



# HOW CITIES CAN PROTECT PUBLIC HEALTH WHEN STATES STAND IN THE WAY

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September 2020



# INTRODUCTION

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Cities play a vital role in protecting the health and safety of their residents. But they have been increasingly thwarted by their own state governments, thanks to a relatively recent uptick in “preemption,” where a higher level of government uses either executive authority or legislation to limit the authority of a lower level of government. In Atlanta, for example, Mayor Keisha Lance Bottoms has been consistently stymied in her efforts to fight the COVID-19 pandemic with mask regulations and business closures by a state policy that prioritizes reopening the economy.

Preemption can be an important and useful tool when it’s used to create a “floor” of protections that apply state or nationwide. The Civil Rights Act of 1964 is a prime example: It preempts discriminatory state and local laws. But states are increasingly using preemption to create a regulatory vacuum rather than a regulatory floor, leading to situations where a state both refuses to act on a certain issue and forbids localities from doing so themselves.

This trend is most pronounced in conservative states that are home to more progressive cities and plays out across different issues, from minimum wage increases and “sanctuary city” policies that protect undocumented people to plastic bag regulations and antidiscrimination laws. And preemption is on the rise. Since 2010, more preemptive laws have been introduced every year,<sup>1</sup> some going as far as punishing cities and local elected officials that try to enact preempted policies.<sup>2</sup>

Preemption has been especially prevalent in the South: The only three states that prohibit local nondiscrimination ordinances are Tennessee,<sup>3</sup> North Carolina,<sup>4</sup> and Arkansas;<sup>5</sup> nearly every Southern state preempts local minimum wage increases and paid sick leave requirements;<sup>6</sup> and almost as many states preempt rent control<sup>7</sup> and inclusionary housing policies.<sup>8</sup>

So-called “punitive preemption” is also widespread in the South. For example, a gun preemption law in Florida—which currently faces a legal challenge—imposes financial and civil penalties on both the cities that enact preempted policies and the local officials who support them.<sup>9</sup> In Texas, local officials who uphold so-called sanctuary city policies—such as those that limit local cooperation with federal agencies that enforce immigration law—can be removed from office and local law enforcement officers who fail to comply with federal immigration authorities can be charged with a crime.<sup>10</sup> Arizona’s punitive preemption law threatens cities that enact any kind of preempted policy, from plastic bag bans to gun control regulations, with a cutoff of state funding.<sup>11</sup>

## PREEMPTION IN THE COVID ERA

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The COVID-19 pandemic highlights how this wide-ranging use of preemption undermines local officials’ ability to protect the health and economic security of their communities. First, preemption has prevented cities from establishing policies that protect people from, and slow the spread of, infectious disease: 22 states have

preempted local paid sick leave policies<sup>12</sup> and 25 states have prohibited local rent control policies,<sup>13</sup> which have become ever more important as economic shutdowns and soaring unemployment put millions at risk of eviction.

Second, states have used preemption to prevent cities and counties from enacting emergency measures like mask mandates and other basic health and safety precautions. Consider the following examples:

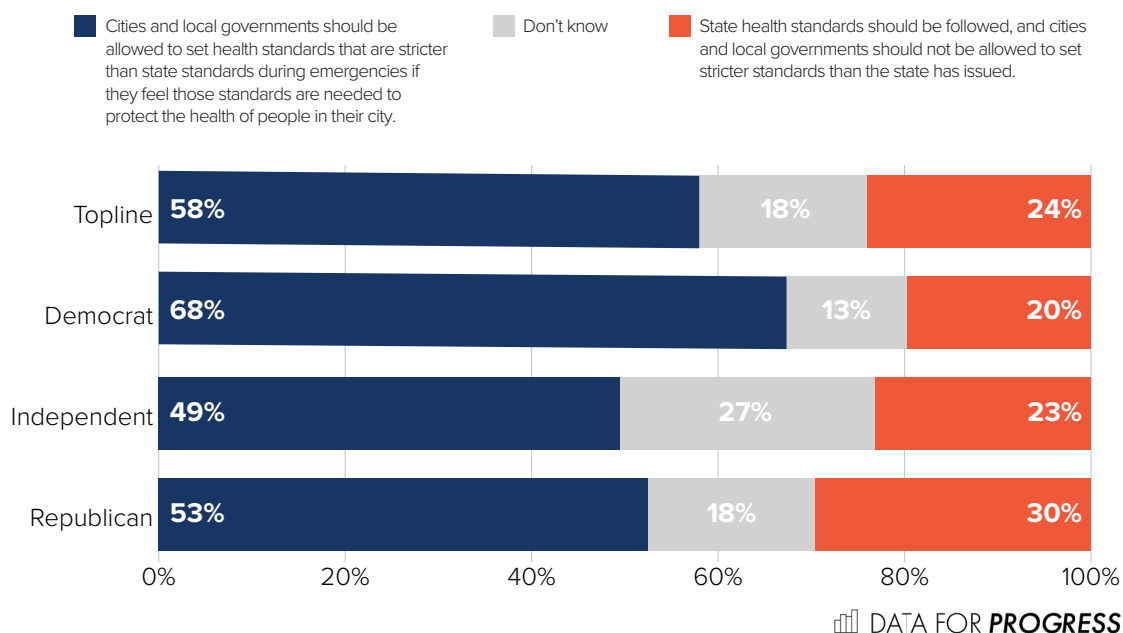
- ▶ An Arizona executive order issued on March 23 prohibited localities from issuing stay-at-home orders or ordering “essential” businesses (which included golf courses, pawnshops, and payday lenders) to close.
- ▶ A Mississippi executive order issued on March 24 forbade political subdivisions (including cities, counties, and school districts) from imposing social distancing regulations or business shutdowns stricter than the state’s.
- ▶ On March 26, Arkansas Governor Asa Hutchinson issued an executive order prohibiting local stay-at-home requirements, arguing that such regulations would interfere with essential operations and commerce.
- ▶ In Florida, an executive order issued on April 1 “clarified” that state-level orders related to COVID-19 superseded local ones. The next day, the governor explained that cities could still enact stricter coronavirus-related protections, but the ensuing confusion resulted in local officials’ reluctance to enact stay-at-home orders or require businesses to close.

- ▶ In Georgia, an April 6 executive order required localities to re-open beaches after several cities had closed them to the public.
- ▶ In South Carolina, the governor issued an executive order on April 7 explicitly disallowing local stay-at-home orders stricter than the state’s.
- ▶ On April 27, Texas Governor Greg Abbott forbade localities from requiring residents to wear masks. Under this order, localities have still been able to mandate that businesses require their customers to wear masks.

Though some of these executive orders have either expired or been rescinded, the initial aggressive preempting of local regulations created uncertainty around local authorities’ ability to protect residents against the spread of COVID-19, which was especially harmful because of the need for quick action to reduce infections.

State preemption of public health policies is also unpopular among voters of both parties. A recent poll by Data for Progress and The Justice Collaborative Institute shows that **58% of likely voters, including 53% of Republicans, believe that local governments should be allowed to set health standards during an emergency that are stricter than state standards:**

## Which statement is closer to your view?



## COVID-RELATED PREEMPTION LEADS TO RISE IN STATE-LOCAL CONFLICT

There has already been some litigation around the authority of local governments to enact COVID-related policies and the authority of states to limit their power. In Georgia, Governor Brian Kemp sued the Mayor of Atlanta for, among other things, requiring residents to wear masks in public—an order that was more restrictive than the governor’s executive order that encouraged, but did not mandate, mask usage.<sup>14</sup> The governor eventually withdrew the lawsuit and adopted a new order that permits cities to impose mask orders but only on city property.<sup>15</sup>

School reopenings have also been a flashpoint in COVID-related preemption litigation. The Florida Education Association (FEA), the state’s largest labor union, filed a lawsuit against Florida Governor Ron DeSantis, the state’s Department of Education, and a department commissioner after they ordered schools to open for in-person learning by the end of August rather than allowing school districts and counties to determine when to reopen. The lawsuit claims that the order violates a constitutional requirement for safe and secure schools and seeks a temporary injunction “to stop the reopening of schools until it is safe to do so.” The state filed a motion to dismiss the lawsuit, but a judge denied it. Governor DeSantis has also threatened to withhold up to \$200 million in funding from the Hillsborough County School District, which covers Tampa and is one of the nation’s largest school districts, if it does not reopen for in-person learning.

In Texas, several local health authorities issued orders mandating that schools remain closed, which Attorney General Ken Paxton said were invalid. And confusion still reigns over whether local school districts can reopen for in-person teaching and who gets to make that decision. Superintendents and principals have received changing and conflicting guidance from Texas officials on reopening schools. Early last month, state officials said opening schools on time for face-to-face instruction was mandatory, then changed course. Now districts can stay online longer if they request, and are granted, a waiver.

## WHAT LOCAL OFFICIALS CAN DO

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City-state conflicts arising from pandemic preemption illustrate the precarious position of local governments in many states. They are responsible for the health and welfare of their populace, and yet also constrained in what policies they have authority to adopt. Governors are using their emergency powers to override local mask and stay-at-home orders and to order school openings. In many cases, these executive actions conflict with local government officials' best judgments about what is required in their communities.

Despite the general sense of uncertainty over cities' authority, there are some areas touching on public health where they do have more leeway to regulate. For example, cities can implement public-sector paid sick leave and minimum wage policies, so that at least city employees can take time off if they or their loved ones are sick.<sup>16</sup> Local health and safety regulations are another potential avenue of regulation. Though several states have made it difficult to impose mask mandates, cities may still be able to require businesses to implement precautionary safety measures, like

sanitation and distancing requirements, especially since federal guidance from the Occupational Safety and Health Administration has been so scant.

In addition, with many state eviction moratoria sunset and few state laws explicitly forbidding similar city orders, cities can explore their authority to implement tenant and owner protections like local eviction and foreclosure moratoria, or limits on late rent fees. To be clear, adoption of such policies may invite a hostile response from state officials.

Where a local government's authority is unclear or might be expressly preempted under normal circumstances, local officials could invoke emergency authority. A number of states' statutes grant local governments broad authority to protect the health and safety of residents during declared states of emergency. While courts, in general, have not clarified the scope and practical consequences of broad local emergency powers, it might be argued that such authority allows local governments to adopt temporary emergency policies even when state law expressly preempts such policies under normal circumstances, or at least when it is unclear whether a local policy might be preempted by state law.

Localities and advocates can also push for state-level and private-sector policy change. In Tennessee, for example, a group of grassroots organizations pushed Governor Bill Lee to use his statutory emergency powers to suspend preemption laws that hamper local COVID-19 responses, such as those concerning paid sick leave, "sanctuary city" policies, and rent control during the pandemic. They also asked the governor to explicitly delegate authority to cities to impose policies like mask mandates.

Nashville followed suit, passing a resolution urging businesses to voluntarily provide paid sick leave to employees and asking the governor to suspend the state's preemption of local paid sick leave requirements, though he has not done so.<sup>17</sup>

Finally, in response to preemptive executive orders, cities can argue that governors have overstepped their legal authority. Though state emergency authority and public health and safety laws are often broad, governors' emergency powers are not unlimited. It is also an open question whether executive orders have preemptive effect in the 40 or so "home rule" states where localities have broad constitutional or statutory authority to govern themselves.<sup>18</sup> Cities in these states can argue that their home rule authority to regulate local public health trumps the governor's executive powers, or that executive orders provide only a floor, not a ceiling, on local protective efforts.

The financial and political costs associated with litigating these issues is obviously a barrier for many local governments, but the potential effects of lifting preemption laws is also significant. Municipal and county associations, including the National League of Cities, have advocated for more local authority<sup>19</sup>—though city-state conflicts have become highly politicized, especially in states with conservative statewide government. Those conflicts were on the rise prior to the pandemic, as legislatures repeatedly undermined local authority across numerous policy areas.

The pandemic has made the problem of preemption even more salient; the public health and safety consequences of limiting local power to respond to local outbreaks are significant and in many cases frightening.

## POLLING METHODOLOGY

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From 7/24/2020 to 7/25/2020 Data for Progress conducted a survey of 1,318 likely voters nationally using web panel respondents. The sample was weighted to be representative of likely voters by age, gender, education, race, and voting history. The survey was conducted in English. The margin of error is +/- 2.7 percent.

1. Lori Riverstone-Newell, *The Rise of State Preemption Law in Response to Local Policy Innovation*, 47 *PUBLIUS: J. OF FEDERALISM* 403, 406 (2017).
2. Richard Briffault, *The Challenge of the New Preemption*, 70 *STAN. L. REV.* 1995, 1996, 1999-2007 (2018).
3. H.B. 600, 107th Gen. Assemb. (Tenn. 2011).
4. N.C. GEN. STAT. ANN. § 143-422.2(a) (LexisNexis 2017).
5. ARK. CODE ANN. §§ 14-1-401 to 403 (LexisNexis 2015).
6. Those Southern states include Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas. *See* ALA. CODE § 25-7-41 (LexisNexis 2016) (AL minimum wage); ALA. CODE § 11-80-16 (LexisNexis 2014) (AL paid sick leave); FLA. STAT. ANN. § 218.077 (LexisNexis 2015) (FL minimum wage & paid sick leave); GA. CODE ANN. § 34-4-3.1 (2017) (GA minimum wage & paid sick leave); LA. STAT. ANN. § 23:642 (2012) (LA minimum wage & paid sick leave); MISS. CODE ANN. § 17-1-51 (2013) (MS minimum wage & paid sick leave); N.C. GEN. STAT. § 95-25.1 (2017) (NC minimum wage & paid sick leave); OKLA. STATE ANN. tit. 40, § 160 (2014) (OK minimum wage & paid sick leave); S.C. CODE ANN. § 6-1-130 (2002) (SC minimum wage); TENN. CODE ANN. § 50-2-112 (2013) (TN minimum wage); TENN. CODE ANN. § 7-51-1802 (2017) (TN paid sick leave); TEX. LABOR CODE ANN. § 62.0515 (West 2003) (TX minimum wage); S.B. 668, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (AR minimum wage & paid sick leave); H.B. 3, 2016 Reg. Sess. (Ky. 2017) (KY minimum wage & paid sick leave); S.B. 218, 2017 Reg. Sess. (S.C. 2017) (SC paid sick leave).
7. Those states preempting rent control include Alabama, Arizona, Florida, Georgia, Mississippi, New Mexico, North Carolina, South Carolina, Tennessee, Texas, and Virginia (which, as a Dillon's Rule state, does not currently extend local governments the authority to control rents). *See* ALA. CODE § 11-80-8.1 (2018) (AL rent control); ARIZ. REV. STAT. § 33-1329 (LexisNexis 1980) (AZ rent control); FLA. STAT. ANN. § 166.043 (LexisNexis 2001) (FL rent control); GA. CODE ANN. § 44-7-19 (1984) (GA rent control); MISS. CODE ANN. § 21-17-5 (2016) (MS rent control); N.M. STAT. ANN. § 47-8A-1 (LexisNexis 1991) (NM rent control); N.C. GEN. STAT. § 41-14.1 (1987) (NC rent control); S.C. CODE ANN. § 27-39-60 (1985) (SC rent control); TENN. CODE ANN. § 66-35-102 (2018) (TN rent control); TEX. LOCAL GOV. CODE ANN. § 214.902 (West 2001) (TX rent control).
8. Those states that also preempt inclusionary housing policies include Arizona, Tennessee, Texas, and Virginia. *See* ARIZ. REV. STAT. § 9-461.16 (LexisNexis 2014) (AZ inclusionary housing); TENN. CODE ANN. § 66-35-102 (2018) (TN inclusionary housing); TEX. LOCAL GOV. CODE ANN. § 214.905 (West 2007) (TX inclusionary housing).
9. *See* FLA. STAT. ANN. § 790.33 (LexisNexis 2011); *State v. City of Weston*, No. 1D19-2819 (Fla. Dist. Ct. App. Jan. 2, 2020).
10. *See City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018); S.B. 4, 85th Leg. Sess. (Tex. 2017).
11. *See State ex rel. Brnovich v. City of Phoenix*, No. CV-20-0019-SA, 2020 Ariz. LEXIS 228, at \*24-25 (Ariz. Aug. 3, 2020); S.B. 1487, 52nd Leg., 2nd Reg. Sess. (Ariz. 2016).
12. Dilini Lankachandra, *Enacting Local Workplace Regulations in an Era of Preemption*, 122 *W. VA. L. REV.* 941, 944 (2020).
13. *Rent Control Laws by State*, NAT'L MULTIFAMILY HOUS. COUNCIL, <https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/> (last updated Sept. 20, 2019).
14. Complaint for Declaratory Relief, *Kemp v. Bottoms*, No. 2020CV338387 (Ga. Sup. Ct. July 13, 2020).
15. Ga. Exec. Order 08.31.20.02.
16. Shelby County, Tennessee, is one example of a jurisdiction that enacted a public-sector paid family leave requirement during the pandemic, in part to ensure that parents do not need to save their sick days to care for a new child. Shelby County News Release, *May Lee Harris' Update on Implementation of County Government's First Paid Parental Leave Policy*, Jun. 23, 2020, <https://www.shelbycountyttn.gov/civicalerts.aspx?aid=2774>.
17. Nashville Resolution RS2020-327 (May 19, 2020).
18. Nestor Davidson et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, American Constitution Society (Sept. 2017), [https://www.acslaw.org/wp-content/uploads/2017/09/ACS\\_Issue\\_Brief\\_-\\_Preemption\\_0.pdf](https://www.acslaw.org/wp-content/uploads/2017/09/ACS_Issue_Brief_-_Preemption_0.pdf).
19. *See* NAT'L LEAGUE OF CITIES, *PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY* (2020).