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The Honorable Barbara Boxer
Chairwoman, Senate Environment
and Public Works Committee
112 Hart Senate Office Building
Washington, D.C. 20510

RE: Concerns with Preemption Language in Chemical Safety Improvement Act, S.1009

Dear Senator Boxer:

I write to convey the concerns of the California Attorney General regarding the proposed Chemical Safety Improvement Act, S.1009. Although we recognize that the Toxic Substances Control Act (TSCA) is in need of substantial reform, we believe that S.1009, as currently drafted, cripples the police powers that California relies on to protect public health and the environment and, in addition, severely compromises California's authority to supplement and complement federal efforts to regulate the safety of chemicals. As a leader in chemical safety and consumer protection, California has a direct stake in the outcome of any reform of TSCA. We respectfully request that S.1009 be amended to address the problems outlined below.

California's Role in Protecting Public Health

California has been a leader in enacting laws that protect public health and the environment, and has served as a laboratory for innovation for other states and the federal government. Many of the innovative laws that California has enacted are jeopardized by S. 1009.

Green Chemistry

Over the past several years, California has undertaken to implement ground-breaking "green chemistry" programs, reflecting an approach to environmental and public health protection that focuses on reducing or eliminating the use and generation of hazardous substances. Green chemistry marks a sharp departure from managing hazardous substances after they already have entered consumer products and our environment. In 2005, the State enacted the California Safe Cosmetics Act, becoming the first state in the nation to regulate toxic ingredients in cosmetics. The next year, California established the California Environmental Contaminant Biomonitoring Program to identify toxics accumulating in California residents and, in 2007, banned plasticizers called phthalates in children's products. In 2008, California enacted

two bills that together created the State's comprehensive Green Chemistry Program. Under that program, the Department of Toxic Substances Control (DTSC) is in the final stages of promulgating regulations that will establish a process for identifying chemicals of concern in consumer products and their potential alternatives, in order to determine how best to limit exposure or to reduce hazard levels.

Proposition 65

The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), was enacted as a ballot initiative in November 1986 by 63% of the voters. Proposition 65 was designed to protect California citizens and drinking water sources from chemicals known to cause cancer, and birth defects or other reproductive harm. Proposition 65 requires the Governor to publish, at least annually, a list of chemicals known to the State to cause cancer or reproductive toxicity. Businesses may not discharge these chemicals to sources of drinking water and must warn individuals about exposures to the listed chemicals. The Attorney General is the only official with statewide authority to enforce Proposition 65, and actions by the Attorney General in the name of the People are brought under the sovereign authority of the State.

Using this authority, the Attorney General's Office has taken a number of steps over the years to protect public health, including:

- Required manufacturers to reformulate the "Brazilian Blowout" hair straightener which contained high levels of formaldehyde that sickened hair stylists and their customers, and to provide warnings and accurate labeling of such products.

- Required manufacturers, sellers, and distributors of vinyl "jump houses" for children, to lower the levels of lead in the vinyl. Children playing in the jump houses were previously exposed to significant levels of lead from the vinyl.

- Required terminal operators at the Los Angeles and Long Beach Ports to provide a strong warning program about diesel fumes emitted into surrounding neighborhoods, and to implement a Clean Trucks Program to reduce diesel emissions from Port operations.

- Required manufacturers to reduce the lead in calcium supplements, multi-vitamins, and other nutritional supplements, including prenatal supplements, supplements for women of childbearing age, and supplements for children to levels below where Proposition 65 requires point-of-sale warnings, an area in which the Federal government has not taken regulatory action.

- Required manufacturers of wooden playground structures to stop using wood treated with chromated copper arsenate, which exposed children to high levels of arsenic.

- Required manufacturers of Mexican chili candies to reduce the high lead levels in their candies by improving their manufacturing processes, including washing the chilies before manufacture. The candies are eaten extensively by children in the Mexican-American community in California.

California's Programs are Threatened by S.1009's Overreaching Preemption Provisions

States Must Not Be Preempted in the Absence of Federal Regulation

Among the bedrock powers reserved to the states under the Tenth Amendment to the U.S. Constitution is the exercise of police powers to protect the health and safety. The courts have long recognized that regulation of health and safety matters is historically a matter of significant state concern, and the federal government has traditionally granted the states great latitude to protect the health and welfare of their citizens. To take away those historical police powers through preemption in instances where the federal government has yet to regulate or will not be regulating a chemical substance serves only to increase the risk to public health. Under S.1009:

- States are prohibited from enforcing existing state laws or from adopting new laws regulating chemical substances determined by U.S. EPA to be "high priority" even before federal regulations or orders become effective, creating a period of months or potentially years where such chemical substances are unregulated. See S.1009, § 15(a)(2).

- States are barred from adopting and enforcing new laws regulating "low priority" chemical substances – of which there will be tens of thousands – even though the U.S. EPA Administrator is also expressly prohibited from regulating those substances and has made only a preliminary safety assessment that is immune from judicial review. This creates a gaping and permanent regulatory vacuum. See S.1009, §§ 4(e)(3)(H)(ii), 4(e)(5) and 15(b)(2).

States Must Retain the Ability to Ban Use of a Chemical Substance In-State

Even where the federal government has acted to regulate a chemical substance, states must retain the ability to ban the use of that chemical substance in-state, in order to protect its residents' health and safety. In-state use bans – which do not prohibit the manufacture or processing of the chemical substance for export – do not unduly burden interstate commerce.

- Existing law gives states authority to prohibit the use of a chemical substance in-state without having to apply to the U.S. EPA for a waiver. See 15 U.S.C. § 2617(a)(2)(B)(iii). S.1009 revokes this authority by preempting state prohibitions or restrictions on the use of a chemical substance. See S.1009, §§ 15(a)(2), 15(b)(1) and 15(b)(2).

States Play a Vital Role as Co-Enforcers of Federal Standards

In numerous areas of environmental law, states and their political subdivisions play a vital role in enforcing federal standards. For example, under the nation's solid hazardous waste law – the Resource Conservation and Recovery Act (RCRA) – once state programs are certified by the federal government, states assume primary responsibility for enforcement. With respect to consumer product safety, federal law provides states with the ability to enforce federal regulations and orders. Under existing TSCA provisions, states are allowed to enact requirements that are "identical to the requirement prescribed by the Administrator," gaining the ability to enforce that requirement without having to apply for a waiver.

- S.1009 provides none of the above avenues for state enforcement. Rather, enforcement of all new prohibitions or restrictions on chemical substances is wholly dependent on the resources, priorities, and discretion of the U.S. EPA and the U.S. Department of Justice.

States Should Have a Reasonable Opportunity to Obtain a Waiver to Enforce a Higher Degree of Protection Within Their Borders

Under the existing provisions of TSCA, where the Administrator has adopted a rule with respect to a chemical substance, states are allowed to apply for an exemption to provide a higher degree of protection, so long as state requirements do not make it impossible to also comply with federal law (i.e., create a conflict) or unduly burden interstate commerce. See, e.g., 15 U.S.C. 2617(b).

- S.1009 has no directly analogous provision. The bill allows states to apply for a waiver to enforce a prohibition or restriction, if the application is filed prior to the Administrator's completion of a safety assessment/safety determination. But, depending on the timing of the state's application, the waiver either terminates automatically after completion of the safety assessment/safety determination or terminates if it "conflicts" with the Administrator's safety assessment/safety determination (which itself is not a restriction or prohibition). See S.1009, § 15(c)(6).

- Even then, S.1009 sets up an unrealistic test if a state seeks to obtain a waiver to adopt and enforce its requirements. Specifically, a state must certify that "the State has a compelling local interest to protect human health or the environment." See S. 1009, §§ 15(d)(1)(B)(i) and 15(d)(2)(B)(ii). It is unclear what is meant by "local interests" or what showing would be required. It is likely not possible to show unique circumstances that differentiate health risks by geography, since dangerous chemicals don't act differently in different locations. Risks from exposure to chemicals in the home, at the office or at retail establishments do not vary from one state to the next. Under this standard, it is unclear whether a waiver could ever be granted.

Thank you for your consideration of our comments. Please feel free to contact me if you have any questions or need further information.

Sincerely,

Brian Nelson (sm)

BRIAN NELSON
Special Assistant Attorney General

For KAMALA D. HARRIS
Attorney General

cc: The Honorable Diane Feinstein