

PANDEMIC PREEMPTION: LIMITS ON LOCAL CONTROL OVER PUBLIC HEALTH

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INTRODUCTION

As COVID-19 silently spread across the globe, the earliest effective responses in the United States were driven by localities. However, as the pandemic progressed, many of the most impacted cities were barred from taking comprehensive action in response to the pandemic. The broader trend of state preemption of local public health interventions accelerated as a result of COVID-19 and left many localities effectively defenseless against an invisible enemy.

As the earliest known outbreak in the United States took hold in Washington state, King County encouraged workers to telecommute and dramatically reduced mobility via public transportation within the county.¹ In the Bay Area, several counties joined together to issue the nation's first stay-at-home order in an effort to try and curb community transmission in the early stages of the pandemic.² While many states allowed localities to take the initiative in the early stages of the pandemic, subsequently, there was a preemption pivot. Over time, more governors issued executive orders that prevented localities from taking further action.³ As a result, many of the nation's largest cities and most major cities in the Sunbelt and the Midwest regions were blocked from taking action to confront the rising number of cases and deaths in their communities. While many scholars have pointed to the lack of a uniform national response to this crisis, few have recognized that the uniformity of statewide preemption played a significant role in the high level of mortality.

- 1 Sandi Doughton, *New Analysis May Rewrite the History of Washington State's Coronavirus Outbreak*, SEATTLE TIMES (May 27, 2020), <https://www.seattletimes.com/seattle-news/health/genetic-analysis-raises-more-questions-about-the-history-of-washington-states-coronavirus-outbreak/>; Meredith Li-Vollmer, *New Public Health Recommendations to Slow the Spread of Coronavirus*, PUB. HEALTH INSIDER (Mar. 5, 2020), <https://publichealthinsider.com/2020/03/04/new-public-health-recommendations-to-slow-the-spread-of-coronavirus/>; Heidi Groover & Mike Lindblom, *King County Metro Will Reduce Bus Service Amid Coronavirus Outbreak*, SEATTLE TIMES (Mar. 18, 2020), <https://www.seattletimes.com/seattle-news/transportation/king-county-metro-reportedly-plans-to-cut-bus-service-amid-coronavirus-outbreak/>.
- 2 Press Release, Cnty. of San Mateo, Seven Bay Area Jurisdictions Ord. Residents to Stay Home, (Mar. 16, 2020), <https://www.smcgov.org/press-release/march-16-2020-seven-bay-area-jurisdictions-order-residents-stay-home>. See generally Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement—United States, March 1–May 31*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1198–99, 1202 (2020) (discussing California as the first state with a stay-at-home order).
- 3 See Brentin Mock, *These States Are Sowing Confusion About Cities' Power to Fight Covid-19*, BLOOMBERG CITYLAB (Apr. 8, 2020), <https://www.bloomberg.com/news/articles/2020-04-08/how-much-power-do-cities-have-to-fight-covid-19>.

Perhaps no issue highlighted the nature of pandemic preemption more than the limits on mask mandates imposed by many states. Iowa, Georgia, and Nebraska are among the most dramatic examples of statewide limits on local action. In Iowa, as local governments sought to implement a mask mandate, Governor Kimberly Reynolds claimed they could not do so without her permission, citing informal advisory opinions by the State Attorney General's office.⁴ In Georgia, Governor Brian Kemp issued an executive order sharply limiting any local action in response to the pandemic.⁵ He later responded to local mask mandates by bringing litigation against the city of Atlanta.⁶ Cities across Georgia opposed the governor's lawsuit, and the Georgia Municipal Association, with many member-municipalities having already adopted mask policies in public buildings, submitted an amicus brief arguing that the Georgia Constitution prohibited the governor from exercising such legislative or judicial powers in a time of emergency and that local mask mandates were a "consistent supplementation of the governor's executive orders."⁷ In Nebraska, Governor Pete Ricketts threatened to withhold federal stimulus funding from any locality which imposed a mask mandate.⁸

In a pandemic, there is a strong argument that a uniform response is more likely to be effective. However, in a country as diverse and widespread as the United States, there are good reasons to allow cities with denser populations to respond differently than rural and more sparsely populated areas. In prior pandemics, local action was central to reducing overall levels of mortality. Strong public health data around the impact of mask usage in reducing the rate of transmission suggests that this intervention was among the most important local responses to COVID-19.⁹

4 Clark Kauffman, *Attorney General Casts Doubt on Legality of Local COVID-19 Orders*, IOWA CAP. DISPATCH (July 7, 2020), <https://iowacapitaldispatch.com/2020/07/07/attorney-general-casts-doubt-on-legality-of-local-covid-19-orders/>.

5 Ga. Exec. Order No. 07.15.20.01, at 1, 32, 40 (July 15, 2020).

6 *See* Complaint at 1, 5–7, *Kemp v. Bottoms*, No. 2020-CV-338387 (Ga. Super. Ct. July 16, 2020) [hereinafter *Kemp Complaint*].

7 Brief of Georgia Municipal Ass'n, Inc. & International Municipal Lawyers Ass'n as Amici Curiae in Opposition to Plaintiff's Motion for Emergency Interlocutory Injunction and Complaint for Declaratory and Injunctive Relief at 1, 6, 7, 9, 12, *Kemp v. Bottoms*, No. 2020-CV-338387 (Ga. Super. Ct. July 21, 2020) [hereinafter *Brief of Amici Curiae*].

8 Joseph Zeballos-Roig, *A Republican Governor Is Threatening to Withhold \$100 Million in Federal Relief Funds from Cities if Local Officials Mandate Wearing Masks in Public Buildings*, BUS. INSIDER (June 18, 2020), <https://www.businessinsider.com/republican-governor-nebraska-pete-ricketts-federal-relief-funds-cities-2020-6>.

9 Nina Bai, *Still Confused About Masks? Here's the Science Behind How Face Masks Prevent Coronavirus*, U.C.S.F. (July 11, 2020), <https://www.ucsf.edu/news/2020/06/417906/>

As of early December 2020, with cases reaching unprecedented rates in the United States, thirty-eight states, plus the District of Columbia and Puerto Rico, had imposed statewide mask mandates.¹⁰ Among these states, at least five of them adopted the policy after November 2020, nearly a year after the beginning of the pandemic.¹¹ Several other states, including Iowa, aggressively sought to prevent localities from adopting local mask mandates.¹² Of the remaining twelve states without a statewide mask mandate, Florida Governor Ron DeSantis preempted local governments from imposing fines for violators of local mask mandates.¹³ Florida surpassed one million COVID-19 infections as of December 1, 2020.¹⁴ Governors in other states, including Georgia and Nebraska, previously sought to preempt or impose fiscal penalties on localities that required masks.¹⁵ More than 500,000 Georgia residents contracted COVID-19 without any statewide approach to requiring masks.¹⁶

Local leaders throughout major population centers and diverse counties generally led the effort to encourage universal masking during the pandemic, and in the twelve states without mask mandates, they are the only authority requiring such a response.¹⁷ In Alaska, for example, a mayoral

still-confused-about-masks-heres-science-behind-how-face-masks-prevent; Jeremy Howard et al., *An Evidence Review of Face Masks Against COVID-19*, PROC. NAT'L ACAD. SCI., Jan. 2021, at 1; Heesoo Joo et al., *Decline in COVID-19 Hospitalization Growth Rates Associated with Statewide Mask Mandates – 10 States, March-October 2020*, 70 MORBIDITY & MORTALITY WKLY. REP. 212 (2021); Wei Lyu & George Webby, *Community Use of Face Masks and COVID-10: Evidence from a Natural Experiment of State Mandates in the US*, 38 HEALTH AFFS. 1419 (2020).

10 Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (Mar. 16, 2021), <https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html>.

11 *Id.*

12 See, e.g., David Pitt, *Local Control Dispute Brewing Over Iowa Mask Mandates*, AP NEWS (Aug. 9, 2020), <https://apnews.com/article/iowa-health-local-governments-kim-reynolds-virus-outbreak-e8e439daf0941a6b2edfc86d2262d1eb>.

13 See Fla. Exec. Order No. 20-244 (Sept. 25, 2020); see also Fla. Exec. Order No. 20-92 (Apr. 1, 2020) (providing that Governor Ron DeSantis' executive orders supersede conflicting local orders).

14 *Florida Surpasses 1 Million COVID-19 Cases*, AP NEWS (Dec. 1, 2020), <https://apnews.com/article/florida-coronavirus-pandemic-ron-desantis-cc761f945a8a32f4db240cc3fdd0abf9>.

15 See Ga. Exec. Order No. 07.15.20.01 (July 15, 2020); see also Zeballos-Roig, *supra* note 8.

16 Jeff Amy, *COVID-19 Cases Keep Soaring in Georgia as Hospitals Fill*, AP NEWS (December 7, 2020), <https://apnews.com/article/atlanta-georgia-coronavirus-pandemic-6e4ad3e7abe160b200cbbd8c89999a21>; see Markowitz, *supra* note 10.

17 See Markowitz, *supra* note 10 (discussing cities and counties in Idaho, Arizona, South Carolina, Nebraska, Oklahoma, Missouri, Tennessee, Georgia, Florida, and Alaska); see also, e.g., Kobbie Vance, *Cities and Counties Continue Mask Mandates as Statewide Order Expires*,

order requires people in Anchorage to wear face coverings in public.¹⁸ In Arizona, major cities, such as Phoenix and Tucson, require masks, as do some counties in the state.¹⁹ In Georgia, major cities, including Atlanta and Savannah, as well as a number of counties, have mask mandates.²⁰ In South Carolina, Charleston and Columbia both have mask mandates.²¹

In most states, local governments also led early efforts to impose stay-at-home orders or temporarily close non-essential businesses. However, by April, most states had adopted a similar approach, and these statewide orders often included preemption of local action. Nearly half of the forty-three stay-at-home orders included preemption language.²² In some of these states, the stay-at-home orders set a floor, below which no locality could go, while others set a ceiling, forcing localities to refrain from creating policies that went further than the states, and many others were entirely restrictive of local government action.²³ With at least eight states adopting a pure ceiling

MISS. PUB. BROAD. (Oct. 8, 2020), <https://www.mpbonline.org/blogs/news/cities-and-counties-continue-mask-mandates-as-statewide-order-expires/> (discussing Mississippi); Jeremy Fugleberg, *South Dakota Cities Tackle COVID-19 Mask Mandates*, MITCHELL REPUBLIC (Nov. 21, 2020), <https://www.mitchellrepublic.com/newsmd/coronavirus/6771465-South-Dakota-cities-tackle-COVID-19-mask-mandates> (discussing South Dakota); Ethan Bakuli, *Coronavirus in Vermont: What Towns and Businesses Require Face Masks? Here Are Answers.*, BURLINGTON FREE PRESS (June 17, 2020), <https://www.burlingtonfreepress.com/story/life/2020/06/08/covid-19-vermont-what-towns-and-businesses-require-face-masks-covid-19/5317789002/> (discussing Vermont); Scott Bauer, *3 Cities Enact[] Mask Mandates; Evers Resists Statewide Order*, AP NEWS (July 22, 2020), <https://apnews.com/article/5857b586ad2613043676a9967107249e> (discussing Wisconsin).

18 Aubrey Wieber & Morgan Krakow, *Anchorage Mayor Berkowitz Orders Mask Wearing in Indoor Public Spaces*, ANCHORAGE DAILY NEWS (June 27, 2020), <https://www.adn.com/alaska-news/anchorage/2020/06/26/anchorage-mayor-berkowitz-issues-indoors-mask-mandate/>.

19 Bob Christie, *Many Arizona Cities Back Masks to Slow Virus, Others Say No*, AP NEWS (June 18, 2020), <https://apnews.com/article/c37cee0b11d8abd65fc50808330616ce>; Vanessa Romo, *Phoenix Passes Face Mask Mandate Amid Arizona Coronavirus Surge*, NPR (June 19, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/06/19/881079527/phoenix-passes-face-mask-mandate-amid-arizona-coronavirus-surge>.

20 Brittany Crocker, *Fact Check: Florida, Georgia, Idaho, South Dakota, Tennessee Don't Require Masks Statewide*, USA TODAY (Oct. 28, 2020), <https://www.usatoday.com/story/news/factcheck/2020/10/27/fact-check-florida-georgia-tennessee-idaho-s-d-arent-mask-free/6045575002/>.

21 Tim Scott, *South Carolina Among 22 States Without Some Sort of Face-Mask Ordinance*, ABC COLUMBIA (July 20, 2020), <https://www.abccolumbia.com/2020/07/20/south-carolina-among-22-states-without-some-sort-of-face-mask-ordinance/>.

22 Katherine Hoops et al., *Stay-at-Home Orders and Firearms in the United States During the COVID-19 Pandemic*, 141 PREVENTIVE MED. 1, 2–3 (2020).

23 Kim Haddow et al., *Preemption, Public Health, and Equity in the Time of COVID-19*, in ASSESSING LEGAL RESPONSES TO COVID-19, at 71, 72–73 (Scott Burris et al. eds., 2020).

approach to preemption, many local governments lost the ability to act rapidly to counteract the effects of the pandemic.²⁴

This article will focus on analyzing the role of pandemic preemption in the case of one non-pharmaceutical intervention adopted by many localities—the requirement that facial coverings be worn to prevent the transmission of the virus. Although the exact form of the so-called mask mandates has varied from locality to locality, these policies generally require those over a certain age to wear a face covering in public spaces, particularly indoors, or when social distancing is not possible. The controversy generated by this public health intervention is not new, as the anti-mask leagues of the 1918 flu pandemic demonstrate,²⁵ but the response by state governments to prevent localities from adopting such a response is essentially new and reveals much about the constraints on local action designed to protect public health. Part I analyzes the local role in responding to COVID-19 with a particular focus on policies and research related to the use of masks. Part II offers a broader perspective on the ways in which state-level preemption constrains local approaches to public health. Part III introduces case studies of pandemic preemption in the context of COVID-19 by looking at statewide limits on local mask requirements. Finally, the Conclusion assesses the dynamics of pandemic preemption and its relationship to the trend toward wider statewide preemption in the realm of public health.

²⁴ *Id.* at 71–73.

²⁵ Kiona N. Smith, *Protesting During a Pandemic Isn't New: Meet the Anti-Mask League of 1918*, FORBES (Apr. 29, 2020), <https://www.forbes.com/sites/kionasmith/2020/04/29/protesting-during-a-pandemic-isnt-new-meet-the-anti-mask-league/?sh=575ee40112f9>.

I. COVID-19 AND PANDEMIC RESPONSE

In a global pandemic, locally driven responses are not necessarily optimal given the likelihood of viral spillover from other localities, other states, and other countries. However, in the absence of coordinated global, national, or even state responses, local action can be essential to reducing the exponential growth of cases and ultimately saving lives. Voluntary action by citizens is critical to the response to the current pandemic. Yet, as with state governments that are reluctant to take public health actions, citizens who decide not to take measures to prevent the spread of the virus can ultimately become super spreaders of the virus to others and generate enormous externalities.

In this context, growing scientific evidence demonstrates that facial coverings can dramatically reduce the transmission of COVID-19.²⁶ The efficacy of masks, of course, depends on the percentage of the population that adopts the practice of wearing them.²⁷ Substantial peer effects shape these individual-level decisions. Most people take cues from their environment. So, if people see others wearing a mask, they are much more likely to wear one themselves. This suggests that getting a threshold percentage of the population to wear facial coverings can alter the behavior of others and create a tipping point or norm cascade.

As of early December 2020, the federal Centers for Disease Control and Prevention urged “universal mask use” to prevent COVID-19 infections and deaths.²⁸ Updated guidance from the World Health Organization (WHO) similarly recommended the use of facial coverings indoors and outdoors: “[w]hen indoors with others, people should wear a mask unless ventilation has been assessed to be adequate. At home, people should wear

26 See Catherine M. Clase et al., *Forgotten Technology in the COVID-19 Pandemic: Filtration Properties of Cloth and Cloth Masks—A Narrative Review*, 95 *MAYO CLINIC PROC.* 2204, 2214–15, 2221 (2020). See generally Joo, *supra* note 9; Benjamin Rader et al., *Mask-Wearing and Control of SARS-CoV-2 Transmission in the USA: A Cross-Sectional Study*, 3 *LANCET DIGITAL HEALTH* e148 (2021); Sharoda Dasgupta et al., *Differences in Rapid Increases in County-Level COVID-19 Incidence by Implementation of Statewide Closures and Mask Mandates – United States, June 1–September 30, 2020*, *ANNALS EPIDEMIOLOGY*, May 2021, at 46; Miriam E. Van Dyke et al., *Trends in COVID-19 Incidence in Counties with and Without a Mask Mandate – Kansas, June 1–August 23, 2020*, 69 *MORBIDITY & MORTALITY WKLY. REP.* 1777 (2020).

27 Steffen E. Eikenberry et al., *To Mask or Not to Mask: Modeling the Potential for Face Mask Use by the General Public to Curtail the COVID-19 Pandemic*, 5 *INFECTIOUS DISEASE MODELING* 293, 295 (2020).

28 Teylor Telford, *CDC Recommends People Wear Masks Indoors When Not at Home*, *WASH. POST* (Dec. 4, 2020), <https://www.washingtonpost.com/health/2020/12/04/cdc-mask-guidance-indoors/>.

a mask when receiving visitors if they cannot maintain distance or assess that ventilation is good.”²⁹

Moreover, the former White House Coronavirus Response Coordinator, Dr. Deborah Birx, attributed the stabilization of cases in Iowa to the belated adoption of a mask mandate in November 2020.³⁰ In Kansas, a statewide mask mandate in early July allowed for counties to opt-out.³¹ Among counties that adopted the mandate, new cases dropped 6%, while in those counties that opted out, new cases jumped by 100%.³² Research suggests that the use of masks has already prevented 1.4 million new infections in the Tampa Bay region.³³ In October 2020, a study projected that the universal adoption of facial coverings could prevent 130,000 deaths by the end of February 2021 in the United States.³⁴ In June 2020, an economic study estimated that a universal, national mask mandate could generate \$1 trillion in economic benefit by preventing future lockdown measures.³⁵

In Germany, the city of Jena adopted a mask mandate in early April 2020, and within a few weeks, new infections were close to zero.³⁶ As a result

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- 29 *WHO Updates Guidance on Mask Use in the Context of COVID-19*, HEALTHCARE PURCHASING NEWS (Dec. 2, 2020), <https://www.hpnonline.com/infection-prevention/disposables-kits-drapes-ppe-instruments-textiles-etc/article/21164834/who-updates-guidance-on-mask-use-in-the-context-of-covid19>; WORLD HEALTH ORG., MASK USE IN THE CONTEXT OF COVID-19: INTERIM GUIDANCE 8, 10 (2020), <https://apps.who.int/iris/handle/10665/337199>.
- 30 See Rachel Droze, ‘Mandates Work’: Dr. Birx Says Iowa’s Stabilizing Case Counts Prove Mask Requirements Help Slow Spread, WE ARE IOWA (Dec. 5, 2020), <https://www.weareiowa.com/article/news/health/coronavirus/dr-deborah-birx-says-masks-should-be-mandated-at-iowa-schools-all-indoor-locations-covid-19-coronavirus-pandemic/524-649b9bfc-b275-4384-889b-45bba5a7f0fe>.
- 31 Kan. Exec. Order No. 20-52 (July 2, 2020).
- 32 Jonathan Shorman, *CDC Report: COVID-19 Cases Dropped in Kansas Counties with Mask Orders, Rose in Others*, KAN. CITY STAR (Nov. 20, 2020), <https://www.kansascity.com/article247315954.html>.
- 33 C.T. Bowen, *Face Masks Reduced Tampa Bay Coronavirus Cases by 1.4 Million, Says USF Professor*, TAMPA BAY TIMES (Dec. 2, 2020), <https://www.tampabay.com/news/health/2020/12/02/face-masks-reduced-tampa-bay-coronavirus-cases-by-14-million-says-usf-professor/>.
- 34 Eric Boodman, *Universal Mask Use Could Save 130,000 U.S. Lives by the End of February, New Study Estimates*, STAT (Oct. 23, 2020), <https://www.statnews.com/2020/10/23/universal-mask-use-could-save-130000-lives-by-the-end-of-february-new-modeling-study-says/>.
- 35 Sarah Hansen, *A National Mask Mandate Could Save the U.S. Economy \$1 Trillion, Goldman Sachs Says*, FORBES (June 30, 2020), <https://www.forbes.com/sites/sarahhansen/2020/06/30/a-national-mask-mandate-could-save-the-us-economy-1-trillion-goldman-sachs-says/?sh=5ea2e89e56f1>.
- 36 Disha Shetty, *German Study Finds Face Masks Reduce New Covid-19 Infections by 45%*, FORBES (Dec. 6, 2020), <https://www.forbes.com/sites/dishashetty/2020/12/06/>

of this experience, every federal state in Germany made facial coverings mandatory by the end of April.³⁷ A study of the German model found that within twenty days of mask mandates, the number of new infections declined between 15% and 75%, with the greatest reduction for those over age sixty, who are generally more vulnerable to severe outcomes.³⁸ In Jena, the adoption of the mask mandate reduced new cases by 75% overall and by 90% for those over age sixty.³⁹ The average reduction in the number of new cases was 45% within three weeks with virtually no economic cost.⁴⁰

Statewide approaches to requiring masks seem to be more effective than local mask mandates, but both can significantly alter individual behavior and case growth. One major difference between statewide and local approaches seems to be that statewide mandates stimulate economic activity in a way that is not evident with local ones.⁴¹ A study by the University of Utah found that mask mandates reduced new cases by 10 per 100,000 per day.⁴² It also determined that state mask mandates lead to increased consumer spending, with 51% of respondents more likely to go into a store if everyone is wearing a mask.⁴³ Statewide mandates are also more effective at increasing consumer confidence in a way that was not evident for local requirements.⁴⁴

Nonetheless, local responses can have a major impact in reducing cases, particularly if they are coordinated. In Arizona, local mask mandates in mid-June 2020, covering 85% of the state's population, contributed to a stabilization of cases by early July and a 75% decline in cases by early August.⁴⁵ Yet, by July 2020, a minimal number of states required facial

german-study-finds-face-masks-reduce-new-covid-19-infections-by-45/.

37 *Id.*

38 *Id.*

39 Timo Mitze et al., *Face Masks Considerably Reduce COVID-19 Cases in Germany*, 117 *PROC. NAT'L ACAD. SCI.* 32293, 32293 (2020).

40 *Id.*

41 Alison Durkee, *Statewide Mask Mandates Are Better for Economy than Local Ones, Study Finds*, *FORBES* (Nov. 24, 2020), <https://www.forbes.com/sites/alisondurkee/2020/11/24/statewide-mask-mandates-are-better-for-economy-than-local-ones-study-finds/?sh=2ec8b384498d>.

42 Nathan Seegert et al., *Information Revelation of Decentralized Crisis Management: Evidence from Natural Experiments on Mask Mandates 4* (Nov. 23, 2020) (unpublished preprint), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736407.

43 *Id.* at 24.

44 *Id.* at 12–13.

45 M. Shayne Galloway et al., *Trends in COVID-19 Incidence After Implementation of Mitigation Measures — Arizona, January 22–August 7, 2020*, 69 *MORBIDITY & MORTALITY WKLY. REP.* 1460, 1460–61 (2020) (“Updated guidance from state officials provided local governments the authority to implement mask policies (June 17) and enforcement measures tailored to local public health needs (local policies were applicable to

coverings as part of a statewide pandemic response.⁴⁶ Several of the twelve states without mask mandates as of December 2020 still encourage local approaches.⁴⁷ However, many of these states, a few of which have since adopted statewide mandates, have demonstrated much less support for local innovation with respect to facial coverings and other pandemic responses.⁴⁸ In Iowa and Georgia, among other states, the governors directly challenged the authority of local governments to implement mask requirements.⁴⁹ In Nebraska, the governor threatened to withdraw pandemic-related federal funding from localities requiring masks.⁵⁰ In Florida, the governor reversed course in September 2020 after initially allowing local approaches and declared that localities lacked the authority to enforce mask mandates.⁵¹ Of these states, only Iowa subsequently adopted a statewide mask requirement, although it is more limited than in most other states.⁵² Laredo, Texas, was among the first localities in the United States to require the wearing of

approximately 85% of the total Arizona population). Before June 17, mask wearing had not been widely mandated or enforced.”).

- 46 Markowitz, *supra* note 10. As of July 1, 2020, only eight states, and one territory, required face masks in public: California, Connecticut, Illinois, New Mexico, Nevada, New York, Rhode Island, Washington, and Puerto Rico. *Id.*
- 47 *Id.*; Adrian Mojica, *Tennessee Governor Won't Change Position on Mask Mandate Regardless of Who's President*, FOX17 WZTV NASHVILLE (Nov. 10, 2020), <https://fox17.com/news/local/tennessee-governor-wont-change-position-on-mask-mandate-regardless-of-whos-president-donald-trump-joe-biden-john-cooper-bill-lee-coronavirus> (statement of Tennessee Governor's press secretary) (“The governor strongly believes statewide, one-size-fits-all government mandates are not the best way to achieve sustainable compliance from individuals, as they are more likely to trust local leaders and that local leaders know the unique needs of their communities best.”); *see also* Keith Ridler, *Idaho Governor Pleads for Mask-Wearing to Protect Veterans*, U.S. NEWS & WORLD REP. (Nov. 9, 2020), <https://www.usnews.com/news/best-states/idaho/articles/2020-11-08/idaho-keeps-breaking-new-coronavirus-case-records> (quoting a spokesperson for the governor of Idaho: “Idahoans value local control . . .”).
- 48 *See, e.g.*, Maeve Sheehy, *Americans' Aversion to Mask-Wearing Is Holding Back the Economy*, BLOOMBERG (July 11, 2020), <https://www.bloomberg.com/news/articles/2020-07-11/americans-aversion-to-mask-wearing-is-holding-back-the-economy>.
- 49 Kauffman, *supra* note 4; Markowitz, *supra* note 10; *see also* ANNA PRICE & LOUIS MYERS, LAW LIBRARY OF CONGRESS, UNITED STATES: FEDERAL, STATE, AND LOCAL GOVERNMENT RESPONSES TO COVID-19 10–13 (2020), <https://www.loc.gov/law/help/covid-19-responses/federal-state-local-responses.pdf>.
- 50 Jason Silverstein, *Nebraska Governor Threatens to Withhold Coronavirus Relief Funds from Counties that Require Masks*, CBS NEWS (June 19, 2020), <https://www.cbsnews.com/news/nebraska-governor-pete-ricketts-withhold-coronavirus-relief-funds-face-masks/>.
- 51 Markowitz, *supra* note 10; Josh Rojas, *Florida Mayors Push DeSantis to Put COVID Restrictions Back in Place*, BAY NEWS 9 (Nov. 18, 2020), <https://www.baynews9.com/fl/tampa/coronavirus/2020/11/18/florida-mayors-push-desantis-to-put-covid-restrictions-back-in-place>.
- 52 Markowitz, *supra* note 10.

facial coverings in early April 2020.⁵³ Yet Laredo and other Texas cities were challenged by state officials over their local authority to implement them.⁵⁴

53 See Miles Moffeit et al., *Texas Leaders Say You Should Wear a Mask, but You Don't Have To, Muddling Public Health Message*, DALLAS MORNING NEWS (May 9, 2020), <https://www.dallasnews.com/news/politics/2020/05/09/texas-leaders-say-you-should-wear-a-mask-but-you-dont-have-to-muddling-public-health-message/>.

54 *Id.*

II. PREEMPTION AND PUBLIC HEALTH

Local preemption was significant in the area of public health even before the COVID-19 pandemic.⁵⁵ Pandemic preemption, therefore, is an outgrowth of a broader trend with respect to state-local government relations in recent years. Referred to by some scholars as the “new preemption,” the approach by state governments to local regulation in a wide range of areas is increasingly preemptive of local action.

The baseline rules with respect to local preemption vary significantly by state and even by the local jurisdiction. Those states that retain the approach known as “Dillon’s Rule” only offer localities those powers which are exclusively granted by the state constitution or by state statute.⁵⁶ In many states, some localities have what is known as “home rule,” under which either the state constitution or a state statute outlines an arena in which localities can act without state interference.⁵⁷ Promoting the health and safety of residents is among the core authorities preserved under local control in most home rule jurisdictions.⁵⁸ However, action by the state government can restrict the scope of home rule, and, in many of these states, governors have sought to do so by asserting that their emergency powers supersede local control.⁵⁹

The broader trend of local preemption arguably has its own independent effect on the capacity and willingness of local governments

55 See David Gartner, *States, Localities and Public Health*, 122 W. VA. L. REV. 965, 967 (2020). See generally James G. Hodge, Jr. et al., *Public Health Preemption: Constitutional Affronts to Public Health Innovations*, 79 OHIO ST. L.J. 685 (2018).

56 See Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1129 n.99 (2012) (stating that eight states adhere strictly to Dillon’s Rule: Alabama, Arkansas, Nevada, New Hampshire, Vermont, Virginia, West Virginia, and Wyoming); see also Marni von Wilpert, *City Governments Are Raising Standards for Working People—and State Legislators Are Lowering Them Back Down*, ECON. POL’Y INST. (Aug. 26, 2017), <https://www.epi.org/publication/city-governments-are-raising-standards-for-working-people-and-state-legislators-are-lowering-them-back-down/> (asserting that unless there is no doubt about the authority of local government to act, courts in Dillon’s Rule states generally rule against local governments).

57 Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 269–70 (1968).

58 See generally Gartner, *supra* note 55, at 967 (“[M]any cities around the country have had significant power to regulate, especially in matters of local concern, such as public health.”); Hodge, Jr. et al., *supra* note 55, at 693 (“Sweeping removals of local regulatory or home rule authority proliferate across multiple public health areas, including nutrition-based regulation.”).

59 Vanlandingham, *supra* note 57, at 280; see Kauffman, *supra* note 4; Markowitz, *supra* note 10; Moffeit et al., *supra* note 53; Rojas, *supra* note 51; Sheehy, *supra* note 48; Silverstein, *supra* note 50; PRICE & MYERS, LAW LIBRARY OF CONGRESS, *supra* note 49, at 13–15.

to intervene to protect public health.⁶⁰ An analysis by the Urban Institute sought to understand how the background conditions of local preemption shaped the response to COVID-19.⁶¹ States with greater preemption adopted fewer COVID-19-related policies at both the local and state level.⁶² By contrast, states with less preemption of local laws generally demonstrated a more comprehensive response to the pandemic, including efforts to prevent transmission and lower the growth of new cases such as mask requirements.⁶³ Overall, local-level executive action was much less likely in states with more generalized state preemption of localities.

State preemption, especially in the area of public health, faces opposition by large majorities of people across the spectrum. A recent poll found that 58% of likely voters, including majorities of those in both major political parties, believe that local governments should have the power to establish health standards that are stricter than those of the state in an emergency.⁶⁴

60 See Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 958, 966–67, 995 (2019); Nestor M. Davidson & Laurie Reynolds, *The New State Preemption, the Future of Home Rule, and the Illinois Experience*, 4 ILL. MUN. POL'Y J. 19, 19–20 (2019).

61 Mark Treskon & Benjamin Docter, *Preemption and Its Impact on Policy Responses to COVID-19*, URB. INST. 1 (Sept. 2020), <https://www.urban.org/sites/default/files/publication/102879/preemption-and-its-impact-on-policy-responses-to-covid-19.pdf>.

62 E.g., Sheila R. Foster, *As COVID-19 Proliferates Mayors Take Response Lead, Sometimes in Conflicts with Their Governors*, GEO. PROJECT ON ST. & LOC. GOV'T POL'Y & L., <https://www.law.georgetown.edu/salpal/as-covid-19-proliferates-mayors-take-response-lead-sometimes-in-conflicts-with-their-governors/> (last visited Jan. 8, 2021) (“In the absence of state action, local governments that have Home Rule authority can exercise that authority to put in place orders that protect the health, safety and welfare of their residents. In other words, cities can step into the breach before state authorities exercise their authority in an emergency. However, once the state has acted and set the terms of a statewide response, local governments must essentially step aside.”); Treskon & Docter, *supra* note 61, at 1.

63 Treskon & Docter, *supra* note 61, at 1.

64 RICHARD SCHRAGGER & DILINI LANKACHANDRA, *HOW CITIES CAN PROTECT PUBLIC HEALTH WHEN STATES STAND IN THE WAY* 3–4 (2020), https://30glxtj0jh81xn8rx26pr5af-wpengine.netdna-ssl.com/wp-content/uploads/2020/12/20.09_COVID-Preemption-in-the-South-1.pdf.

III. PANDEMIC PREEMPTION

With pandemic preemption, this general trend toward greater statewide preemption is made explicit in the emergency orders of governors across the United States.⁶⁵ In the context of the pandemic, local preemption took a variety of forms. Some states adopted ceiling preemption, whereby localities could not adopt policies more protective than the statewide standard.⁶⁶ Other states adopted floor preemption, under which localities had to meet the minimum standard based on state guidelines but could go further with local regulation.⁶⁷ Many states adopted both ceiling and floor preemption approaches, thereby creating a “regulatory vacuum” where localities could not create any policies.⁶⁸ Finally, some states utilized total local preemption prohibiting local governments from adopting any response to the pandemic.⁶⁹

With respect to the response to COVID-19, by mid-April 2020, 864 counties around the country had already issued emergency declarations.⁷⁰

65 See Haddow et al., *supra* note 23, at 72–73.

66 *Id.* at 72.

In many states—Arizona, Florida, Georgia, Mississippi, South Carolina, Tennessee, Texas, and West Virginia, among others—the statewide stay-at-home orders established a regulatory ceiling . . . prevent[ing] local governments from imposing stricter requirements than the state. For example, Arizona’s governor issued an executive order prohibiting any county, city, or town from issuing any order or regulation ‘restricting persons from leaving their home due to the COVID-19 public health emergency.’ Similarly, the Texas attorney general warned officials in Austin, Dallas, and San Antonio to roll back ‘unlawful’ local emergency orders that imposed stricter COVID-19 restrictions—and hinted that litigation would ensue if they did not.

Id.

67 *Id.* Maryland’s governor issued a statewide stay-at-home order, but allowed local governments to implement additional restrictions based on local conditions, establishing a regulatory floor.

68 *Id.*

69 *Id.* “On March 26, 2020, the governor of Arkansas issued an executive order prohibiting local stay-at-home requirements, arguing that such regulations would interfere with essential operations and commerce.” HUNTER BLAIR ET AL., *ECON. POL’Y INST.*, *PREEMPTING PROGRESS* 27 (Sept. 30, 2020), <https://files.epi.org/pdf/206974.pdf>. Although Iowa did not implement a stay-at-home order, the Governor and Attorney General told local officials that they lacked the authority to pass such orders as well. See Kauffman, *supra* note 4.

70 See Lindsay K. Cloud et al., *A Chronological Overview of the Federal, State, and Local Response to COVID-19*, in *ASSESSING LEGAL RESPONSES TO COVID-19*, at 10, 18 (Scott Burris et al. eds., 2020).

By July, more than 500 cities had issued policies related to the pandemic.⁷¹ Many of the same states that engaged in broad local preemption before the pandemic utilized specific pandemic preemption approaches in 2020.⁷² Some of the earliest uses of this specific preemption approach were related to the regulation of businesses within the states, including Mississippi in March 2020.⁷³ Subsequent executive orders in Arizona and Arkansas similarly limited the ability of localities to issue stay-at-home orders.⁷⁴ In April, Florida clarified that state-level orders superseded local ones, but the governor also suggested that local officials could still act, leading to confusion about the scope of local authority.⁷⁵ Later, executive orders in states such as Texas explicitly prohibited localities from requiring residents to wear masks.⁷⁶

With respect to facial covering requirements, states generally followed the same three approaches as with pandemic preemption overall. While a few states subsequently reversed policies on ceiling preemption that barred localities from issuing mask mandates, these restrictions were in place in many of the states that experienced the worst surge in cases in the summer of 2020.⁷⁷

71 *See id.*

72 Blair et al., *supra* note 69, at 27.

73 *Id.* (“A Mississippi executive order issued on March 24, 2020, forbade political subdivisions (including cities and counties) from imposing social distancing regulations or business shutdowns stricter than the state’s”); *see* Miss. Exec. Order No. 1463 (Mar. 24, 2020).

74 Ariz. Exec. Order No. 2020-12 (Mar. 23, 2020); Ark. Exec. Order No. 20-03 (Mar. 11, 2020) (“The Secretary of Health may issue orders of isolation and/or quarantine as necessary and appropriate to control this disease in the State of Arkansas, and the Secretary of Health, in consultation with the Governor, shall have sole authority over all instances of quarantine, isolation, and restrictions on commerce and travel throughout the state.”).

75 Steven Lemongello et al., *DeSantis Order Overruling Local Coronavirus Rules Generates Confusion*, S. FLA. SUN SENTINEL (Apr. 2, 2020), <https://www.sun-sentinel.com/coronavirus/fl-ne-coronavirus-desantis-second-order-local-impact-20200403-sipn6s23tfc73motnyoz3j562y-story.html>.

76 Tex. Exec. Order No. GA-18 (Apr. 27, 2020) (“Individuals are encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering.”). In a reversal, Texas Governor Greg Abbott instituted a face mandate by Executive Order on July 2, 2020. Tex. Exec. Order No. GA-29 (July 2, 2020).

77 Although the governors of states such as Arizona temporarily reversed state preemption of mandatory local masking orders, Arizona’s statewide emergency order included no mask-wearing mandate even as it specifically prohibited local governments from acting independently. *See* Maria Polletta, *Ducey Will Let Arizona Cities Decide on Mandating Mask Wearing, Announces New Rules for Businesses*, ARIZ. REPUBLIC (June 17, 2020), <https://www.azcentral.com/story/news/local/arizona-health/2020/06/17/arizona-gov-doug->

The impact of pandemic preemption can be assessed by analyzing how it operated in some of the regions most affected by the second wave of COVID-19 cases after the initial outbreak subsided in the spring of 2020. The Southeast and the Midwest were each the epicenter of major surges in infections beginning in the Summer of 2020.⁷⁸ By analyzing neighboring states in these regions and their respective approaches to pandemic preemption, it is possible to unpack the range of obstacles to local action and the dynamics which shape the contours and impact of such preemption.

Looking at neighboring states is of particular interest because of the peer effect, which often leads neighboring states to adopt similar policies in response to the pandemic.⁷⁹ While political variables were important factors associated with the adoption of more or less extensive pandemic response measures, governors also often looked to their neighbors when deciding whether or not to adopt specific policies. When no neighboring states adopted a given policy, a governor was 32% less likely to adopt such a policy than when half or more of its neighbors had adopted that policy.⁸⁰ In the case of Nebraska and Iowa, approximately half of their neighboring states adopted statewide mask mandates.⁸¹ Two of five of Nebraska's neighbors, excluding Iowa, adopted such an approach, while three, or half, of Iowa's neighbors did so.⁸² One of Florida's two neighboring states adopted a mask mandate, while 40% of Georgia's neighboring states implemented such a policy.⁸³

The next several Sections offer case studies of the COVID-19 response in these two pairs of neighboring states: Iowa, Nebraska, Florida, and Georgia. It analyzes the different approaches to pandemic preemption utilized in each state in 2020. While Nebraska initially used funding as a targeted lever to prevent local mask requirements, Iowa embraced a strategy of total statewide preemption of local action. While Georgia engaged in litigation designed to block localities from adopting mask mandates, Florida reversed its early support for local initiative and later prevented localities from effectively enforcing mask requirements.

ducey-update-covid-19/3208320001/.

78 Matt Stieb, *After an Early Summer Lull, COVID-19 Cases Surge in the Midwest*, N.Y. MAG (Aug. 2, 2020), <https://nymag.com/intelligencer/2020/08/after-a-lull-covid-19-cases-surge-in-the-midwest.html>.

79 Christopher Adolph et al., *Pandemic Politics: Timing State-Level Social Distancing Responses to COVID-19*, 46 J. HEALTH POL. POL'Y & L. 211, 213 (2021).

80 *Id.*

81 Erin Schumaker, *Which States Have Mask Mandates: Map*, ABC NEWS (Nov. 19, 2020), <https://abcnews.go.com/Health/states-mask-mandates-map/story?id=74168504>.

82 *Id.*

83 *Id.*

A. *Nebraska: Contingent Funding*

In Nebraska, the fiscal consequences of the new wave of local preemption were central to deterring local governments from implementing mask mandates. Nebraska's Governor Pete Ricketts warned localities in the state that he would block them from receiving emergency federal pandemic funding if they adopted mask mandates or other types of local rules to slow transmission of the virus.⁸⁴ The Governor's statements in June 2020, as cases surged in parts of the country, successfully preempted local action.

Leadership within the unicameral state legislature in Nebraska sided with localities, determining that state law gives the authority to "make regulations to prevent the introduction and spread of contagious infectious or malignant diseases into the city."⁸⁵ The governor of Nebraska later said he would not interfere with local mask mandates after the Beatrice County Board of Health required the use of masks in indoor public spaces.⁸⁶

Ultimately, seven of the largest ten cities in Nebraska imposed mask mandates amidst rapid growth in the number of cases.⁸⁷ As a result, over half of the state's population lived in communities where facial coverings were required, at least in indoor public spaces.⁸⁸ Among the cities in Nebraska that adopted such an approach were most of the population centers in the central and eastern parts of the state, such as Omaha, Lincoln, Kearney, Norfolk, and Columbus.⁸⁹

The governor of Nebraska nonetheless resisted adopting a statewide

84 Kelly Mena, *Nebraska Governor Tells Local Officials They Can't Require Face Masks if They Want Federal Coronavirus-Relief Funding*, CNN (June 19, 2020), <https://www.cnn.com/2020/06/19/politics/nebraska-governor-no-face-masks-requirement/index.html>.

85 Martha Stoddard & Reece Ristau, *Debate Emerges over City Authority to Issue Mask Mandates as Ricketts Resists State Requirement*, OMAHA WORLD-HERALD (Nov. 16, 2020), https://omaha.com/news/state-and-regional/govt-and-politics/debate-emerges-over-city-authority-to-issue-mask-mandates-as-ricketts-resists-state-requirement/article_6bc9cb4a-9478-5c76-98de-789df323d8a6.html ("State Sen[ator] Justin Wayne . . . chairman of the Legislature's Urban Affairs Committee, said . . . state law gives cities . . . the authority to 'make regulations to prevent the introduction and spread of contagious, infectious or malignant diseases into the city.'").

86 Martha Stoddard, *Ricketts Won't Stop Cities from Requiring Masks*, OMAHA WORLD-HERALD (Nov. 18, 2020), https://omaha.com/edition/sunrise/articles/ricketts-wont-stop-cities-from-requiring-masks/article_cf4d435d-73f5-56a4-a3d2-40dff5dc3689.html.

87 *7 of Nebraska's 10 Largest Cities Have Local Mask Mandates*, AP NEWS (Nov. 27, 2020), <https://apnews.com/article/pete-ricketts-lincoln-norfolk-omaha-grand-island-ec39dbf18077a19bd9266678a692ecff#:~:text=Most%20cities%20with%20mandates%20are,the%20approach%20Ricketts%20has%20taken>.

88 *Id.*

89 *Id.*

mask mandate, arguing that it would create resentment and would not be followed.⁹⁰ The state did adopt a mask requirement for a few close contact indoor businesses.⁹¹ However, this statewide mask order covered only barbershops, salons, tattoo parlors, and massage parlors.⁹²

Local authorities generally engaged in limited enforcement of these new orders and instead sought voluntary compliance instead. For example, in Norfolk, while the police department was charged with enforcement, police dispatchers received few complaints, and the police chief confirmed that voluntary compliance was the core approach.⁹³

B. *Iowa: Total Preemption*

In Iowa, many localities sought to implement mask mandates, but Governor Kim Reynolds claimed that local governments had no such authority under state law.⁹⁴ As virus cases surged in the state, county officials in Linn County and elsewhere urged the governor to allow local officials to implement requirements related to facial coverings.⁹⁵

Despite the governor's claims that local officials lacked the authority to issue mask mandates, some localities adopted them, citing the opinion

90 Chris Cillizza, *This Republican Governor's Explanation for Why He Won't Issue a Mask Mandate Is, Uh, Something Else*, CNN (Nov. 19, 2020), <https://www.cnn.com/2020/11/19/politics/pete-ricketts-mask-mandates-nebraska/index.html>.

91 Alia Conley & Martha Stoddard, *Ricketts Unveils New COVID-19-Related Restrictions, Pleads for People to Take Virus Seriously*, OMAHA WORLD-HERALD (Nov. 9, 2020), https://omaha.com/news/local/ricketts-unveils-new-covid-19-related-restrictions-pleads-for-people-to-take-virus-seriously/article_de943dd2-2f8f-59d5-9b9b-0914ebe86d2c.html.

92 *Id.*

93 See Dean Welte, *Norfolk City Council Passes Ordinance Requiring Masks in Public Places*, KTIV4 (Nov. 23, 2020), <https://ktiv.com/2020/11/23/norfolk-city-council-passes-ordinance-requiring-masks-in-public-places/>; Brett Mayerson, *Norfolk City Officials: Mask Mandate Received Well So Far*, KTIV4 (Dec. 16, 2020), <https://ktiv.com/2020/12/16/norfolks-mask-mandate-received-well-so-far>.

94 Kauffman, *supra* note 4.

95 Kate Payne, *Linn County Supervisors, Mayors Urge Reynolds to Let Them Issue Local Mask Mandates*, IOWA PUB. RADIO (Aug. 5, 2020), <https://www.iowapublicradio.org/ipr-news/2020-08-05/linn-county-supervisors-mayors-urge-reynolds-to-let-them-issue-local-mask-mandates> (“Elected leaders across Linn County, including the mayors of Cedar Rapids, Central City, Ely, Fairfax, Hiawatha, Marion, Mount Vernon, Palo, Prairieburg, Springville and Robins formally made that request by approving a joint proclamation on Wednesday.”); Press Release, Linn Cnty., Iowa, Linn Cnty. Offs. Request Local Control on Use of Face Coverings During Pandemic (Aug. 5, 2020) (announcing a proclamation approved unanimously at a joint meeting between the Linn County Board of Supervisors and the Linn County Board of Health and supported by mayors of eleven of Linn County's eighteen cities).

of their own attorneys who disagreed with the governor.⁹⁶ In July, health experts within the state urged a statewide approach to expand the use of masks and reduce levels of transmission.⁹⁷ However, the governor disputed the efficacy of mask mandates, citing the experience of other states.⁹⁸ The view of state officials successfully deterred local officials from adopting mask mandates in the most populous areas of the state for many months.⁹⁹

Public support for the local authority in Iowa was quite robust, with one poll showing that 73% of voters in the state believed that cities and towns should be allowed to set their own rules with respect to masks.¹⁰⁰ The tension between state and local officials with respect to facial coverings was accentuated by the governor's order that all local school districts needed to resume in-person instruction at least 50% of the time without any accompanying authority for school officials to require masks.¹⁰¹ Nonetheless, the governor stood by the position that local officials could not issue their own mask mandates.¹⁰² The office of the attorney general offered multiple

96 Payne, *supra* note 95.

97 Soo Kim, *Iowa Gov. Kim Reynolds Ignored COVID Experts for Months over Mask Mandate*, NEWSWEEK (Nov. 17, 2020), <https://www.newsweek.com/coronavirus-iowa-mask-mandate-governor-kim-reynolds-ignored-health-experts-1547964> (“Back in late July, the Iowa Medical Society and 14 other health professional groups called for the ‘widespread use of cloth masks in public settings [to] dramatically slow the spread of COVID-19 and save lives,’ in a letter to the governor.”).

98 Elaine Godfrey, *Iowa Is What Happens When Government Does Nothing*, ATLANTIC (Dec. 3, 2020), <https://www.theatlantic.com/politics/archive/2020/12/how-iowa-mishandled-coronavirus-pandemic/617252/>; Stephen Gruber-Miller, *There's Not a Silver Bullet: Iowa Gov. Kim Reynolds Defends Not Ordering a Mask Mandate*, DES MOINES REG. (July 30, 2020), <https://www.desmoinesregister.com/story/news/politics/2020/07/30/iowa-governor-kim-reynolds-defends-not-ordering-mask-mandate-theres-not-a-silver-bullet/5545145002/> (“A lot of the states, they’ve done that, but they’ve said there’s absolutely no enforcement . . . They’ve put it right in the declaration [saying]: ‘We’re going to issue a face mandate, but we’re not going to enforce it.’ And if you look [at] the cases and the timelines that they actually issued a mandate, the cases are still rising, so it’s just, there’s not a silver bullet, there’s not a single answer.”).

99 Brian A. Morelli, *Mayor: Cedar Rapids Stay at Home Order Would Not Be Enforceable*, GAZETTE (Apr. 7, 2020), <https://www.thegazette.com/subject/news/government/cedar-rapids-coronavirus-shelter-in-place-stay-at-home-order-brad-hart-not-enforceable-covid-19-20200407> (Hart said: “This week I spoke directly with the Governor who confirmed her opinion, which is supported by the Iowa Attorney General, that cities and counties in Iowa do not have the authority to close businesses or order people to stay in their homes.”).

100 *Close Contests for Prez & Senate*, MONMOUTH U. POLLING INST. (Aug. 5, 2020), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_ia_080520/.

101 David Pitt, *Iowa Governor Overrides Schools, Requires In-Person Classes*, AP NEWS (July 17, 2020), <https://apnews.com/article/ecc4a3f87122f943f03fe07e37b2bf1b>.

102 Pitt, *supra* note 12 (“Reynolds on Thursday again asserted she believes cities and

legal opinions, which both supported the governor's emergency authority and pointed to the local authority to take actions not clearly inconsistent with the governor's orders.¹⁰³

By August, several localities went forward with local mask mandates despite state assertions that they lacked such authority.¹⁰⁴ Johnson County and the city of Dubuque followed Iowa City and Muscatine in enacting such mandates.¹⁰⁵ In Johnson County, the county attorney suggested that the mandate was enforceable because it was enacted by the county board of health.¹⁰⁶ In Dubuque, the city attorney argued that the city had sufficient authority under the home rule amendment to the Iowa Constitution.¹⁰⁷ The lack of legal action against Muscatine and Iowa City for imposing a mask

counties cannot implement mask orders unless she says they can. 'We don't believe during a public health emergency that the local governments have the authority to supersede what has been put in place at the statewide level by the governor,' she said, adding she's consulted with the attorney general on the matter.'")

103 *Id.*

The attorney general's office in March provided Reynolds with an analysis of home rule in Iowa. "While cities and counties have police powers to protect the health and safety of their citizens, the state has the authority to declare and coordinate the response to a public health disaster," wrote Assistant Attorney General Heather Adams in a message to Reynolds' legal staff. However, in June the attorney general's office wrote an informal advice letter on local mask actions to Sen. Zach Wahls. The letter said that if a local regulation isn't preempted by the governor's proclamation, local jurisdictions could adopt regulations "not inconsistent with law and the rules of the state board, as may be necessary for the protection and improvement of the public health."

Id.

104 Nick Coltrain, *Dubuque City, Johnson County Mandate Masks in Public, Buck Gov. Reynolds' Ban on Local Action*, DES MOINES REG. (Aug. 7, 2020), <https://www.desmoinesregister.com/story/news/2020/08/07/dubuque-johnson-county-iowa-require-face-coverings-coronavirus/3319998001/>.

105 Zachary Oren Smith, *Johnson County Supervisors Pass Face Mask Requirement; Measure Goes Into Effect Monday*, DES MOINES REG. (Aug. 6, 2020), <https://www.desmoinesregister.com/story/news/2020/08/06/johnson-county-iowa-mask-mandate-enacted-covid-face-covering-coronavirus/3308200001/>; see also Coltrain, *supra* note 104 ("The Johnson County mandate follows Iowa City's lead by making a first offense a simple misdemeanor and carrying a fine of between \$105 and \$885. In Dubuque, the fine is \$10 for a first offense The mandate will also be enforced by the Dubuque Police Department. The memo specifies that responding officers can enforce it with education or by issuing a warning, but that they can also arrest offenders.").

106 Smith, *supra* note 105.

107 Memorandum from Crenna Brumwell et al., to Mayor Roy D. Buol & Members of City Council of Dubuque, Missouri, on Face Covering Requirement Analysis, Capacity Limitation Restriction (Aug. 5, 2020), www.cityofdubuque.org/DocumentCenter/View/46486/City-of-Dubuque-Mask-Mandate-Memo-8520.

mandate was cited as a further justification for Dubuque to act as school reopening was imminent.¹⁰⁸ The mayor of Dubuque specifically cited the lack of a controlling legal opinion against local action in defense of the step.¹⁰⁹

A few other local governments also adopted mask mandates despite the governor's challenge. In Cedar Rapids, the mayor spoke with the governor to urge a statewide mandate and ultimately issued an order for facial coverings in the city, despite notification from the governor's office that he did not have the authority to do so.¹¹⁰ However, some of the most populous areas in the state continued to defer to state authority despite substantial interest in enacting similar mask mandates. By September 2020, the state's largest city of Des Moines and smaller towns, including Mount Vernon and Cedar Falls, also adopted local requirements.¹¹¹

As Iowa became the epicenter of the pandemic in the United States, the governor faced increasing calls from all levels of government for the adoption of a mask mandate.¹¹² Nonetheless, the governor characterized

108 Coltrain, *supra* note 104 (“But it was Reynolds’ commitment to reopening schools to in-person learning that ultimately spurred the [mask mandate, Dubuque Mayor] Buol said.”).

109 *Id.* (“‘That is their opinion, and they are very much entitled to that,’ Buol said of Reynolds’ and the Attorney General’s office’s stances on local mask mandates. ‘But the governor has really failed to perform the necessary analysis as to whether a local face mask mandate is irreconcilable with her emergency management action. Until that analysis is done, or a court settles the question of preemption, then the matter is not settled.’”).

110 Sarah Mervosh et al., *How Iowa’s Governor Went from Dismissing Mask Mandates to Ordering One Herself*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/us/coronavirus-mask-mandate-iowa-reynolds.html>.

111 Marissa Payne, *Cedar Rapids Issues Mask Mandate as Coronavirus Cases Spike*, GAZETTE (Sept. 2, 2020), <https://www.thegazette.com/subject/news/cedar-rapids-mask-mandate-iowa-coronavirus-masks-required-covid-19-20200902>.

112 Mervosh et al., *supra* note 110. White House Coronavirus Response Coordinator Dr. Deborah Birx said face coverings should be required whenever indoors in states that have active COVID-19 cases. Droze, *supra* note 30.

The crisis led to a significant move last week, when the Iowa State Board of Health, whose members Ms. Reynolds appointed, urged her to issue a mask mandate. The board’s vote was itself a sign of how the virus’s worsening toll has forced people to change their thinking. Board members, most of whom are Republicans and work in health care, had discussed face coverings at previous meetings but did not come out in favor of a mandate. At the most recent meeting, however, they voted 7 to 2 to encourage the governor to issue the order. “Circumstances have changed enough in Iowa,” said Chris Atchison, the board’s vice chair, who said he could recall only one other instance in which members had made a recommendation to the governor in his more than three years on the board.

mask mandates as an unenforceable “‘feel-good’ measure.”¹¹³ In November, with Iowa facing the third-highest rate of new cases in the nation and the state facing an urgent crisis of hospital capacity, the governor adopted a limited statewide mandate with respect to masks.¹¹⁴ Ultimately, the prospect of hospitals being entirely overwhelmed by the pandemic and unable to take any more patients shaped the reversal.¹¹⁵

C. *Georgia: Litigation*

Georgia Governor Brian Kemp sued Atlanta Mayor Keisha Lance Bottoms to prevent the city of Atlanta from issuing an order requiring facial coverings.¹¹⁶ While many state officials challenged the authority of local officials to issue mask mandates and some threatened financial penalties, Georgia brought legal action.¹¹⁷ Although the suit was ultimately settled in a way that preserved the local mask mandate, it nonetheless reflects a different strategy of pandemic preemption with ongoing significance.

Like Iowa, Georgia is a home rule state where local governments have substantial authority.¹¹⁸ Atlanta has a charter that was approved by the Georgia state legislature.¹¹⁹ Under that charter, Atlanta’s mayor and council can take actions to preserve health and to respond to emergencies.¹²⁰ The authority of the city under home rule can only be limited by the state legislature.¹²¹

In the litigation brought by the governor, *Kemp v. Bottoms*, the state claimed that several emergency orders by the city of Atlanta were preempted

Id.

113 Mervosh et al., *supra* note 110.

114 *Id.* (“People must wear a mask in indoor public places, but only if they will be within six feet of another person for at least 15 minutes. Indoor dining is still permitted. School districts are allowed to decide for themselves whether or not to require masks; about one third of Iowa’s school districts currently do not require them.”).

115 Ryan J. Foley, *Iowa Governor Sees ‘Science on Both Sides’ on Use of Masks*, AP NEWS (Nov. 17, 2020), <https://apnews.com/article/kim-reynolds-iowa-coronavirus-pandemic-iowa-city-7674cd44e7815eafcb4663c10d82644e> (“She said she changed course because the state has seen an exponential increase in the number of people hospitalized with the virus this month. She warned that without action, hospitals will be overwhelmed and people will be at risk of not being able to get medical care of any kind.”).

116 *See* Kemp Complaint, *supra* note 6.

117 *Id.* *But see* Mock, *supra* note 3; Zeballos-Roig, *supra* note 8.

118 IOWA CONST. art. III, §§ 38A, 39A; GA. CONST. art. IX, § 2, ¶¶ I–II.

119 *See generally* Charter of the City of Atlanta, 1996 Ga. Laws 4469–4558.

120 *See, e.g., id.* §§ 1-102(b), (c)29, 30, 32, 35, 42, 50, 54–56 (describing powers of the city).

121 *See* Sturm, Ruger & Co. v. City of Atlanta, 560 S.E.2d 525, 528 (Ga. Ct. App. 2002).

by the governor's statewide orders.¹²² One of these orders required people in the city limits to wear facial coverings when in businesses or outside.¹²³

Like many states, Georgia gives emergency powers to executive officials in times of crisis.¹²⁴ The governor can declare a state of emergency, and, if the legislature agrees, then the governor and local officials can issue emergency orders; however, these orders of local governments are barred from being "inconsistent with any orders, rules, or regulations promulgated by the governor."¹²⁵ In April 2020, the Governor issued an executive order implementing a statewide response to the pandemic that included language on local preemption.¹²⁶

Amidst a surge in cases in the state of Georgia, the governor issued an order in late June which "strongly encouraged" the use of facial coverings.¹²⁷ By early July, the mayor of Savannah issued a mask mandate. Soon thereafter, Clarke County also required facial coverings.¹²⁸

Less than two weeks later, the mayor of Atlanta issued an order

122 Complaint, *supra* note 6, ¶¶ 22–24, 51–55.

123 Thomas Merrill, *Kemp v. Bottoms Unmasked: Emergency Powers and State Preemption*, NETWORK FOR PUB. HEALTH L. (July 23, 2020), <https://www.networkforphl.org/news-insights/kemp-v-bottoms-unmasked-emergency-powers-and-state-preemption/>.

124 GA. CODE ANN. § 38-3-51 (2019).

125 *Id.* § 38-3-28.

126 Ga. Exec. Order No. 04.02.20.01.

That pursuant to Code Section 38-3-51, the powers of counties and cities conveyed in Titles 36 and 38, including those specific powers enumerated in Code Sections 36-5-22.1 and 36-35-3 are hereby suspended to the extent of suspending enforcement of any local ordinance or order adopted or issued since March 1, 2020, with the stated purpose or effect of responding to a public health state of emergency, ordering residents to shelter-in-place, ordering a quarantine, or combatting the spread of coronavirus or COVID-19 that in any way conflicts, varies, or differs from the terms of this Order. Enforcement of all such ordinances and orders is hereby suspended and no county or municipality shall adopt any similar ordinance or order while this Order is in effect, except for such ordinances or orders as are designed to enforce compliance with this Order, **IT IS FURTHER ORDERED**: That if one or more of the provisions contained in this Order shall conflict with the provisions of any previous Executive Order or Agency Administrative Order, the provisions of this Order shall control. Further, in the event of any conflict, the provisions of any quarantine or isolation Order issued to a specific person by the Department of Public Health shall control.

Id.

127 Ga. Exec. Order No. 06.29.20.02.

128 David A. Graham, *The Battle for Local Control Is Now a Matter of Life and Death*, ATLANTIC (July 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/why-states-wont-let-cities-save-themselves/614539/>.

requiring residents to wear face coverings when outside.¹²⁹ In response, the governor issued a new executive order that “‘suspended to the extent they are more restrictive [than state requirements]’ any local order ‘that requires persons to wear face coverings, masks, face shields or any other kind of Personal Protective Equipment while in places of public accommodation or on public property.’”¹³⁰ Although the orders are not precisely identical, there is also not an obvious conflict between the two orders.¹³¹

The Georgia Municipal Association submitted an amicus brief supporting the city of Atlanta and arguing that the governor’s action threatened home rule.¹³² Significantly, the amicus brief focused not only on the specific conflict over the mask mandate but also the implications of the governor’s claims for home rule on a wide range of issues for localities across the state of Georgia.¹³³

Although Governor Kemp sought to block all local mask mandates through an executive order in July, by August, he announced a new order allowing local mask mandates subject to certain criteria.¹³⁴ The reversal

129 Merrill, *supra* note 123.

130 Ga. Exec. Order No. 07.15.20.01; *see also* Merrill, *supra* note 123.

131 *See* Merrill, *supra* note 123.

[The governor’s] argument ignores the dual authority that Georgia’s emergency management laws give to both the governor and the heads of local governments and that § 38-3-28 is intended to protect health and preserve lives. GA Code § 38-3-6 commands that the statute be liberally construed to effectuate this purpose. Clearly, cities cannot undo or choose not to follow any of the social distancing requirements that Governor Kemp has mandated for the entire state. They prescribe a set of protective directives that Georgia cities at a minimum must require and enforce. Significantly, even Governor Kemp acknowledges that people should wear masks and he encourages them to do so. According to his public statements about face coverings, his opposition to a mandate is based purely on business concerns and not on any belief that mask wearing would not help curb viral spread. Reading § 38-3-28 to prevent Atlanta from imposing an additional mandate that will save lives does not effectuate its purpose. Rather, it should be read to allow Atlanta’s local government to require an additional safeguard that, consistent with the social distancing measures required statewide, will help flatten the curve of disease in that city.

Id.

132 Brief of Amici Curiae, *supra* note 7, at 16.

133 Sarah Fay Campbell, *Governor Can’t Usurp Local Power, Court Filing Says*, NEWNAN TIMES-HERALD (July 24, 2020), <https://times-herald.com/news/2020/07/governor-cant-usurp-local-power-court-filing-says>.

134 *See* Ga. Exec. Order No. 08.15.20.01; *Kemp to Issue New Executive Order After Negotiations Break Down with Mayor Bottoms over Mask Mandate*, WSB-TV ATLANTA 2 (Aug. 13, 2020), <https://www.wsbtv.com/news/local/atlanta/kemp-issue-new-executive->

followed a new surge in cases bringing Georgia to 1,000 new cases per 100,000 people with a positivity rate of over 10% in many localities.¹³⁵ As a result, the White House Coronavirus Task Force placed Georgia in the “red zone” and recommended a statewide mask mandate.¹³⁶ In the wake of the governor’s reversal, many cities joined Atlanta and a couple of other major population centers in issuing mask mandates.¹³⁷

D. *Florida: Blocking Enforcement*

Unlike Iowa, Nebraska, and Georgia, Florida initially allowed localities to implement mask mandates, even as the state itself did not implement such an approach.¹³⁸ By affording localities the power to individually implement responses to the pandemic, it allowed for their policies to be tailor-made to the varying needs and impact of COVID-19 on each region.¹³⁹ However, Florida subsequently engaged in local preemption and, in some areas of the pandemic response, threatened punitive financial sanctions for localities.¹⁴⁰

order-after-negotiations-break-down-with-mayor-bottoms-over-mask-mandate/FTZ2UUJ2Q5CK7M4633N6VQNYEY/ (permitting local governments in Georgia to impose mask mandates so long as they are not enforced in residences or on private property including businesses).

135 See *Georgia Department of Public Health Daily Status Report*, GA. DEP’T PUB. HEALTH, <https://dph.georgia.gov/covid-19-daily-status-report> (last visited Jan. 9, 2021) (consistently reporting statistics of 1,000 new cases per 100,000 people and a 10% positivity rate beginning on July 10, 2020).

136 See Jason Morris & Jay Croft, *Report: White House Task Force Urged Georgia to Mandate Masks as It Warned of Expanding Covid-19 Spread*, CNN (Aug. 14, 2020), <https://www.cnn.com/2020/08/14/us/report-white-house-georgia-mask-mandate/index.html>.

137 Beau Evans, *Georgia Cities, Counties Weigh Mask Mandates with More Leeway from Governor*, SAVANNAH MORNING NEWS (Aug. 24, 2020), <https://www.savannahnow.com/story/news/2020/08/24/georgia-cities-counties-weigh-mask-mandates-with-more-leeway-from-governor/114874238/>. Following the Governor’s decision to end his challenge to the city of Atlanta’s policy, the major cities of Atlanta, Augusta and Savannah each adopted mask mandates and other cities, including Columbus, Milledgeville, Warner Robins, Smyrna and Sandy Springs all required masks on city-owned public property. *Id.*

138 Jacob Ogles, *Beyond the Veil: What Mask Requirements Are in Place in Florida?*, FL. POL. (Dec. 11, 2020), <https://floridapolitics.com/archives/342364-beyond-the-veil-what-face-mask-requirements-are-in-place-in-florida>.

139 Jake Stofan, *Florida Cities Seek More Control over Pandemic Policy*, NEWS4JAX (Nov. 23, 2020), <https://www.news4jax.com/news/local/2020/11/23/florida-cities-fight-for-more-control-over-pandemic-policy> (detailing the Governor’s remarks on the varied nature of the state’s pandemic response: “Each region in Florida is very distinct and some of these things may need to be approached a little bit differently[.]”).

140 When Hillsborough County planned to open its schools for remote learning, the

By June 2020, many of Florida's largest cities introduced mask mandates.¹⁴¹ Although the requirement of facial coverings was controversial in some counties, Palm Beach County unanimously approved the new policy and joined major cities, such as Orlando and Tampa, in requiring masks in public.¹⁴² Nearly one-third of Florida counties adopted some form of mask mandate in the wake of reaching some of the highest caseloads in the nation.¹⁴³

In late September, the governor of Florida issued an executive order which barred local governments from collecting fines in the enforcement of local mask mandates.¹⁴⁴ The governor also rejected proposals for a statewide mask requirement.¹⁴⁵ This reversal left many localities with existing mask mandates in a very unusual position. While local mandates were not explicitly preempted, the means of enforcing these mandates was preempted.¹⁴⁶ The largest city in the state, along with many other

Governor suggested he would withhold up to \$200 million from the Hillsborough County School District unless it adopted in-person learning. Lori Rozsa et al., *A Florida School District Wanted to Wait to Reopen School Buildings*, WASH. POST (Aug. 14, 2020), https://www.washingtonpost.com/local/education/florida-coronavirus-schools/2020/08/14/a37b39a8-dd99-11eb205-f838e15a9a6_story.html.

141 Brittany Muller, *Most Major Florida Cities Now Require Wearing Face Masks in Public*, NEWS4JAX (June 19, 2020), <https://www.news4jax.com/news/local/2020/06/19/major-florida-cities-now-require-use-of-facemask-in-public-places/>.

142 *Angry Residents Erupt at Meeting over New Mask Rule*, CNN, <https://www.cnn.com/videos/politics/2020/06/24/mask-mandate-florida-anger-erupts-coronavirus-vpx.cnn> (last visited Mar. 28, 2021).

143 Daniel Cassady, *Despite DeSantis, Nearly One-Third of Florida Counties Require Masks*, FORBES (July 23, 2020), <https://www.forbes.com/sites/danielcassady/2020/07/23/despite-desantis-nearly-one-third-of-florida-counties-require-masks/>. Sixty-seven counties and a large number of municipalities implemented mask mandates. In Broward County, masks are required in essential businesses and in the common areas of residential communities. In Miami, those who fail to comply with the requirement can face up to a \$500 fine or risk being arrested. *Id.*

144 See Fla. Exec. Order No. 20-244 (Sept. 25, 2020) (suspending “the collection of fines and venalities associated with COVID-19).

145 Jeffrey Schweers, *Florida Surpasses 1 Million COVID-19 Cases*, TALLAHASSEE DEMOCRAT (Dec. 1, 2020), <https://www.tallahassee.com/story/news/local/state/2020/12/01/florida-coronavirus-1-million-cases-covid-19-pandemic/6462304002/> (“He also said he is opposed to mask mandates, opting for people to make their own decisions about preventative actions. ‘They don’t work,’ he said of mandates. ‘People wear them when they go out, but they don’t have to be strung up on a bayonet.’”).

146 See Issac Morgan, *FL Counties Keeping Mask Mandates Even Though Gov. DeSantis Won't Allow Penalties for Violations*, FLA. PHOENIX (Sept. 28, 2020), <https://www.talchamber.com/fl-counties-keeping-mask-mandates-even-though-gov-desantis-wont-allow-penalties-violators/> (“The county’s facial covering mandate remains in place. Although the governor’s order suspends the collection of fines and penalties enforced upon individuals, it does not preempt local governments from assessing fines or otherwise

localities, ended its enforcement of the mask mandate.¹⁴⁷ Many localities let requirements related to facial coverings expire given the lack of enforcement authority under state preemption.¹⁴⁸

Local leaders, especially in the hardest-hit area of South Florida, sought to convince the governor to allow the enforcement of mask mandates and allow for citations for non-compliance.¹⁴⁹ With an upsurge in cases, the mayors sought to convince the governor to institute a statewide mask mandate or to allow for greater local control in shaping the pandemic response since most large and mid-size cities in the state already implemented local mask mandates.¹⁵⁰ Even in those cities in which few citations were issued, local officials believed that the possibility of fines was important to ensure compliance with the requirement.¹⁵¹ Health professionals echoed the call for

penalizing businesses that violate emergency orders including mask mandates.”).

147 Martin Vassolo, *Facing COVID Surge, Florida Mayors Ask DeSantis for Mask Mandate, More Local Control*, MIA. HERALD (Nov. 18, 2020), <https://www.miamiherald.com/news/local/community/miami-dade/article247260214.html> (“On Sept. 25, DeSantis signed a ‘right to work’ executive order, ending state and some local COVID restrictions. That led Miami-Dade County to stop collecting face-mask fines and to reopen its bars and nightclubs.”).

148 Sara-Megan Walsh, *Polk Leaders Split over Possibility of Reinstating Mask Mandates*, LEDGER (Nov. 22, 2020), <https://www.theledger.com/story/news/local/2020/11/22/coronavirus-florida-polk-leaders-split-over-possibility-of-reinstating-mask-mandates/6354752002/>.

Lakeland Mayor Bill Mutz said he supports the push for local governments to be given back the right to enforce mask mandates, if necessary, based on local infection rates. “It’s clearly a local rule health care issue. Period,” he said. “It needs to be prescriptive to that particular city and particular county.” Lakeland commissioners allowed the city’s mask mandate to expire Oct. 5 once the governor stripped enforceability. Winter Haven officials also let their mandate end Oct. 15.

Id.

149 *‘We Should Have That Local Control’: Local Leaders Urging Gov. Ron DeSantis to Give Them Resources to Fight COVID*, CBS MIA. (Nov. 22, 2020), <https://miami.cbslocal.com/2020/11/22/south-florida-leaders-urge-ron-desantis-action-covid/> (“‘I do agree that we should have that local control,’ said Miami Mayor Francis Suarez. ‘That is something we had at the beginning and we were effective at using the local control.’”).

150 Vassolo, *supra* note 147.

151 Greg Allen, *Florida’s Governor: Officials Can Require Face Masks, but Can’t Enforce It*, NPR (Oct. 7, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/10/07/921216724/floridas-governor-officials-can-require-face-masks-but-can-t-enforce-it>; Nicholas Reimann, *Florida Mayors Plead for Mask Mandate, but DeSantis Says No New Restrictions Coming*, FORBES (Nov. 18, 2020), <https://www.forbes.com/sites/nicholasreimann/2020/11/18/florida-mayors-plead-for-mask-mandate-but-desantis-says-no-new-restrictions-coming/>.

Despite repeated requests from local officials and infectious disease

greater local control in Florida with respect to facial coverings.¹⁵² However, the governor instead extended his prohibition on local enforcement of mask mandates in late November 2020.¹⁵³

In Central Florida, local officials confronted widespread flouting of social distancing guidelines, particularly in bars and nightclubs, amidst severe constraints on the ability of local officials to respond.¹⁵⁴ Even as hospitalization rates increased, many local leaders were left without any effective tools to combat the spread of the virus.¹⁵⁵ Seeking to circumvent

experts, DeSantis refused to issue a statewide face covering mandate but in Miami, Orlando, Tampa, and most other large and mid-size cities, local governments did. Those ordinances can remain in place, DeSantis said but local officials can't collect fines from scofflaws. . . . Kriseman says St. Petersburg has a face mask mandate in place, but up to now hadn't issued any fines. But, he says, "I still like having that tool in my tool belt." Prohibiting local officials from enforcing the mandate, Kriseman says is "like telling somebody we have a speed limit, we expect you to follow the speed limit, but we're not going to give you a ticket if you do violate it."

Id.

- 152 Troy Kinsey, *Doctors Call on DeSantis to Allow Tougher Local Restrictions as COVID-19 Cases Rise*, SPECTRUM NEWS 13 (Nov. 28, 2020), <https://www.mynews13.com/fl/orlando/news/2020/11/28/doctors-desantis-tougher-local-restrictions-covid-19-cases> ("This week, doctors representing Physicians for Social Responsibility endorsed the call for more local control, faulting DeSantis for not having ordered a statewide mask mandate.").
- 153 Evan Axelbank, *DeSantis Extends Ban on Mask Bans, Business Restrictions*, FOX 13 NEWS (Nov. 25, 2020), <https://www.fox13news.com/news/desantis-extends-ban-on-mask-bans-business-restrictions>.
- 154 Ryan Gillespie & Stephen Hudak, *Gov. Ron DeSantis Doesn't Want to Shut Down Florida. What Power Do Mayors Have to Control the Virus?*, ORLANDO SENTINEL (Nov. 20, 2020), <https://www.orlandosentinel.com/coronavirus/os-ne-coronavirus-county-restrictions-20201120-6rfuaheapjg3nfhdyvmiupaxm-story.html>.

[Orange County Mayor] Demings said his strike teams visited 11 bars last weekend and none were in compliance. In one example, after midnight at Knights Pub in east Orange, the teams found a line of patrons wrapped around the building and a manager on duty said there were about 500 people inside. The teams noted hand sanitizer stations inside but no way to socially distance. At other bars teams found crowds around the bar or bartenders not wearing face coverings.

Id.

- 155 Ryan Gillespie & Stephen Hudak, *Orange County Mayor to Begin Fining Businesses This Weekend if They Don't Enforce Masks*, ORLANDO SENTINEL (Dec. 4, 2020), <https://www.orlandosentinel.com/news/orange-county/os-ne-coronavirus-orange-update-124-20201204-k3jvnwtlszf4xel6dg6krea62a-story.html>; Gillespie & Hudak, *supra* note 154.

"Counties and cities need to have the flexibility to make choices to respond to what's happening in their [jurisdictions] and, when you take away the enforcement measures, they're no longer able to respond based

state preemption, local officials in Orange County issued new executive orders implementing fines on businesses that failed to enforce requirements related to facial coverings and social distancing.¹⁵⁶ This approach is similar to one taken by localities in Texas in response to state preemption.¹⁵⁷ In South Florida, Miami took a similar approach by increasing enforcement against businesses not following its “New Normal Guidelines.”¹⁵⁸ Despite the Governor’s order, Miami Beach plans to continue issuing citations to those who violate the mask mandate, although police were instructed to offer

on infection rates or hospital capacity or other health data,” said Cragin Mosteller, a spokeswoman for the Florida Association of Counties. “Those are local numbers and therefore should be addressed by local decisions.”

Id.

156 Gillespie & Hudak, *supra* note 154.

The order takes effect Sunday morning and requires social distancing of six feet or more where possible. It also requires business owners enforce a mask mandate for employees and patrons and encouraged businesses to reduce on-site employees by allowing work-from-home options. Businesses must also have signage and markings to help maintain social distancing. Penalties include fines of \$500 as an immediate citation. A special magistrate could impose steeper fines of \$1,000 per day or, for repeat offenders, up to \$5,000 per day. If the damage is deemed irreparable, a magistrate can impose fines of up to \$15,000. [Mayor] Demings said the order was necessary because, despite weeks of his pleas for voluntary compliance with guidelines created by the CDC, some businesses still flouted them.

Id.

157 David A. Graham, *Governors Are Passing the Coronavirus Buck to Mayors*, ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/covid-preemption-reversals/613210/> (explaining that in June 2020, Texas Governor Greg Abbott reversed his prior sentiments when he “said he would not block Bexar County, home to San Antonio, from forcing employees and customers at businesses to wear masks”). However, in April 2020, Governor Abbott made clear that: “My executive order, it supersedes local orders, with regard to any type of fine or penalty for anyone not wearing a mask.” Sami Sparber, *Gov. Greg Abbott Says Harris County Can’t Impose Fine over Face Mask Order*, TEX. TRIBUNE (Apr. 27, 2020), <https://www.texastribune.org/2020/04/27/harris-face-masks-fine-texas-coronavirus/>. He reaffirmed those sentiments in May 2020 as well. Nic Garcia, *Texas AG Ken Paxton: Dallas County, Other Local Governments, Must Scale Back Orders to Align with State*, DALL. MORNING NEWS (May 12, 2020), <https://www.dallasnews.com/news/public-health/2020/05/12/texas-ag-ken-paxton-dallas-county-other-local-governments-must-scale-back-orders-to-align-with-state/>.

158 Christina Vazquez, *Miami Cities Grapple with Enforcing Mask Mandate as Florida Gov. Continues to Not Allow Fines*, LOCAL 10 NEWS (Nov. 25, 2020), <https://www.local10.com/news/local/2020/11/26/miami-cities-grapple-with-enforcing-mask-mandate-as-florida-gov-continues-to-block-citations/>.

masks to anyone without one first.¹⁵⁹ Key West issued a new facial covering requirement for all residents when they leave their homes.¹⁶⁰

159 *Id.* (“‘We need to let people know they have to wear masks and (we will) give citations even if we can’t collect the fine right now,’ said Miami Beach Mayor Dan Gelber When it comes to enforcement for the individual mask mandate in the city of Miami, Suárez said that he is going to keep a close watch on what happens in Miami Beach. If the data shows that the strategy of issuing citations to increase self compliance works even though they cannot issue fines because of the governor’s orders at this point, he might consider that idea in his city.”).

160 Melissa Alonso & Scottie Andrew, *Key West Will Require Everyone to Wear a Mask and Will Fine Anyone Who Doesn’t Up to \$500*, CNN (Nov. 19, 2020), <https://www.cnn.com/2020/11/19/us/key-west-covid-mask-requirement-500-fine-trnd/index.html> (“If Key West residents repeatedly fail to wear a face mask when they’re in public, even when social distancing is possible, they can be fined up to \$500 after a verbal warning and civil citation, the ordinance rules. The ordinance exempts children under age 6, private workers and gymgoers, among some other groups.”).

CONCLUSION: THE DYNAMICS OF PANDEMIC PREEMPTION

Pandemic preemption can slow or prevent local action through a variety of mechanisms. Explicit state preemption removes the authority of local governments to act. However, the situation is not always as clear in pandemic preemption because often orders by state Governors, in the absence of explicit state statutes, also claim to bar local action. Nonetheless, the lack of clarity regarding state preemption is often enough to deter local officials from aggressively responding to the pandemic. The likelihood of this outcome increases dramatically as state law or state officials threaten to withhold funding from localities that take action.

The COVID-19 pandemic emerged in the context of a growing trend toward statewide preemption in a range of areas including public health. A number of scholars have highlighted the dramatic expansion of state preemption of local authority in recent years.¹⁶¹ Although this new preemption has covered a wide range of substantive areas of law, public health has been directly affected through limits on local rulemaking related to areas such as smoking and nutrition.¹⁶² Nonetheless, these discrete constraints on local initiative are generally not related to the need for timely emergency action.

The strategies employed by states to limit local authority and the scope of local action in pandemic preemption reflect the broader preemption strategies of states: (1) condition local funding on compliance, (2) block all local action in the field, (3) engage in litigation to ensure local compliance, and (4) prevent local enforcement of existing laws. The significance of pandemic preemption relates to the way in which a rapid local response is, in many ways, the only tool that can change the trajectory of infection and death in local communities. Early and sustained local action is a key

161 See generally Nestor Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 *YALE L.J.* 954, 957, 962 n.2 (2019); Nicole DuPuis et al., *City Rights in an Era of Preemption: A State-by-State Analysis*, NAT'L LEAGUE CITIES (2018); KIM HADDOW ET AL., LOCAL SOL. SUPPORT CTR. & STATE INNOVATION EXCH., *THE GROWING SHADOW OF STATE INTERFERENCE: PREEMPTION IN THE 2019 STATE LEGISLATIVE SESSIONS* (2019), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/5d66a3c36044f700019a7efd/1567007722604/LSSCSiXReportAugust2019.pdf>; JESSE J. RICHARDSON ET AL., *IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT* (2003), <https://www.brookings.edu/wp-content/uploads/2016/06/dillonsrule.pdf>.

162 See *Preemption Can Impede Local Tobacco Protection Efforts*, CTRES. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/statesystem/factsheets/preemption/Preemption.html> (last visited Jan. 6, 2021); *State Policies to Prevent Obesity: Preemption*, STATE CHILDHOOD OBESITY, <https://stateofchildhoodobesity.org/state-policy/policies/preempt/> (last visited Jan. 6, 2021).

contributing factor to reducing mortality. Pandemic preemption often leaves localities defenseless in real time as their communities are overwhelmed with surging caseloads, overloaded hospitals, and rising mortality.

While most local preemption is clearly grounded in state statute, pandemic preemption has another complicating feature in that it often features executive, rather than legislative, preemption. As governors utilize their emergency powers and issue executive orders under these powers, pandemic preemption often takes the form of executive, rather than legislative, action. The role of executive action raises important and, in many states, still unresolved questions about not only the scope of executive authority but also its role in constraining the emergency authority of local officials.¹⁶³

These issues are only rarely resolved through litigation, so the assessments of city attorneys or state attorneys general are often the final, if not necessarily authoritative, word on such controversies. Even in the rare instances in which pandemic preemption has been litigated, as in Georgia, settlements between the parties are often more likely than binding court opinions, given the fast-moving nature of the situation. While many important legal questions surrounding pandemic preemption remain unresolved, the impact of pandemic preemption nonetheless remains profound in the context of COVID-19.¹⁶⁴

163 Schragger, *supra* note 64, at 6.

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. 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.

Id.

164 Schragger & Lankachandra, *supra* note 64, at 5.

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. . . . A number of states' statutes grant local governments broad authority to protect the health and safety of residents during declared states of emergency.

While there are examples of public health exceptions in other areas of law, pandemic preemption reveals the need for a wider debate about the role of such exceptions in the context of local preemption. A core function of local government is to protect the health of its residents and the history of public health in the United States reflects local efforts to create boards of health and other institutions to accomplish this central goal.¹⁶⁵ While the financing of health and the regulation of health entities is often primarily a state function, there remains a vital role for local governments in public health, which is accentuated in the context of a pandemic. Pandemic preemption points to the consequences of limited exceptions for public health in the context of the widening scope of state preemption.

In the major pandemic of the last century, the 1918 flu pandemic, the different responses by local governments dramatically shaped the overall number of deaths in those communities. Localities that responded more quickly, more comprehensively, and for a longer period experienced sharply lower rates of above-average mortality as compared to those localities which responded more slowly, less comprehensively, and for a shorter period of time. Over one hundred years later, local action once again has proven significant. However, this time, life and death often turned less on the independent decisions of local officials and more on whether state officials preempted effective local action.

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.

Id.

165 Drew Altman & Douglas Morgan, *The Role of State and Local Government in Health*, 2 HEALTH AFFS. 7, 10, 15–16 (1983).