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LAW SCHOOL

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Jessica Hertz
Office of Management and Budget
725 17th St. NW
Washington, D.C. 20503

Dear Jessica:

Thank you again for your invitation to submit comments as part of OMB's development of recommendations for a new Executive Order on federal regulatory review. Given your request that comments be submitted within a one week period, my remarks below are fairly brief.

In theory, centralized federal regulatory review under OMB and OIRA serves a useful coordination and consistency function and represents an important mechanism to ensure presidential awareness and oversight of agency actions. In practice, however, such review under Executive Order 12866 (as amended) has not lived up to its potential. A number of administrative law scholars have identified troubling aspects of the EO 12866 process, particularly under the Bush administration. These include: its anti-regulatory and politically-biased bent; the opportunities for undue presidential influence at the expense of agency expertise; and failure to take adequate account of the benefits of regulation or distributional concerns. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260 (2006); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev. 47 (2006); David M. Driesen, *Is Cost-Benefit Analysis Neutral*, 77 U. Colo. L. Rev. 335 (2006); Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696 (2006). Even scholars who are more optimistic about the current federal regulatory review process have noted problems, such as the lack of transparency regarding many agency-OIRA interactions, see, e.g. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. Chi. L. Rev. 821 (2003).

Several thoughtful proposals have been offered for ways to improve the federal regulatory review process to address these concerns, ranging from instituting greater transparency measures, further developing and formalizing mechanisms (such as prompt letters) to address regulatory inaction and the anti-regulatory bent that generally characterized federal regulatory review, placing greater emphasis on regulatory planning and priority-setting, and expanding or eliminating cost-benefit analysis in some contexts. While I support many of these proposals, I am interested here in calling OMB's attention to a reform that has not received as much

attention: the possibility of using centralized review to better address federalism concerns associated with federal regulation generally and with administrative preemption in particular.

The later years of the Bush Administration witnessed a notable increase in regulations that expressly preempted state law, including state tort suits. In some instances, the preemptive aspects of federal regulation were added late in the regulatory promulgation process; in others, the agencies involved offered little justification for the need for preemption or appeared unconcerned about the preemptive impact that federal regulation would have on the states. See, e.g., William Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1573-75 (2007); Nina Mendelson, *A Presumption Against Agency Preemption*, 102 Nw. U. L. Rev. 695, 699-704 (2008); Catherine A. Sharkey, *Preemption by Preamble, Federal Agencies and the Federalization of Tort Law*, 56 DePaul L. Rev. 227 (2007). In response, some scholars have sought to restrict or deny agency power to preempt state regulation. See, e.g., Mendelson, *supra*; Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869 (2008). My own view is that a more fruitful path is to seek to discipline agency preemption decisions through administrative law, given the dominance of the federal administrative state. In addition, I believe that administrative law—by which I mean both internal agency procedures and external judicial review—offers real potential for enhancing federal agency sensitivity to state interests and expanding state and local participation in federal regulatory decisions. See Gillian E. Metzger, *Administrative Law As the New Federalism*, 57 Duke L. J. 2023, 2048-55, 2072-107 (2008); see also Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 Duke L. J. 1922 (2008) (similarly arguing that federalism concerns are best addressed through administrative law).

Greater attention to federalism concerns during centralized federal regulatory review is an important dimension of such administrative law reform. OMB and OIRA could significantly enhance agencies' receptiveness to state and local concerns by requiring that agencies demonstrate they have given serious consideration to such concerns and have sought to mitigate the harmful federalism impacts of regulations. Even limited efforts, such as serious enforcement of the federalism impact analysis requirement of Executive Order 13132, could prove beneficial. See Mendelson, *supra*, at 718-20. But OMB and OIRA should be more proactive in seeking to enhance agency sensitivity to federalism concerns. In the context of administrative preemption decisions, for example, OMB could design guidelines that would identify factors that agencies should consider when deciding whether to preempt state law and outline procedures that agencies should follow to provide state and local governments a meaningful voice in such decisions. More generally, OMB and OIRA could develop a set of best practices on how agencies can better incorporate state and local governments into the federal regulatory process and seek to learn from state and local experimentation.

OMB and OIRA leadership is critical to ensuring that agencies do not lose sight of the wider structural and systemic federalism effects of their regulatory decisions. Absent such external encouragement, the press of immediate regulatory challenges can lead agencies to focus narrowly on achieving specific programmatic goals. As a result, I strongly encourage OMB to undertake efforts to enhance agency sensitivity to federalism concerns and to include provisions

aimed at achieving this result in any new Executive Order on centralized regulatory review. I am happy to provide additional and more detailed comments on how OMB and OIRA review could be structured to achieve this goal if that would be helpful.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Gillian Metzger". The signature is fluid and cursive, with the first name "Gillian" written in a larger, more prominent script than the last name "Metzger".

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Professor of Law

