *Geier* opinion, the fiscal impact of this proposed rule on the states will be substantial. The effect of preempting state common law tort actions will result in shifting the costs of compensating victims from those who manufacture unsafe vehicle roof designs to insurance providers, which will pass those costs along to their policyholders. State governments and the federal government will have to cover millions of dollars in health care costs which they will pass along to taxpayers, costs that, by all rights, should be the responsibility of manufacturers.[3] The proposed regulation will result in a substantial lessening of the incentives for motor vehicle manufacturers to make safer vehicles, and will shift the costs of failing to make safer vehicles to those who are not responsible for ensuring that motor vehicles are manufactured to be safe. Such an extreme step is unwarranted in the absence of express Congressional intent.

We further note that the process followed by NHTSA in this proposed action is directly contrary to Executive Order 13132, which requires that federal agencies consider federalism principles in the development of regulatory policy and restrict regulatory preemption of state law to the minimum level necessary. Given this attempt to override state law regarding motor vehicle safety, it is surprising that NHTSA would assert in its notice that it considered the rulemaking in accordance with the principles and criteria of Executive Order 13132 that the proposal "would not have any substantial impact on the states," and concluded that it did "not have sufficient federal implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement." *Federal Register*, Vol. 70, No. 162, p. 49245. Prior consultation with state officials should always be necessary under Executive Order 13132 when the effect of a regulation is to override state law.

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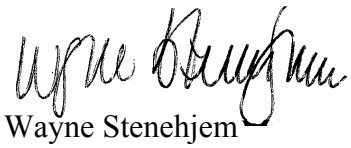
[3] The National Spinal Cord Injury Statistical Center estimates the national cost of lifetime care for the seriously injured from rollover crashes to be over $20 billion per year. NHTSA's assertion in its notice that "[n]o expenditures by State, local or tribal governments are expected" completely discounts the significant costs the states would incur due to these injuries.

Therefore, we respectfully request that NHTSA reexamine this issue and reverse its position as to the impact of these proposed rule revisions on conflicting state common law requirements.

Thank you for considering our views regarding this important issue.

Sincerely,

Tom Miller
Attorney General of Iowa



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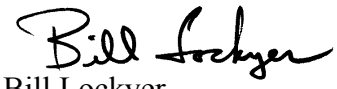

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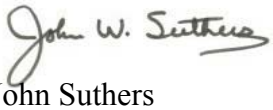

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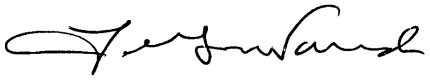

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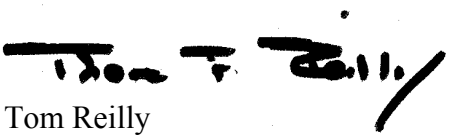

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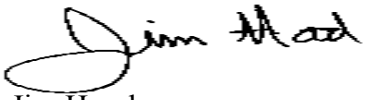

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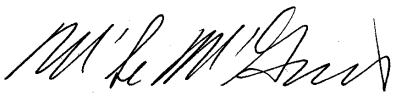

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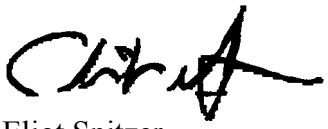

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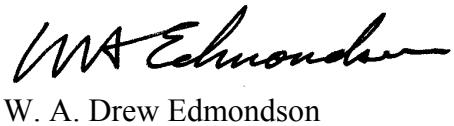

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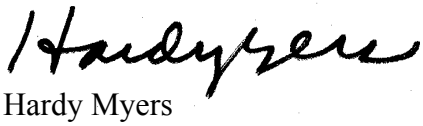

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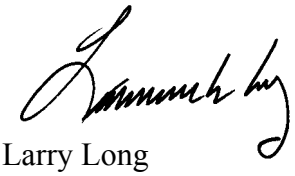

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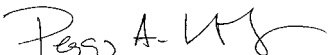

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