

## DEMOCRATIZING EMERGENCIES: THE LOCAL PREDICAMENT\*

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*Disasters are typically local events—even in a pandemic. Throughout 2020 and into 2021, state governors used their emergency powers to issue stay-at-home orders, close nonessential businesses, and ban mass gatherings—including gatherings for religious services. However, during the COVID-19 pandemic it was local government that reacted more quickly in the beginning and continued to act into early 2022 when many state governments refused to consider social mitigation measures to curb transmission, despite a national surge of nearly a million cases per day. For citizens who desire their state government to do more in an emergency, local government often fills that gap. While these local cities and counties are enacting measures, like school mask mandates, in direct response to local public health metrics, many have faced resistance from their state. Some states have banned local authorities from enacting certain mitigation measures and have aggressively sought to restrain those local authorities from defying these bans through litigation and fines. While red states preempting blue-city laws is not new, some of the states' bans are more brazen in method and more obstructing in outcome. This new form of "obstructing preemption" places local officials in an untenable predicament. Charged with providing for the health, safety, and education of its citizens, local government cannot carry out its duties if state government removes critical public mitigation tools from its toolbox in a public health emergency. This Article highlights the urgent need for local government to fully respond in an emergency and the most important problems facing proponents of responsive regulation. This Article urges local government to continue to challenge state-placed limitations on local emergency orders. The Article further concludes: (1) that the state and federal courts can and should bolster the local governments' legitimacy in their actions on either constitutional or statutory grounds; and (2) that governments should model*

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*themselves on those successful state-local partnerships, especially ones that transcend party lines.*

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## I. INTRODUCTION

Local government officials may be the unsung heroes of the pandemic. When COVID-19 first emerged in the United States, local counties and municipalities responded more quickly than their state counterparts. Seven San Francisco Bay area counties issued the first stay-at-home orders in the United States.<sup>1</sup> Some cities, like Chicago, New Orleans, and New York City, supplemented their state's social mitigation measures because of their city's population density and therefore increased COVID-19 transmission.<sup>2</sup> And perhaps most critically, some local cities and counties in mostly red states, like Florida and Texas, adopted social mitigation measures because their state simply failed to do so.<sup>3</sup> Most commonly, these locales issued mask mandates either for their general populations or in a school setting.<sup>4</sup>

Local governments may be a creation of state government,<sup>5</sup> but at their most basic level, they are the ones most responsible for their citizens' critical

1. Jill Cowan, *Newsom Orders All Californians To Stay Home*, N.Y. TIMES, <https://www.nytimes.com/2020/03/20/us/coronavirus-california-stay-at-home-order.html> [<https://perma.cc/88LN-LKBL> (staff-uploaded, dark archive)] (last updated Mar. 24, 2020); *Seven Bay Area Jurisdictions Order Residents To Stay Home*, CNTY. SAN MATEO (Mar. 16, 2020), <https://www.smcgov.org/news/march-16-2020-seven-bay-area-jurisdictions-order-residents-stay-home> [<https://perma.cc/N87M-JXSB>].

2. *See infra* notes 45–47, 56.

3. *See infra* notes 109–10.

4. *See infra* notes 109–10.

5. *See infra* notes 28–30.

everyday needs, including health, police, and education.<sup>6</sup> Yet in this pandemic, local governments have faced significant barriers to providing responsive regulation.<sup>7</sup> First, the trend of U.S. federal courts, most notably the Supreme Court, is to strike down state and local social mitigation orders when those orders implicate a fundamental right, such as religious freedom.<sup>8</sup> Second, some red-state governors and state legislatures have sought to preempt their localities, often blue cities but even some red localities, from imposing social mitigation orders from mask and vaccine mandates to gathering restrictions.<sup>9</sup> Some scholars have coined this disturbing trend as “denialist state laws.”<sup>10</sup>

Red-state governments preempting blue-city orders is all too common in our system of governance—but what are the consequences of preempting local governments from imposing social mitigation measures in an emergency?<sup>11</sup> Are the consequences more significant? Have the ground rules changed? This Article argues that this form of “obstructing preemption” is not simply states precluding local governments from enacting laws in a certain area. Rather, these bans preclude local governments from using public health mitigation tools essential to protect their citizens during a public health emergency. Even more, some state governors have bypassed the legislative process altogether by issuing preemptive measures, such as implementing mask mandate bans via executive orders.<sup>12</sup>

In earlier waves of the pandemic, local governments did not sit idly while their state tied their hands. Some cities and counties have fought back in a variety of ways—from challenging these bans in court<sup>13</sup> to openly defying them by imposing the social mitigation measures despite the bans.<sup>14</sup> In response, local

6. See Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1309, 1333 (1994) [hereinafter Briffault, *Concerns in Contemporary Federalism*].

7. See generally *infra* Part IV (discussing how local governments can overcome barriers to provide responsive regulation).

8. See generally *infra* Section III.A (discussing how the U.S. Supreme Court is trending towards limiting government intervention during an emergency).

9. See generally *infra* Section III.B (discussing how states preempted local orders during the pandemic).

10. James G. Hodge, Jr., Jennifer L. Piatt & Leila Barraza, *Legal Interventions To Counter COVID-19 Denialism*, 49 J.L. MED. & ETHICS 677, 677 (2021).

11. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–98 (2018) [hereinafter Briffault, *The Challenge of the New Preemption*].

12. See, e.g., *infra* notes 94, 121 and accompanying text.

13. See *infra* Sections III.B.1–2.

14. See, e.g., Alison Durkee, *Schools Are Defying State Governments and Imposing Their Own Mask Mandates*, FORBES (Aug. 4, 2021, 5:08 PM), <https://www.forbes.com/sites/alisondurkee/2021/08/04/schools-are-defying-state-governments-and-imposing-their-own-mask-mandates/?sh=2b74d839b2e7> [https://perma.cc/7AL9-9JZT].

officials were threatened with fines,<sup>15</sup> litigation,<sup>16</sup> loss of local funding,<sup>17</sup> and even in some cases, with physical harm.<sup>18</sup> Local governments have had mixed success where some courts struck down these obstructing bans, while other courts forced local governments to run their localities without key social mitigation tools.<sup>19</sup>

Virus variants may continue to prolong the pandemic or at the very least require our society to pivot in response to seasonal outbreaks.<sup>20</sup> Almost two years into the pandemic, in January 2022, the United States reported an average of over 800,000 cases per day.<sup>21</sup> This was about three times the average daily case count from one year earlier.<sup>22</sup> Considering the likely threat of future variants, local governments will face the same barriers to responding as they have in previous waves.

This Article makes the case that local governments are a crucial source for emergency response regulation but, paradoxically, face some of the most difficult barriers to implementing those regulations. First, this Article explores the nature of local government and how it is in the best position to respond in an emergency. Next, this Article confronts the new legal barriers local governments face when responding to a public health threat. Specifically, this Article outlines the current Supreme Court trend to limit state and local governments' emergency social mitigation measures where such measures may infringe on an individual's civil rights, particularly in the exercise of religion. It

15. Kevin Stankiewicz, *Texas Gov. Abbott Threatens To Fine Cities and Local Officials if They Impose Mask Mandates*, CNBC (May 18, 2021, 6:56 PM), <https://www.cnbc.com/2021/05/18/texas-gov-abbott-threatens-to-fine-cities-and-local-officials-if-they-impose-mask-mandates.html> [https://perma.cc/Y4HT-YDRK].

16. See, e.g., Mark Walsh, *Mask Mandate Lawsuits Reflect Bigger Battle: Do States or Local Districts Control Schools?*, EDUCATIONWEEK (Aug. 27, 2021), <https://www.edweek.org/policy-politics/mask-mandate-lawsuits-reflect-bigger-battle-do-states-or-local-districts-control-schools/2021/08> [https://perma.cc/MKR4-XNAF (dark archive)].

17. See, e.g., Carlee Simon, *Why Our School District Is Defying Florida's Ban on Mask Mandates – Even if It Means We Lose Funding*, WASH. POST (Aug. 9, 2021, 2:31 PM), <https://www.washingtonpost.com/opinions/2021/08/09/florida-schools-mask-mandate-ban-desantis-alachua/> [perma.cc/JJ8K-6JMB (staff uploaded, dark archive)].

18. Gabriella Borter, Joseph Ax & Joseph Tanfani, *School Boards Get Death Threats amid Rage over Race, Gender, Mask Policies*, REUTERS (Feb. 15, 2022, 11:00 AM), <https://www.reuters.com/investigates/special-report/usa-education-threats/> [https://perma.cc/YPL6-NF4F].

19. See generally *infra* Section III.B (discussing how states preempted local orders during the pandemic).

20. Apoorva Mandavilli & Benjamin Mueller, *Virus Variants Threaten To Draw Out the Pandemic, Scientists Say*, N.Y. TIMES, <https://www.nytimes.com/2021/04/03/health/coronavirus-variants-vaccines.html?action=click&module=Spotlight&pgtype=Homepage> [https://perma.cc/QB5E-B9Y4 (staff uploaded, dark archive)] (last updated Apr. 23, 2021).

21. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> [https://perma.cc/CRE9-VFEY (staff uploaded, dark archive)].

22. *Id.*

also looks at how some state governments have tied the hands of their local officials by banning them from enacting meaningful social mitigation measures, in particular school mask mandates. And finally, this Article highlights and recommends ways for local governments to provide responsive public health mitigation measures in this continuing pandemic, as well as in the future. Specifically, local governments should craft emergency orders to withstand an attack on civil rights grounds. Local governments should continue to fight in state courts to strike down state social mitigation public health bans, particularly where those bans violate local government Home Rule powers or where the state orders are issued without authority. State governments have a role here too. State legislators should move away from preemptive measures and instead install some statutory guardrails as a meaningful check on local government emergency powers. And finally, more attention should be given to the successful state and local partnerships in an emergency, particularly to ones that transcend political lines.

## II. THE GREAT RESPONDERS: LOCAL GOVERNMENT TO THE RESCUE

Local government does more on the ground for its citizens, but ironically it is armed with little power compared to its state and federal counterparts.<sup>23</sup> The U.S. Constitution makes no mention of local government.<sup>24</sup> Instead, the Tenth Amendment gives all reserved powers to the states.<sup>25</sup> The states, through their own constitutions and statutes, created local government in the forms of cities, counties, and towns.<sup>26</sup> While our formal federalist system is a two-tiered federal-state system, the implicit federalist system is a three-tiered one, which recognizes that states would create and delegate to local governments certain public services, such as fire, police, schools, and health.<sup>27</sup> In the federal-state system, where the federal government is not superior to its state counterpart, each government is “supreme and independent within its sphere.”<sup>28</sup> However, “[t]he state-local relationship is exactly the opposite.”<sup>29</sup> Local government is in essence an engine of the state, and the states can add, amend, or even abolish the powers of their local governments.<sup>30</sup> That is not to say that a state can ride

23. See Briffault, *Concerns in Contemporary Federalism*, *supra* note 6, at 1309.

24. Jake Sullivan, *The Tenth Amendment and Local Government*, 112 *YALE L.J.* 1935, 1937 (2003).

25. See U.S. CONST. amend. X; see also ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS 25–27* (Oxford Univ. Press 2009) (explaining that state constitutions originated from affirmative votes by the electorates, while the U.S. Constitution owes its legitimacy to the Framers).

26. See David J. Barron, *A Localist Critique of the New Federalism*, 51 *DUKE L.J.* 377, 391–92 (2001).

27. See Briffault, *The Challenge of the New Preemption*, *supra* note 11, at 2017.

28. Briffault, *Concerns in Contemporary Federalism*, *supra* note 6, at 1308.

29. *Id.*

30. *Id.* at 1308–09. However, while most local governments are created by their state’s constitution, that same constitution provides them with “considerable authority to determine their own powers and functions.” Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, HARV. C.R.-

roughshod over one of its local entities if there is a conflict in approach. For example, a state governor typically cannot preempt local orders where the power to issue those orders comes from the state legislature.<sup>31</sup> To do so would be *ultra vires*—acting beyond one’s legal authority.<sup>32</sup> Moreover, most states have delegated authority to their local governments in their state constitutions or in some cases by statute.<sup>33</sup> This is the concept of Home Rule—the power of a local county, town, or city to set up its own local system of governance.<sup>34</sup> The Home Rule powers may be viewed as “mini Tenth Amendments” created to separate local matters from state intervention.<sup>35</sup> Though to be clear, local jurisdictions have rarely succeeded in court using Home Rule when the state has flexed its preemptive muscles.<sup>36</sup> In any event, Home Rule, whether it be by state constitution or statute, is the main source of local power.<sup>37</sup>

In an emergency, including a public health emergency, local emergency powers, much like those of the state, are likely provided by that state’s disaster statute.<sup>38</sup> For example, the Texas Disaster Act provides that “the presiding officer of the governing body of a political subdivision may declare a local state of disaster.”<sup>39</sup> Such officers may include mayors and county judges, and they are empowered to “control ingress to and egress from a disaster area” under their jurisdiction.<sup>40</sup> Likewise, in New York, the chief executive of any county, town, or municipality may declare a local state of emergency upon a finding

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C.L. L. REV. 1, 30 (2012). To that extent, the state legislature does not have the authority to abolish local government and must respect the local government’s constitutional existence. *See id.* at 31.

31. *See, e.g.*, *Abbott v. Harris County*, 641 S.W.3d 514, 525–26 (Tex. App. 2022) (finding that the state legislature did not provide the governor with authority to issue executive order banning schools from issuing a mask mandate).

32. *See* Kellen Zale, *Texas Mask Mandate Ban Exceeds Governor’s Authority*, LAW360 (Aug. 18, 2021, 3:44 PM), <https://www.law360.com/articles/1413694/texas-mask-mandate-ban-exceeds-governor-s-authority> [<https://perma.cc/TJ3Z-APQS> (staff-uploaded, dark archive)].

33. OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* § 6.1 (West Pub. Co. 4th ed. 2015).

34. OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* § 35 (West Pub. Co. 3d ed. 2009) [hereinafter REYNOLDS, JR., *LOCAL GOVERNMENT THIRD EDITION*]; *see, e.g.*, LA. CONST. art. 6, pt. I, § 4; MINN. CONST. art. XII, § 4; WASH. CONST. art. XI, § 4.

35. Barron, *supra* note 26, at 392.

36. *Id.*

37. *Id.* “They are a kind of mini-Article I for local governments, in the sense that they enumerate their authority over local or municipal affairs.” *Id.* Except for “a few states—Alabama, Delaware, Indiana, Kentucky, Mississippi, Nevada, North Carolina, Vermont, and Virginia—” the remaining states’ constitutions provide for local Home Rule to some degree. NAT’L LEAGUE OF CITIES, *PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY* 13 (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/5T8K-32CN>].

38. *See, e.g.*, TEX. GOV’T CODE ANN. § 418.108(g) (Westlaw through the end of the 2021 Reg. and Called Sess. of the 87th Leg.); N.Y. EXEC. LAW § 24 (McKinney 2022).

39. *See* TEX. GOV’T CODE ANN. § 418.108(a) (Westlaw).

40. *Id.*

that the public safety is imperiled.<sup>41</sup> The local chief executive “may promulgate local emergency orders to protect life and property or to bring the emergency situation under control.”<sup>42</sup>

Throughout 2020 and 2021, state governors issued emergency orders in response to the pandemic under these statutes. Many of their local counterparts did so as well. In fact, when COVID-19 first emerged in the United States, local counties and municipalities responded more quickly than their state counterparts.<sup>43</sup> Local governments in the San Francisco region issued the first stay-at-home order in the United States, ordering their citizens to shelter in place for three weeks and not go out except to obtain essential services.<sup>44</sup> In mid-March 2020, former New York City Mayor de Blasio asked residents to prepare to shelter in place—as he was prepared to order that they do so, incorrectly assuming that Governor Cuomo would approve such an order.<sup>45</sup>

Because of population density, and therefore higher rates of COVID-19 transmission, some cities supplemented social mitigation measures issued by their state. Chicago is a prime example. The city of Chicago required citizens from certain states to quarantine<sup>46</sup> while the rest of Illinois did not impose any such restriction.<sup>47</sup> It also had more stringent curfews for restaurants and nonessential businesses.<sup>48</sup> Indianapolis also imposed additional restrictions—including curfews and capacity restrictions on bars and restaurants—beyond Indiana.<sup>49</sup>

In red states, where Republican governors employed fewer social mitigation measures to curb COVID-19 transmission, some cities and counties

41. N.Y. EXEC. LAW § 24(1).

42. *Id.*

43. *See* Cowan, *supra* note 1.

44. *See id.*

45. Andy Newman, *Drastic ‘Shelter in Place’ May Be Next for N.Y.C. To Combat Coronavirus*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/nyregion/coronavirus-nyc-shelter-in-place.html> [<https://perma.cc/JEF7-9NJM> (staff-uploaded, dark archive)].

46. *See* CDPH Travel Guidance, CITY CHI., <https://www.chicago.gov/city/en/sites/covid-19/home/emergency-travel-order.html> [<https://perma.cc/LHD8-6PYW>]; *see also* CHI. DEP’T OF PUB. HEALTH, EMERGENCY TRAVEL ORDER — FREQUENTLY ASKED QUESTIONS 2 (2021), [https://www.chicago.gov/content/dam/city/sites/covid/documents/ETO-FAQ\\_web.pdf](https://www.chicago.gov/content/dam/city/sites/covid/documents/ETO-FAQ_web.pdf) [<https://perma.cc/65TJ-H9ZA>]. Chicago required citizens from certain states to quarantine for ten days unless citizen falls into an exempted category. *Id.* at 6–8.

47. CHI. DEP’T OF PUB. HEALTH, *supra* note 46, at 3. Illinois currently does not have any travel or quarantine restrictions for out of state residents.

48. *See* Chi. Order No. 2020-11 (Oct. 23, 2020), <https://www.chicago.gov/content/dam/city/sites/covid/health-orders/CDPH%20Order%202020-11%20Non-Essential%20Business%20Curfew%20Order.pdf> [<https://perma.cc/2NA4-N8M3>] (providing a curfew for all nonessential businesses between 10 p.m. and 6 a.m. and prohibiting bars from selling alcohol for on-premise consumption, unless it also had a food license).

49. *See* Bar Indy LLC v. City of Indianapolis, 508 F. Supp. 3d 334, 340 (S.D. Ind. 2020) (finding that Indianapolis had authority to issue various public health orders, which provided curfews and capacity restrictions for bars and restaurants).

issued their own local orders to curb transmission and better align with their citizens' needs. In Springfield, Missouri, the city issued a mask mandate for its citizens through local ordinance—even though the state declined to impose any mask mandate.<sup>50</sup> In October 2020, the local government of Broward County, Florida, issued an emergency order, which provided, among other things, a curfew prohibiting restaurants and bars from the sale or consumption of food between midnight and 5:00 a.m.<sup>51</sup> Miami-Dade County issued a similar curfew.<sup>52</sup>

New Orleans may be the best example of a blue city that has imposed significant social mitigation orders during the Omicron wave, whereas Louisiana merely made recommendations.<sup>53</sup> As of February 1, 2022, New Orleans had a health advisory that required, in part, that masks be worn in all indoor spaces outside the home and all individuals age five and older must show proof of full vaccination or a negative test to access certain businesses.<sup>54</sup> In contrast, Governor Edwards declared a public health emergency in December 2021 merely recommending that individuals wear face coverings.<sup>55</sup> New Orleans was also the first major U.S. city to institute a vaccine mandate for all K-12 students.<sup>56</sup>

Local governments are also the primary source for innovative solutions to curb the spread of the virus or even help detect the next variant more quickly.<sup>57</sup> For example, New York City, Boston, and Minneapolis use wastewater monitoring to detect the virus before an individual can be tested or develop

50. See Order Denying Plaintiff's Request for a TRO, *Shelton v. City of Springfield*, No. 6:20-cv-03258-MDH (W.D. Mo. Sept. 2, 2020), 2020 WL 6503407, at \*1–3 (finding that the city likely had authority to issue mask mandate).

51. Broward Cnty. Emergency Order 20-28 (Oct. 16, 2020), <https://www.lauderdalebythesea-fl.gov/DocumentCenter/View/1552/Emergency-Order-20-28> [<https://perma.cc/4V37-D43A>].

52. See 7020 Ent., LLC v. Miami-Dade County, 519 F. Supp. 3d 1094, 1099 (S.D. Fla. 2021) (finding that Miami-Dade County Order 30-20, which provided a curfew on restaurants and bars, was not preempted by the governor's prior executive order).

53. See City of New Orleans Pub. Health Advisory (Feb. 1, 2022), [https://ready.nola.gov/NOLAReady/media/Documents/Coronavirus/PUBLIC-HEALTH-ADVISORY-Feb-1-2022\\_2.pdf](https://ready.nola.gov/NOLAReady/media/Documents/Coronavirus/PUBLIC-HEALTH-ADVISORY-Feb-1-2022_2.pdf) [<https://perma.cc/CZX3-T2ZG>]; La. Exec. Order No. 234 JBE 201 (Dec. 21, 2021), <https://gov.louisiana.gov/assets/Proclamations/2021/234JBE2021StateofEmergency.pdf> [<https://perma.cc/9QBN-9AYX>].

54. See CITY OF NEW ORLEANS HEALTH DEP'T, GUIDELINES FOR COVID-19 REOPENING 4 (Feb. 1, 2022), <https://ready.nola.gov/NOLAReady/media/Documents/Coronavirus/NOHD-Guidelines-for-reopening-Jan-27-Final.pdf> [<https://perma.cc/ST7V-PWBD>].

55. La. Exec. Order No. 234 JBE 201.

56. Ben Chapman, *New Orleans Begins COVID-19 Vaccine Mandate for All Students*, WALL ST. J. (Feb. 1, 2022, 6:13 PM), <https://www.wsj.com/articles/new-orleans-begins-covid-19-vaccine-mandate-for-all-students-11643756895> [<https://perma.cc/4Z6B-JJZD>] (staff-uploaded, dark archive).

57. See Rick Bright, *The Clues to the Next Variant Surge Are All Around Us*, N.Y. TIMES (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/opinion/covid-variant-air-sewage.html> [<https://perma.cc/c/98PU-PE8S>] (dark archive)].



symptoms.<sup>58</sup> The city of Davis, California, in partnership with the University of California at Davis, is tracking air filtration systems in elementary schools for COVID-19.<sup>59</sup>

More than two years into the pandemic, local governments continue to take the initiative for imposing social mitigation measures when a new variant causes a surge in cases and hospitalizations. In early April 2022, Philadelphia imposed a brief indoor mask mandate in response to the BA.2 Omicron subvariant.<sup>60</sup> In July 2022, Los Angeles County, California, said it would likely impose a new indoor mask mandate in response to the high levels of new cases and hospitalizations caused by Omicron variant BA.5.<sup>61</sup> The Los Angeles Department of Health pulled back from implementing a full indoor mask mandate, but as of September 1, 2022, it still requires masks on all forms of public transportation, including buses, taxis, and rideshares, as well as in transportation hubs.<sup>62</sup> Clearly, local governments are on the front lines of the pandemic.

### III. THE LOCAL PREDICAMENT: BARRIERS TO RESPONSE

While a plethora of local governments have confronted the pandemic head-on with a variety of social mitigation measures and innovative solutions to curb transmission,<sup>63</sup> some have faced significant barriers in providing responsive regulation. This assault has come on two fronts: (1) the U.S. Supreme Court's recent willingness to strike down public health social mitigation orders when fundamental rights are implicated; and (2) state social mitigation bans, namely in the form of bans on mask and vaccine mandates.

58. *Id.*

59. UNIV. OF CAL., DAVIS & CITY OF DAVIS, ENVIRONMENTAL MONITORING: AIR FILTER SAMPLING, [https://healthydavistogether.org/wp-content/uploads/2021/06/HealthyDavisTogether\\_\\_AirFilterSampling.pdf](https://healthydavistogether.org/wp-content/uploads/2021/06/HealthyDavisTogether__AirFilterSampling.pdf) [<https://perma.cc/9RML-B7DG>].

60. Campbell Robertson, *Philadelphia Is Ending a Short-Lived Indoor Mask Mandate*, N.Y. TIMES, <https://www.nytimes.com/live/2022/04/21/world/covid-19-mandates-cases-vaccine> [<https://perma.cc/88PE-PVVX> (staff-uploaded, dark archive)] (last updated July 18, 2022, 4:40 PM); Campbell Robertson & Jon Hurdle, *As Philadelphia Puts on Masks Again, Other Cities Watch Closely*, N.Y. TIMES (Apr. 18, 2022), <https://www.nytimes.com/2022/04/18/us/philadelphia-mask-mandate.html> [<https://perma.cc/TQC4-B99V> (staff-uploaded, dark archive)].

61. Rong-Gong Lin II & Luke Money, *L.A. Is Headed for a New COVID Mask Mandate. Will Other Counties Join?*, L.A. TIMES (July 15, 2022, 3:53 PM), <https://www.latimes.com/california/story/2022-07-15/l-a-headed-for-new-covid-mask-mandate-will-others-join> [<https://perma.cc/5ZP9-SYKY>].

62. *Covid-19 Mask Wearing Rules and Recommendations*, L.A. CNTY. DEPT. HEALTH (Sept. 23, 2022), <http://publichealth.lacounty.gov/acd/ncorona2019/masks/RulesAndRecommendations/> [<https://perma.cc/X2C4-ZJXE>].

63. *See supra* Part II.

A. *U.S. Supreme Court Trend Toward Less Government Intervention During an Emergency*

Even early in the pandemic, when most states had some sort of stay-at-home order in place, some individuals and businesses brought civil rights actions in federal courts and occasionally in state courts claiming that their governor or local officials' executive orders violated their constitutional rights. With limited exceptions, using the framework of the U.S. Supreme Court case *Jacobson v. Massachusetts*,<sup>64</sup> most courts in the spring of 2020 upheld these orders—finding that the government's interest in curbing the spread of COVID-19 outweighed a litigant's constitutional claims.<sup>65</sup> When those claims allegedly involved a fundamental right, such as a litigant's claim that an executive order banning or limiting mass gatherings violated the Free Exercise Clause of the First Amendment, most courts still upheld the governor's executive order.<sup>66</sup> As long as the executive order's specific restrictions on religious organizations appeared consistent with comparable secular organizations, there was likely not a violation of the Free Exercise Clause.<sup>67</sup> Only where the executive order singled out religious organizations for less favorable treatment were these orders likely to violate the First Amendment.<sup>68</sup> During that period, plaintiff businesses that claimed that capacity restrictions

64. 197 U.S. 11 (1905).

65. See *Open Our Or. v. Brown*, No. 6:20-cv-773-MC, 2020 WL 2542861, at \*2 (D. Or. May 19, 2020) (following a “chorus of other federal courts” in its deference to the state's compelling interest in curbing the spread of COVID-19). The Court in *Jacobson* held that the state legislature could permit the City of Cambridge Board of Health to require its residents to be vaccinated for smallpox and in doing so concluded that the Court should not infringe on the legislature's power to protect the public. *Jacobson*, 197 U.S. at 37–38.

66. See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring); *Calvary Chapel of Bangor v. Mills*, 459 F. Supp. 3d 273, 284–86 (D. Me. 2020) (finding that an executive order prohibiting “gatherings of more than ten people” survived plaintiff's challenge under the Free Exercise Clause); *Cassell v. Snyders*, 458 F. Supp. 3d 981, 993–94 (N.D. Ill. 2020) (finding a plethora of evidence that the executive order was issued to curb spread of COVID-19 under *Jacobson* and alternatively that it would withstand scrutiny under the Free Exercise Clause); *Order Denying Plaintiffs' Emergency Request for Temporary Restraining Order*, *Gish v. Newsom*, No. EDCV 20-755 (KKx) (C.D. Cal. Apr. 23, 2020) 2020 WL 1979970, at \*5–6 (holding that the executive orders were substantially related to the COVID-19 crisis and were not palpably invasive because religious groups were not barred from gathering in other ways—such as virtually or over the phone—and alternatively finding that the executive order did not violate the Free Exercise Clause).

67. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613.

68. See *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (finding that the executive order banning mass gatherings, which singled out among other activities “faith-based” events, likely violated the Free Exercise Clause of the First Amendment); *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1087–89 (D. Kan. 2020) (finding that the executive order, which specifically limited “churches or other religious facilities” to no more than ten persons, likely violated plaintiff's right under the Free Exercise Clause).

or stay-at-home orders violated their civil rights under the Fourteenth Amendment were also not likely to succeed on the merits.<sup>69</sup>

Then the tide began to shift. As the pandemic entered the summer and fall of 2020, more courts began siding with plaintiffs: finding less urgency in the state or local government's need to use social mitigation measures to curb the transmission of COVID-19.<sup>70</sup> Some U.S. Supreme Court justices began questioning the need for certain businesses to be closed or have capacity restrictions while others received what these justices perceived as more favorable treatment.<sup>71</sup>

A new majority in the U.S. Supreme Court did not simply defer to the state government's interest in curbing transmission with social mitigation measures. By late November 2020, Justice Barrett had replaced Justice Ginsburg on the bench.<sup>72</sup> The U.S. Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo*,<sup>73</sup> in a per curiam opinion, found that Governor Cuomo's executive order limiting gathering capacity for houses of worship to ten or twenty-five people in certain zones violated the Free Exercise Clause of the First Amendment.<sup>74</sup> The Court found that Cuomo's order targets "houses of worship for especially harsh treatment" noting that the order did not place admission restrictions on other businesses such as "acupuncture facilities, camp grounds, [and] garages."<sup>75</sup> The Court was also quick to point out that there is no evidence that the plaintiffs have contributed to the spread of COVID-19.<sup>76</sup>

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69. See, e.g., *League of Indep. Fitness Facility & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 126–27 (6th Cir. 2020) (finding that the executive order closing fitness facilities for a period of time likely did not violate fitness owners' constitutional rights under the Equal Protection Clause of the Fourteenth Amendment); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 900–02 (Pa. 2020) (finding that Governor Wolf's stay-at-home order did not violate plaintiff business's constitutional rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

70. *County of Butler v. Wolf*, 486 F. Supp. 3d 883, 900–01 (W.D. Pa. 2020) (limiting deference to state's executive orders during COVID-19 pandemic once the crisis was of an "indeterminate" length).

71. Arguably, that questioning began earlier in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), in Justice Kavanaugh's dissenting opinion. *Id.* at 1614–15 (Kavanaugh, J., dissenting) (finding that California did not justify its "discriminatory" treatment" of houses of worship when other secular businesses, such as grocery stores, were not subject to the same restrictions). In July 2020, in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020), Justice Alito took issue with the Nevada Governor's executive order limiting houses of worship to fifty persons, but permitting casinos, bars, and restaurants to admit up to fifty percent of their indoor capacity. *Id.* at 2603–04 (Alito, J., dissenting).

72. See Lisa Mascaro, *Barrett Confirmed as Supreme Court Justice in Partisan Vote*, ASSOCIATED PRESS, Oct. 26, 2020, <https://apnews.com/article/election-2020-donald-trump-virus-outbreak-ruth-bader-ginsburg-amy-coney-barrett-82a02a618343c98b80ca2b6bf9eafe07> [<https://perma.cc/N329-YLUK>].

73. 141 S. Ct. 63 (2020) (per curiam).

74. *Id.* at 70.

75. *Id.* at 66.

76. *Id.*

In fact, the uncontradicted evidence showed that the plaintiffs, a church and synagogue, “have complied with all public health guidance, have implemented additional precautionary measures, and have operated at 25% or 33% capacity for months without a single outbreak.”<sup>77</sup> In *Tandon v. Newsom*,<sup>78</sup> the Court further limited state and local governments’ authority to impose emergency social mitigation measures when these orders “treat *any* comparable secular activity more favorably than religious exercise.”<sup>79</sup> From there, other courts have had to follow suit in similar situations, particularly concerning a fundamental right.<sup>80</sup> While the Court’s per curiam opinions in both *Roman Catholic Diocese* and *Tandon* do not mention *Jacobson*, these decisions clearly erode this long-standing precedent opting to protect an individual’s right under the Free Exercise Clause over protecting the public health in an emergency.<sup>81</sup> However, where the alleged constitutional violation is analyzed under the rational basis test, more recent courts still tend to uphold governors’ executive orders citing *Jacobson* as precedent.<sup>82</sup>

Interestingly, the Supreme Court has been reluctant to extend the same religious protections where the state or local order is a vaccine mandate. In *Does 1–3 v. Mills*,<sup>83</sup> the Court heard an application for injunctive relief on whether a Maine regulation mandating vaccines for certain health-care workers was to be enjoined because it failed to provide for religious exemptions but provided for medical exemptions.<sup>84</sup> Likewise, in *Dr. A. v. Hochul*,<sup>85</sup> the Court turned down

77. *Id.*

78. 141 S. Ct. 1294 (2021) (per curiam).

79. *Id.* at 1296 (emphasis in original). Governor Newsom issued an executive order limiting at-home social gatherings to three households—which, according to the court, did not target religious organizations. *Id.* at 1296–97. The majority found that since other secular businesses, such as hardware stores and salons, were not subject to this order, the government had to show that the order satisfied strict scrutiny. *Id.*

80. *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1234 (9th Cir. 2020) (applying strict scrutiny to the governor’s executive orders and concluding that the order capping houses of worship at fifty persons was not narrowly tailored); *Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020) (remanding to district court to determine whether Governor Cuomo’s executive order limiting houses of worship to fixed-capacity percentages of twenty-five percent, and thirty-three percent in certain zones, survived strict scrutiny).

81. See *Roman Cath. Diocese*, 141 S. Ct. at 71–72; *Tandon*, 141 S. Ct. at 1294; see also Scott Burris, *Individual Liberty, Public Health, and the Battle for the Nation’s Soul*, REGUL. REV. (June 7, 2021), <https://www.theregreview.org/2021/06/07/burris-individual-liberty-public-health-battle-for-nations-soul/> [<https://perma.cc/X8L3-AVZR>] (discussing the decline of *Jacobson* as some American courts elevate individual liberty above the public good and move away from the vision of a cooperative commonwealth promoted by *Jacobson*).

82. *Delaney v. Baker*, 511 F. Supp. 3d 55, 74–75 (D. Mass. 2021) (finding that the executive order mandating wearing face masks in public rationally related to government’s interest in curbing the spread of COVID-19); *M. Rae, Inc. v. Wolf*, 509 F. Supp. 3d 235, 246–47 (M.D. Pa. 2020) (finding that the executive order banning indoor dining was rationally related to the government’s interest).

83. 142 S. Ct. 17 (2021) (mem.).

84. See *id.* at 17–18.

85. 142 S. Ct. 552 (2021) (mem.).

an application to enjoin New York’s health-care vaccine mandate even though it did not provide for a religious exemption.<sup>86</sup> As with *Roman Catholic Diocese* and *Tandon, Does 1–3* and *Dr. A.* were applications for injunctive relief and so these issues were not fully briefed for the Court.<sup>87</sup> Moreover, it may be difficult to reconcile the Court enjoining social mitigation orders on Free Exercise grounds in *Roman Catholic Diocese* and *Tandon* with the Court allowing state vaccine mandates that fail to provide a religious exemption. However, one scholar argues that these cases are distinguishable and that omitting religious exemptions to vaccine mandates may be constitutional.<sup>88</sup>

Since *Roman Catholic Diocese* and *Tandon*, citizens have had a clear legal avenue to strike down both gubernatorial and local social mitigation measures. In contrast, citizens who believe their state executive’s inaction puts their health and safety at risk cannot challenge such inaction in the courts. The United States is based on a system of negative rights rather than positive ones. The courts have consistently denied claims requiring the government to take any positive action.<sup>89</sup> Moreover, the Supreme Court has moved toward protecting individual rights at the expense of protecting the greater public good.<sup>90</sup> Local governments’ responses have been the great equalizer to some extent—at least until their own states erected more barriers.

#### B. State Preemption of Local Orders During the Pandemic

Even during some of the earliest parts of the pandemic, state government, usually the governor, sought to preempt local public health mitigation measures. As the pandemic wore on, more states preempted their local

86. *Id.* at 552.

87. See generally Petition for Writ of Certiorari, *Does 1–3*, 142 S. Ct. 17 (No. 21-717), 2021 WL 5343927 (asking the Court to enjoin a regulation requiring health-care workers to receive a COVID-19 vaccine); Petition for a Writ of Certiorari, *Dr. A.*, 142 S. Ct. 552 (No. 21-1143), 2022 WL 492921 (same).

88. See Donna M. Gitter, First Amendment Challenges to State Vaccination Mandates: Why the U.S. Supreme Court Should Hold That the Free Exercise Clause of Religion Does Not Require Religious Exemptions 77–78 (Mar. 14, 2022) (unpublished manuscript) (on file with the North Carolina Law Review), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4057371](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4057371) [<https://perma.cc/6F7R-7XHT> (staff-uploaded archive)] (click “Download This Paper” or “Open PDF in Browser”). Professor Gitter distinguishes *Does 1–3* and *Dr. A.* from *Tandon* and *Roman Catholic Diocese* on three grounds: (1) *Tandon* and *Roman Catholic Diocese* involved religious worship; (2) the gathering restrictions at issue in *Tandon* and *Roman Catholic Diocese* were subjective and “inexpertly drawn” while the medical exemptions at issue in *Does 1–3* and *Dr. A.* were objective; and (3) the petitioners in *Tandon* and *Roman Catholic Diocese* had no real alternatives to the restrictions, while petitioners in *Does 1–3* and *Dr. A.* could refuse the vaccine albeit with employment consequences. *Id.*

89. See Kelly Deere, *Governing by Executive Order During the COVID-19 Pandemic: Preliminary Observations Concerning the Proper Balance Between Executive Orders and More Formal Rule Making*, 86 MO. L. REV. 721, 785–86 (2021); *Printz v. United States*, 521 U.S. 898, 933 (1997) (establishing that neither Congress nor federal regulators have the authority to require state officials to act).

90. See *Burris*, *supra* note 81.

governments from imposing certain social mitigation measures—namely mask and vaccine mandates. As set forth below, these bans prevent local governments from fully responding to a public health emergency.

### 1. Early On

During 2020 and into 2021, some governors thwarted local government efforts to either impose or enforce social mitigation measures. For example, Georgia Governor Brian Kemp filed suit against Atlanta Mayor Keisha Lance Bottoms for issuing a stay-at-home order for Atlanta residents, which was more restrictive than the mitigation measures the Georgia governor had in place.<sup>91</sup> The Republican governor claimed that the Atlanta order was merely advisory, while the Democratic Atlanta mayor said her orders were legally binding.<sup>92</sup> That lawsuit was withdrawn a month later after Atlanta and the state negotiated the reopening of the city.<sup>93</sup> In September 2020, Florida Governor Ron DeSantis issued an executive order removing all capacity and other restrictions and suspending all individual fines involving COVID-19.<sup>94</sup> This executive order prevented local counties or municipalities from enforcing local social mitigation measures, including mask mandates.<sup>95</sup> In Texas, when Governor Abbott rescinded the state's mask mandate in March 2021, Travis County, which includes the city of Austin, issued its own mask mandate.<sup>96</sup>

These local mitigation measures were challenged either by local citizens or businesses, and sometimes directly by the state. The courts have responded with mixed results. For example, in *Bar Indy, LLC v. City of Indianapolis*,<sup>97</sup> a federal

91. Scott Neuman, *Georgia Governor and the Mayor of Atlanta in Turf War Over COVID-19 Restrictions*, NPR (July 10, 2020, 7:41 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/10/889930319/georgia-governor-and-the-mayor-of-atlanta-in-turf-war-over-covid-19-restrictions> [<https://perma.cc/5AWQ-5D9U>].

92. *Id.*

93. Devan Cole, *Georgia Governor Withdraws Lawsuit Challenging Atlanta Mayor's Mask Mandate*, CNN (Aug. 13, 2020, 9:32 PM), <https://www.cnn.com/2020/08/13/politics/brian-kemp-atlanta-mask-lawsuit-withdrawing/index.html> [<https://perma.cc/4V95-KYLV>].

94. Fla. Exec. Order No. 20-244 (Sept. 25, 2020), [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-244.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-244.pdf) [<https://perma.cc/C5LG-QYYM>]. In mid-September 2020, Florida was still averaging more than 2,600 cases a day, though this was a decrease from the almost 12,000 cases per day that it averaged two months earlier. See *Tracking Coronavirus in Florida: Latest Map and Case Count*, N.Y. TIMES (Aug. 13, 2022), <https://www.nytimes.com/interactive/2020/us/florida-coronavirus-cases.html> [<https://perma.cc/3UC7-B3QJ>] (staff-uploaded, dark archive)].

95. See Fla. Exec. Order No. 20-244.

96. Tex. Exec. Order No. GA-34 (Mar. 2, 2021), <https://open.texas.gov/uploads/files/organization/opentexas/EO-GA-34-opening-Texas-response-to-COVID-disaster-IMAGE-03-02-2021.pdf> [<https://perma.cc/C97X-792X>] (rescinding mask mandate); AUSTIN PUB. HEALTH, HEALTH AUTHORITY RULES (2021), <https://www.austintexas.gov/sites/default/files/files/Health/Health-Authority-Rules-April-13-2021.pdf> [<https://perma.cc/53MA-TVQQ>].

97. 508 F. Supp. 3d 334 (S.D. Ind. 2020).

district court held that a city ordinance, which ordered bars and nightclubs to limit capacity to fifty percent and close at midnight, did not violate the Indiana Home Rule Act because the order did not directly conflict with state law.<sup>98</sup> Plaintiffs argued that the state law providing that entities with alcoholic beverage permits may sell alcohol from 7:00 a.m. until 3:00 a.m. preempted the local order.<sup>99</sup> In denying the plaintiffs' request for a preliminary injunction, the court found that under the Indiana Home Rule Act, local government "may 'impose additional reasonable regulations . . . provided the additional burdens are logically consistent with the statutory purpose.'"<sup>100</sup> In contrast, in *828 Management, LLC v. Broward County*,<sup>101</sup> a federal district court held that the Florida governor's order prohibiting local government from reducing restaurant capacity, unless it made specific fact-based findings supporting that the local order was necessary for public health, preempted a Broward County order, which restricted restaurants from operating between midnight and 5:00 a.m.<sup>102</sup> While the court acknowledged that the county may issue local orders to protect the public health, it may only do so if it "quantifies the economic impact of each restriction."<sup>103</sup> In other words, the court effectively allowed the governor to preempt local regulation of COVID-19 mitigation measures.

Responding to citizens weary of another lockdown or gathering restriction, some state legislatures limited both the governor and local officials' emergency powers.<sup>104</sup> For example, in March 2021, the Kansas Legislature amended its disaster act to create a private cause of action for citizens aggrieved by local emergency mitigation orders.<sup>105</sup> In April 2021, the Florida Legislature passed a bill that gave the governor power to preempt local emergency rules—which was signed by Governor DeSantis in early May 2021.<sup>106</sup> In July 2021, Missouri Governor Mike Parson signed into law a bill, which limits local emergency

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98. *Id.* at 339, 357.

99. *Id.* at 355–56.

100. *Id.* at 357 (quoting *Fort Wayne Women's Health v. Bd. of Comm'rs, Allen Cnty.*, 735 F. Supp. 2d 1045, 1051 (N.D. Ind. 2010)).

101. 508 F. Supp. 3d 1118 (S.D. Fla. 2020).

102. *Id.* at 1198.

103. *Id.*

104. *See, e.g.*, KAN. STAT. ANN. § 48-932(e)(1) (Westlaw through laws enacted during the 2022 Reg. Sess. of the Kan. Leg. effective on July 1, 2022); Act of May 3, 2021, ch. 2021-8, § 8, 2021 Fla. Laws 1, 12–13 (codified at FLA. STAT. § 252.36(1)(c) (2021)); Act of June 15, 2021, § 67.265, 2021 Mo. Laws 335, 345 (codified at MO. REV. STAT. § 67.265 (2021)).

105. KAN. STAT. ANN. § 48-932(e)(1) (Westlaw) (providing a private cause of action for anyone "aggrieved" by an action taken by local government "that has the effect of substantially burdening or inhibiting the gathering or movement of individuals or the operation of any religious, civic, business or commercial activity").

106. *See* Act of May 3, 2021 § 12(4)(d).

public health orders, both in time and scope, and prohibits local governments from requiring vaccine passports.<sup>107</sup>

## 2. Bans on Mask Mandates and Vaccine Requirements

With the rise of COVID-19 cases stemming from the Delta and Omicron variants in the second half of 2021, local governments faced a new urgency to curb that transmission—primarily by using school mask and vaccine mandates. By January 2022, only eight states and the District of Columbia had a state-wide mask mandate for all public spaces and an additional eight states had mask mandates for schools.<sup>108</sup> For the remaining thirty-four states, many local jurisdictions had no choice but to contemplate their own mandates.<sup>109</sup> Indeed, local municipalities and counties throughout the United States issued their own school mask mandates—including municipalities from Alachua County, Florida, to Harris County, Texas.<sup>110</sup> Some larger municipalities, such as New York City, Chicago, and New Orleans, also required proof of vaccination to gain entry into restaurants and other public indoor spaces.<sup>111</sup>

While some locales faced state resistance early on, many more cities and counties confronted hostile state governments toward the end of 2021 and into 2022. About a dozen states have imposed mask mandate bans, and that list appears to be growing.<sup>112</sup> Even more, about twenty states also issued vaccine

107. See Act of June 15, 2021 § 67.265(1) (limiting local emergency health orders that restrict access to businesses, schools, and places of worship to no more than thirty days if there is a state-wide emergency and twenty-one days if there is not).

108. *2021 COVID-19 State Restrictions, Re-openings, and Mask Requirements*, NAT'L ACADEMY FOR STATE HEALTH POL'Y (Nov. 1, 2022), <https://www.nashp.org/governors-prioritize-health-for-all/> [<https://perma.cc/8FZ5-4ZAU>]. California, Connecticut, Illinois, Nevada, New Mexico, New York, Oregon, Washington, and the District of Columbia still had state-wide mask mandates in January 2022. *Id.*

109. See Alachua Cnty. Short-Term Emergency Order 2021-25, ¶ 2(F) (2021), <https://www.alachuacounty.us/Depts/Communications/Documents/ADACompliant/EmergencyOrder21-248-19-21.pdf> [<https://perma.cc/PYM8-XG2C>].

110. *Id.*; HARRIS CNTY. PUB. HEALTH, ALARMING INCREASE IN COVID-19 CASES RESULTS IN LOCAL HEALTH AUTHORITY ORDERING USE OF FACE MASKS IN SCHOOLS (2021), [https://drive.google.com/file/d/1xNaDAqDyBAS\\_HpImAjVT6si0nJtRRu4w/view](https://drive.google.com/file/d/1xNaDAqDyBAS_HpImAjVT6si0nJtRRu4w/view) [<https://perma.cc/VW7X-2RTA>].

111. Carlie Porterfield, *Here Are the U.S. Cities Where You Need a Covid Vaccine To Dine in a Restaurant*, FORBES, <https://www.forbes.com/sites/carlieporterfield/2021/12/22/here-are-the-us-cities-where-you-need-a-covid-vaccine-to-dine-in-a-restaurant/?sh=1cb3bfe38821> [<https://perma.cc/K2QT-YXJV>] (last updated Apr. 21, 2022, 8:13 AM). As of December 2021, Boston, Washington, D.C., Philadelphia, and San Francisco also imposed similar requirements. *Id.*

112. At the time of this Article's submission, the following states issued mask mandate bans: Arizona, Arkansas, Florida, Georgia, Iowa, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Virginia. Alison Durkee, *School Mask Mandate Bans Return amid Omicron Surge – Here Is Where States Stand*, FORBES, <https://www.forbes.com/sites/alisondurkee/2022/01/20/school-mask-mandate-ban-battles-return-amid-omicron-surge---heres-where-states-stand/?sh=11c741c720c4> [<https://perma.cc/994T-EGBM> (dark archive)] (last updated Jan. 21, 2022, 11:18 AM). At the time of submission, the West Virginia Legislature was poised to pass a bill banning masks in schools, among other social mitigations



mandate bans, with eleven states banning these requirements through their governors' executive order and nine states through state legislation.<sup>113</sup> While both types of bans are brazen attempts to preempt local authority from responding in an emergency, state mask mandate bans have become the more highly contested issue between state and local governments. Some local governments have openly defied these mask mandate bans by imposing their own school or local mask mandates.<sup>114</sup> In response, state governments have fined local officials, withheld school funds, and commenced litigation for failing to comply with the ban.<sup>115</sup>

Most states that have imposed a mask mandate ban did so through state legislation.<sup>116</sup> More than half of these mask mandate bans have been blocked in whole or in part by either a state court for violating the state's constitution or a federal court for violating the Americans with Disabilities Act ("ADA").<sup>117</sup> In Arizona and Arkansas, the statutory mask mandate bans have been blocked by state courts.<sup>118</sup> In Tennessee, Oklahoma, and Iowa, the statutory bans have been partially blocked by either state or federal courts.<sup>119</sup> Utah, Florida, and South Carolina had active mask mandate bans as of February 1, 2022.<sup>120</sup>

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bans. See Katherine Fung, *Mask Mandate Bans in Schools Have Been Blocked in Four States, Could West Virginia Be Next?*, NEWSWEEK (Jan. 20, 2022, 4:55 PM), <https://www.newsweek.com/mask-mandate-bans-schools-have-been-blocked-4-states-could-west-virginia-next-1671363> [<https://perma.cc/HE4V-M4M2>].

113. *State Government Policies About Vaccine Requirements (Vaccine Passports)*, BALLOTPEdia (Nov. 2, 2022), [https://ballotpedia.org/State\\_government\\_policies\\_about\\_vaccine\\_requirements\\_\(vaccine\\_passports\)](https://ballotpedia.org/State_government_policies_about_vaccine_requirements_(vaccine_passports)) [<https://perma.cc/7QNV-KJGB>].

114. See Simon, *supra* note 17.

115. See, e.g., *id.*; Aallyah Wright, *Parents Face Dilemma in States That Ban School Mask Mandates*, PEW TRS. (June 30, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/30/parents-face-dilemma-in-states-that-ban-school-mask-mandates> [<https://perma.cc/F9ZF-WKNU>]; Joshua Fechter, *A Texas School District Doesn't Require Masks. The State Is Suing the District Anyway*, TEX. TRIB. (Sept. 14, 2021), <https://www.texastribune.org/2021/09/14/texas-mask-mandate-lawsuits/> [<https://perma.cc/5PWB-A6ZE>].

116. See *State-by-State School Mask Mandates*, CTR. FOR DIGNITY IN HEALTHCARE FOR PEOPLE WITH DISABILITIES (Aug. 13, 2022), <https://centerfordignity.com/state-by-state-school-mask-mandates/> [<https://perma.cc/7WN4-AZT9>].

117. See *id.*

118. See *Ariz. Sch. Bds. Ass'n v. State*, No. CV2021012741, 2021 WL 4487632 (Ariz. Super. Ct. Sept. 22, 2021); *McClane v. State*, Nos. 60CV-21-4692, 60CV-21-4763 (Ark. Cir. Ct. Dec. 29, 2021).

119. See *Arc of Iowa v. Reynolds*, 24 F.4th 1162, 1167–68 (8th Cir. 2022); *G.S. ex rel. Schwaigert v. Lee*, No. 21-5915, 2021 WL 5411218, at \*2 (6th Cir. Nov. 19, 2021). In Oklahoma, a county district judge imposed a temporary injunction on an Oklahoma statute banning masks in public schools, but students and parents could opt-out of the requirement. Montana Staples, *Oklahoma School Mask Mandate Ban Blocked, Exemptions a Must*, NEWS TRIB. (Sept. 2, 2021, 4:00 AM), <https://www.newstribune.com/news/2021/sep/02/oklahoma-school-mask-mandate-ban-blocked/> [<https://perma.cc/UF3N-9ELU>].

120. See Fung, *supra* note 112.

The governors of Florida, Tennessee, Texas, and Virginia banned local authorities from issuing mask mandates or issuing a mandate without a parental opt-out provision via executive order.<sup>121</sup> Though no longer under a state of emergency,<sup>122</sup> Florida Governor DeSantis initially issued Executive Order 21-175, “ensuring parents freedom to choose,” in July 2021, which adopted the policy that school districts could not institute a mask mandate.<sup>123</sup> That executive order was replaced by state anti-COVID mitigation legislation in November 2021.<sup>124</sup> In Texas, an appellate court in Austin enjoined enforcement of Governor Abbott’s Executive Order GA-38<sup>125</sup> in Harris County, which banned local authorities from requiring face coverings.<sup>126</sup> As of February 1, 2022, Governor Abbott’s mask mandate ban remained in effect throughout the rest of Texas.<sup>127</sup> On the same day that Republican Virginia Governor Youngkin took

121. See Fla. Exec. Order No. 21-175 §§ 1–2 (July 30, 2021), <https://www.flgov.com/wp-content/uploads/2021/07/Executive-Order-21-175.pdf> [<https://perma.cc/HDE3-64M9>]; Tex. Exec. Order No. GA-38 ¶ 4 (July 29, 2021), [https://gov.texas.gov/uploads/files/press/EO-GA-38\\_continued\\_response\\_to\\_the\\_COVID-19\\_disaster\\_IMAGE\\_07-29-2021.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf) [<https://perma.cc/YR W9-UCYJ>]; Va. Exec. Directive No. 2 ¶ 3 (Jan. 15, 2022), <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/ed/ED-2---Executive-Branch-Employees.pdf> [<https://perma.cc/XTW5-H288>]; Tenn. Exec. Order No. 84 (Aug. 16, 2021), <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee84.pdf> [<https://perma.cc/9ESG-VFD7>]. While not an executive order per se, Montana’s governor announced a state department emergency rule that prohibits local mask mandates without a parental opt-out provision. 17 Mont. Admin. Reg. 1141–46 ¶ 9 (Aug. 31, 2021).

122. Gary Fineout, *Florida’s Covid-19 Emergency Ends — Death Toll Rises in Condo Collapse — 1st Cruise Ship Leaves Florida Since Pandemic — Toll Road Repeal Gets Mixed Reviews*, POLITICO (June 28, 2021, 6:58 AM), <https://www.politico.com/newsletters/florida-playbook/2021/06/28/floridas-covid-19-emergency-ends-death-toll-rises-in-condo-collapse-1st-cruise-ship-leaves-florida-since-pandemic-toll-road-repeal-gets-mixed-reviews-493391> [<https://perma.cc/V24U-9D89>].

123. See Fla. Exec. Order No. 21-175 §§ 1–2 (requiring the Florida Department of Health to issue rules pertaining to the mask mandate ban). Governor DeSantis’s executive order required the Florida Department of Health to issue rules pertaining to the mask mandate ban. *Id.* § 3. The Florida Department of Health passed emergency rule 64ER21-12, which said the rule “conforms to Executive Order 21-75” and directs “that any COVID-19 mitigation actions taken by school districts comply with the Parents Bill of Rights and ‘protect parents’ right to make decisions regarding masking of their children in relation to COVID-19.” 47 Fla. Admin. Reg. 3650 (Aug. 9, 2021).

124. H.R. 1B § 5, 2021 Leg. (Fla. 2021). This bill also prohibits local authorities from requiring a vaccination mandate for students. *Id.*

125. Tex. Exec. Order GA-38 (July 29, 2021), [https://gov.texas.gov/uploads/files/press/EO-GA-38\\_continued\\_response\\_to\\_the\\_COVID-19\\_disaster\\_IMAGE\\_07-29-2021.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf) [<https://perma.cc/YR W9-UCYJ>].

126. *Abbott v. Harris County*, 641 S.W.3d 514, 518 (Tex. App. 2022); Tex. Exec. Order GA-38. On October 14, 2022, a second Texas Appellate court enjoined enforcement of GA-38, this time against the County of Fort Bend on many of the same grounds as the one in Harris County. See *Abbott v. County of Fort Bend*, No. 01-21-00453-CV (Tex. App. Oct. 14, 2022).

127. *Abbott*, 641 S.W.3d at 530 (granting temporary injunction enjoining enforcement of GA-38 to Harris County). Governor Abbott’s Executive Order GA-38 has had a tumultuous ride. It was preliminarily enjoined by several lower courts, see, e.g., *Abbott v. San Antonio*, No. 04-21-00342-CV, 2021 WL 3819514, at \*1 (Tex. App. Ct. Aug. 19, 2021) (per curiam), only to have the ban reinstated by the Texas Supreme Court while the appellate courts and ultimately the Texas Supreme Court

office, he issued Executive Order “EO2,” which allows for a parental opt-out provision for any school mask mandate.<sup>128</sup> Shortly thereafter, seven local school boards filed suit in Arlington County alleging EO2 was “in conflict with the constitution and state law.”<sup>129</sup>

Success in striking down mask mandate bans has surprisingly come mostly from state courts. For example, in Arizona, the state legislature enacted its mask mandate ban as part of a \$12.8-million-dollar policy package.<sup>130</sup> A Maricopa County judge found that including social mitigation bans, which had nothing to do with the budget or the budget reconciliation, in a budget bill process violated the Arizona State Constitution.<sup>131</sup> That decision was affirmed by the Arizona Supreme Court in November 2021.<sup>132</sup> In Arkansas, the state legislature passed Act 1002, which banned public schools and local government agencies from passing a mask mandate, in 2021.<sup>133</sup> This statute was declared unconstitutional for, among other reasons, “usurp[ing] the constitutional authority granted to county judges over county buildings and property” and violating Article 14, § 1 of the Arkansas State Constitution for failing to “maintain a general, suitable and efficient system of free public schools.”<sup>134</sup>

A Texas appellate court case enjoined enforcement of the Texas governor’s mask mandate ban since it concluded that the governor likely did not have the authority to issue such a ban using his emergency powers under the Texas Disaster Act.<sup>135</sup> The executive order, GA-38, provides that “[n]o governmental entity, including a county, city, school district, and public health authority, and no government official may require any person to wear a face covering or to

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examined the parties’ arguments on the merits, *see In re Abbott*, No. 21-0720, slip op. at 1 (Tex. Aug. 26, 2021).

128. Va. Exec. Directive No. 2 (Jan. 15, 2022), <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/ed/ED-2---Executive-Branch-Employees.pdf> [https://perma.cc/XTW5-H288]; Ben Paviour & Michael Pope, *Republican Glenn Youngkin Is Sworn in as the Governor of Virginia*, NPR (Jan. 15, 2022, 6:18 PM), <https://www.npr.org/2022/01/15/1073180200/youngkin-sears-inauguration-republicans-gop-virginia> [https://perma.cc/5HFC-SNDU].

129. Christine Hauser, *Seven School Boards Sue Virginia’s Governor Over His Order Making Masks Optional*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/virginia-mask-mandate-youngkin.html> [https://perma.cc/R8E2-MFWY (staff-uploaded, dark archive)].

130. *See* *Ariz. Sch. Bds. Ass’n v. State*, No. CV2021012741, slip op. 1, 9–12 (Super. Ct. Ariz. Sept. 22, 2021).

131. *Id.* at 14.

132. *See* Jeremy Duda, *Supreme Court Unanimously Strikes Down Mask Mandate, ‘Critical Race Theory’ Bans*, AZ MIRROR (Nov. 2, 2021, 12:37 PM), <https://www.azmirror.com/2021/11/02/supreme-court-unanimously-strikes-down-mask-mandate-critical-race-theory-bans/> [https://perma.cc/T7YD-FA9H].

133. S.B. 590 § 2(b)–(c), 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

134. *McClane v. State*, No. 60CV-21-4692(U), slip op. at 16 (Ark. Cir. Ct. Dec. 29, 2021) (alteration in original).

135. *Abbott v. Harris County*, 641 S.W.3d 514, 528 (Tex. App. 2022).

mandate that another person wear a face covering.”<sup>136</sup> While the Texas Disaster Act provides the governor with certain emergency powers to meet the “dangers to the state and people presented by disasters,” it also authorizes the presiding officers of local government entities to issue local disaster declarations with accompanying powers.<sup>137</sup> Governor Abbott, in what can be described only as an overreach of power, supported his mask mandate ban by relying on a provision of the Texas Disaster Act that authorizes the governor to “suspend the provisions of any regulatory statute.”<sup>138</sup> The court rejected such an absurd interpretation, finding that the Act allows the governor to suspend laws relating to the conduct of state business but not laws concerning local governments’ authority “to react to local disasters and address local public-health concerns.”<sup>139</sup> The Texas appellate court concluded that the “[g]overnor does not possess absolute authority under the Texas Disaster Act to preempt orders issued by local governmental entities or officials that contradict his executive orders”—and that such action was likely *ultra vires*.<sup>140</sup>

In contrast, the South Carolina legislature twice successfully defended its mask mandate ban before the state’s supreme court.<sup>141</sup> Proviso 1.108, an appropriations bill, stated that public K-12 schools were prohibited from using appropriated state funds to impose mask mandates in schools.<sup>142</sup> The South Carolina Supreme Court, in *Wilson ex rel. State v. City of Columbia*,<sup>143</sup> found that the city of Columbia’s mask mandate ordinance was in direct conflict with state law and therefore preempted.<sup>144</sup> In finding the challenged ordinance preempted, the court rejected the city’s argument that the state’s Home Rule Act provided them with the authority to enact the ordinances.<sup>145</sup> In doing so, the court found that “[t]he Home Rule doctrine in no manner serves as a license for local

136. Tex. Exec. Order No. GA-38 (July 29, 2021), [https://gov.texas.gov/uploads/files/press/EO-GA-38\\_continued\\_response\\_to\\_the\\_COVID-19\\_disaster\\_IMAGE\\_07-29-2021.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf) [<https://perma.cc/YRW9-UCYJ>].

137. TEX. CODE ANN. §§ 418.011, 418.108 (Westlaw through the end of the 2021 Reg. and Called Sesss. of the 87th Leg.).

138. TEX. CODE ANN. § 418.016(a) (Westlaw through the end of the 2021 Reg. and Called Sesss. of the 87th Leg.); see *Abbott*, 641 S.W.3d at 527.

139. *Abbott*, 641 S.W.3d at 528. One legal scholar has commented that the Texas Disaster Act gave the governor emergency powers to “reduce the vulnerability of people and communities of this state.” *Zale*, *supra* note 32. She argues that GA-38 does just the opposite by putting Texas residents at greater risk of contracting COVID-19 and overwhelming the state’s already burdened health-care system. See *id.*

140. *Abbott*, 641 S.W.3d at 528.

141. See *Wilson ex rel. State v. City of Columbia*, 863 S.E.2d 456, 458 (S.C. 2021); *Richland Cnty. Sch. Dist. 2 v. Lucas*, 862 S.E.2d 920, 922 (S.C. 2021) (per curiam).

142. See *Wilson*, 863 S.E.2d at 458. Four weeks later, the South Carolina Supreme Court affirmed its holding in *Wilson* but indicated the possibility that a school district could impose a mask mandate if it used other funds to do so. *Richland Cnty. Sch. Dist. 2*, 862 S.E.2d at 924.

143. 863 S.E.2d 456 (S.C. 2021).

144. *Id.* at 462–63.

145. *Id.* at 462.

governments to countermand a legislative enactment by the General Assembly.”<sup>146</sup> Yet the court also brushed aside that the city enacted its ordinance in accordance with the legislative Home Rule Act, which entrusts the city to “preserve the ‘health, peace, order, and good government’ of its citizens.”<sup>147</sup>

Success in striking down mask mandate bans in federal courts has had mixed results. In South Carolina, Iowa, Tennessee, Florida, and Texas, among others, parents of children with disabilities brought suit against their state alleging that the mask mandate bans discriminated against their children in violation of the ADA.<sup>148</sup> In each case, the students alleged a disability that left them at significant risk of severe illness should they contract COVID-19.<sup>149</sup> As masking is known to reduce the spread of COVID-19, some of the plaintiffs argued that enforcement of mask mandate bans is tantamount to depriving their children meaningful access to in-person school.<sup>150</sup> It is an either/or choice: these at-risk students can attend in person, at greater risk of severe illness, or stay home.<sup>151</sup> The Sixth and Eighth Circuits recognized the discriminatory effect of these mask mandate bans and continued enjoining the enforcement of the mask mandate bans in Tennessee and Iowa.<sup>152</sup> In contrast, the Fifth Circuit found that the perceived higher risk of contracting COVID-19 resulting in severe disease as a result of the mask mandate ban was too abstract.<sup>153</sup> The Fourth Circuit found that the injuries alleged by parents were not traceable to the governor or attorney general since neither was responsible for enforcing the ban.<sup>154</sup>

Sadly, the Supreme Court may be curtailing the federal government’s ability to protect the public health. The recent Supreme Court ruling temporarily staying the Occupational Safety and Health Administration’s (“OSHA”) vaccine mandate for large private employers is troubling, but not

146. *Id.*

147. *Id.* (quoting S.C. CODE. ANN. §§ 5-7-10 to -310 (2004)).

148. See *Arc of Iowa v. Reynolds*, 24 F.4th 1162, 1168 (8th Cir. 2022), *vacated as moot* by *Arc of Iowa v. Reynolds*, 33 F.4th 1042 (8th Cir. 2022) (per curiam); *Disability Rts. S.C. v. McMaster*, 24 F.4th 893, 899 (4th Cir. 2022); *G.S. ex rel. Schwaigert v. Lee*, No. 21-5915, 2021 WL 5411218, at \*1 (6th Cir. Nov. 19, 2021); *E.T. v. Paxton*, 19 F.4th 760, 763 (5th Cir. 2021); *Hayes v. DeSantis*, 561 F. Supp. 3d 1187, 1193–96 (S.D. Fla. 2021).

149. *Arc of Iowa*, 24 F.4th at 1169; *Disability Rts. S.C.*, 24 F.4th at 899; *G.S.*, 2021 WL 5411218, at \*1–2; *E.T.*, 19 F.4th at 765.

150. See, e.g., *Arc of Iowa*, 24 F.4th at 1169–70; *E.T.*, 19 F.4th at 765.

151. See *E.T.*, 19 F.4th at 765.

152. See *G.S.*, 2021 WL 5411218, at \*2–3 (finding that plaintiffs are entitled to a preliminary injunction, but the injunction is limited only to plaintiff school districts); *Arc of Iowa*, 24 F.4th at 1182. The Eighth Circuit subsequently vacated the preliminary injunction prohibiting enforcement of Iowa’s school mask mandate ban, citing low risk to plaintiffs’ children due to “markedly lower [COVID-19] transmission rates and case loads throughout Iowa and the country.” *Arc of Iowa*, 33 F.4th at 1044.

153. See *E.T.*, 19 F.4th at 766.

154. *Disability Rts. S.C.*, 24 F.4th at 901–02.

surprising.<sup>155</sup> This was the Biden administration’s primary strategy for getting a significant portion of the U.S. population vaccinated, and the OSHA vaccine mandate had provided a uniform federal standard for large businesses that operate in multiple locations, often with conflicting rules about vaccine mandates.<sup>156</sup> While the Court acknowledged that OSHA has authority to issue workplace safety rules, it determined that the emergency rule was really a “broad public health measure[.]” that went beyond OSHA’s authority.<sup>157</sup> The Court found that such public safety measures should be left to the states—even though, at the time, at least eleven states had vaccine mandate bans.<sup>158</sup> There is some good news though: the Court held that the U.S. Department of Health and Human Services had the authority to mandate the COVID-19 vaccine for health-care workers.<sup>159</sup>

COVID-19 has spawned a new epidemic of sorts: states flexing their preemptive muscles, particularly when it comes to mask mandate bans. The federal courts have not been a viable alternative, especially after the Supreme Court struck down a federal vaccine mandate for large businesses. As set forth below, a state preempting local social mitigation measures obstructs local governments’ ability to protect the health and welfare of its citizens.

### C. *State Legislative Obstructing Preemption*

Local emergency response regulation at the municipal or city level is likely more reflective and tailored to the specific needs of a community.<sup>160</sup> Unlike a response at the state level that encompasses a wide range of demographics, particularly along the rural/city divide, a city’s response is more local and reflective of what is going on in that immediate community.<sup>161</sup> While COVID-

155. See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 662–63 (2022) (per curiam).

156. Lawrence Gostin, *The Supreme Court’s Ruling on Vaccine Mandates Threatens the Federal Government’s Ability To Protect Public Health*, FORBES (Jan. 19, 2022, 1:49 PM), <https://www.forbes.com/sites/coronavirusfrontlines/2022/01/19/the-supreme-courts-ruling-on-vaccine-mandates-threatens-the-federal-governments-ability-to-protect-public-health/?sh=ce1de5d53392> [https://perma.cc/9N26-ABMK (dark archive)].

157. See *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665–66.

158. See Gostin, *supra* note 156; *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 670 (Gorsuch, J., concurring).

159. See *Biden v. Missouri*, 142 S. Ct. 647, 653 (2022) (per curiam). The Court noted that since the core mission of the U.S. Department of Health and Human Services “is to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients’ health and safety,” it was within its statutory authority to require a health-care worker vaccine mandate. *Id.* at 650.

160. See Briffault, *Concerns in Contemporary Federalism*, *supra* note 6, at 1312–13.

161. Cf. Amicus Curiae Letter from Harris County Judge Lina Hidalgo, in Her Official Capacity, in Support of Appellees, *State v. Texas*, No. 08-20-226-CV (Tex. App. Nov. 11, 2020) 2020 WL 6821262 (arguing that all disasters are local, especially in a state like Texas, which is 790-miles wide, spans two time zones, has three of the top ten most populated U.S. cities, and includes some of the lowest population densities in its prairies and deserts).

19 has impacted the entire United States, “all disasters are local.”<sup>162</sup> The pandemic impacts different areas in different ways and at different times. While COVID-19 cases surged in the New York City area in spring of 2020, the upstate New York area did not see a big surge in cases until November 2020.<sup>163</sup>

Red-state preemption of blue-city orders is all too common in our system of governance.<sup>164</sup> Often preemption is guided by political polarization rather than principled policy-making decisions.<sup>165</sup> Even in strong state-constitutional Home Rule states, the Home Rule provisions often contain explicit reservations of state legislative power to preempt local ordinances.<sup>166</sup> For blue cities with high population densities and, at times, high transmission rates for COVID-19, those local governments desired to keep their citizens safe and healthy perhaps at the expense of a more robust economy. New York City and New Orleans are prime examples. Both cities have confronted large waves of COVID-19 and both municipalities responded by adding additional social mitigation measures that were stricter than what the state required.<sup>167</sup>

State bans on local anti-COVID social mitigation measures obstruct not just blue cities but red cities and towns too. For example, in February 2022, a proposed West Virginia law aimed to ban mask mandates in all public schools.<sup>168</sup> Yet, thirty-five of the fifty-five counties, including Republican counties, had a school mask mandate in place.<sup>169</sup>

While state preemption of local regulation is a significant problem during nonemergency times, it is particularly acute in an emergency when preventing

162. *See id.*

163. *See* Jimmy Vielkind, *COVID-19 Hits Buffalo, N.Y., Much Harder Than in the Spring*, WALL ST. J. (Dec. 3, 2020, 6:30 PM), <https://www.wsj.com/articles/covid-19-hits-buffalo-n-y-much-harder-than-in-spring-11607038255> [<https://perma.cc/3VLF-5D7K> (dark archive)].

164. *See* Briffault, *The Challenge of the New Preemption*, *supra* note 11, at 197–98.

165. *See id.*; LILLIANA MASON, UNCIVIL AGREEMENT 15 (2018).

166. *See, e.g.*, FLA. CONST. art. VIII, § 2(b) (“[Municipalities] may exercise any power for municipal purposes except as otherwise provided by law.”); ILL. CONST. art. VII, § 6(i) (“Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State’s exercise to be exclusive.”); PA. CONST. art. IX, § 2 (“A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution by its home rule charter or by the General Assembly at any time.”).

167. *See* Newman, *supra* note 45 (explaining that New York City considered the possibility of a shelter in place rule while New York State was against such a rule). *Compare* City of New Orleans Pub. Health Advisory (Feb. 1, 2022), [https://ready.nola.gov/NOLAReady/media/Documents/Coronavirus/PUBLIC-HEALTH-ADVISORY-Feb-1-2022\\_2.pdf](https://ready.nola.gov/NOLAReady/media/Documents/Coronavirus/PUBLIC-HEALTH-ADVISORY-Feb-1-2022_2.pdf) [<https://perma.cc/CZX3-T2ZG>], *with* La. Proclamation No. 234 JBE § 3A (Dec. 21, 2021) (highlighting that the city of New Orleans required masks indoors, while the state of Louisiana only recommended individuals wear face coverings).

168. *See* Fung, *supra* note 112.

169. *See id.*

local officials from acting can have life-or-death consequences.<sup>170</sup> This obstructing of state legislative preemption is an expansion of what one legal scholar calls the “new preemption,” where states ban local action in an area without replacing it with substantive state legislation.<sup>171</sup> These obstructing preemptive laws are set apart from other state preemptive efforts.<sup>172</sup> With these laws, state governments tie local officials’ hands, preventing them from carrying out their duties to ensure the health and education of their citizens. The state government hampers the local government by banning important public health mitigation measures, yet expects local government to perform its functions without the full set of tools in its toolbox. For example, each state’s constitution provides for the creation of a public education system.<sup>173</sup> Within that framework, a state constitution often prescribes the authority of local school boards to “supervis[e]” and “operate” the public schools of their respective school division.<sup>174</sup> When the state bans local schools from imposing a mask mandate, it is interfering with that school board’s constitutional duty to operate, control, and supervise its schools.<sup>175</sup> Unlike the situation where a state legislature’s preemptive laws push local government regulation out, the school board must still operate in this field.

Public health emergencies cannot be left largely in the hands of a part-time state legislature. A state statute banning masks or vaccine mandates outright cannot be amended or abolished in a moment’s notice. In fact, only ten

170. See Derek Carr & Sabrina Adler, *Addressing Preemption To Empower Local Governments*, CHANGE LAB SOLS. (June 10, 2020), <https://www.changelabsolutions.org/blog/addressing-preemption-empower-local-governments> [<https://perma.cc/VHW2-9E6C>]. Typically, state preemption involves a red state, Republican governor, and Republican state legislature, enacting state laws to preempt local regulation in blue cities with a Democratic mayor. See Briffault, *The Challenge of the New Preemption*, *supra* note 11, at 1997–98. However, that is not always the case. For example, in Oregon, the Republican mayor in Sandy County brought suit against the Democratic Oregon governor challenging the governor’s order continuing the state of emergency. See *Coronavirus (COVID-19) Preemption Conflicts Between State and Local Governments*, BALLOTPEDIA (Jan. 6, 2022), [https://ballotpedia.org/Coronavirus\\_\(COVID-19\)\\_preemption\\_conflicts\\_between\\_state\\_and\\_local\\_governments](https://ballotpedia.org/Coronavirus_(COVID-19)_preemption_conflicts_between_state_and_local_governments) [<https://perma.cc/R3S2-FCE6>].

171. See Briffault, *The Challenge of the New Preemption*, *supra* note 11, at 1997.

172. NAT’L LEAGUE OF CITIES, PREEMPTION AND THE COVID-19 PANDEMIC: EXPLORING STATE INTERFERENCE BEFORE, DURING, & AFTER THE CRISIS 10–11 (2020), [https://www.nlc.org/wp-content/uploads/2020/11/COVID-19\\_Preemption\\_Report.pdf](https://www.nlc.org/wp-content/uploads/2020/11/COVID-19_Preemption_Report.pdf) [<https://perma.cc/5C46-9WQY>].

173. See Molly A. Hunter, *State Constitution Education Clause Language*, EDUC. L. CTR., [https://edlawcenter.org/assets/files/pdfs/State\\_Constitution\\_Education\\_Clause\\_Language.pdf](https://edlawcenter.org/assets/files/pdfs/State_Constitution_Education_Clause_Language.pdf) [<https://perma.cc/FAD9-XPRH>]; Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMM’N STATES 1, 1 (2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/9DAX-2MJS>].

174. See, e.g., VA. CONST. art. VIII, § 7 (“The supervision of schools in each school division shall be vested in a school board . . .”); FLA. CONST. art. IX, § 4(b) (“The school board shall operate, control and supervised all free public schools within the school district . . .”).

175. See *Alexandria City Sch. Bd. v. Youngkin*, No. CL-22000224-00 (Va. Cir. Feb. 24, 2022) (holding that the governor cannot override the decisions of local school boards).



state legislatures are full-time institutions, with the remaining forty states operating on a reduced schedule.<sup>176</sup> Should another variant threaten the public health and need quick local action, local government officials would face another untenable predicament: either follow state laws with life-or-death consequences or defy them risking litigation and fines.

#### IV. OVERCOMING THE BARRIERS

Local governments should continue to fight pandemics on the ground notwithstanding the numerous challenges they face. They have several weapons at their disposal.<sup>177</sup> They can better craft local orders to withstand civil rights challenges. They can argue that such bans violate constitutional or even legislative Home Rule. Some can even use their own emergency powers when disaster strikes.

Local governments need to consider the phrasing of emergency orders that limit or restrict religious gatherings, even if those orders restrict other secular activities. Considering the recent Supreme Court cases *Roman Catholic Diocese* and *Tandon*, an emergency order will likely be enjoined if the order limits religious gatherings but allows for exceptions for *any* other comparable secular activity.<sup>178</sup> If, however, a local order limits the number of secular exceptions to any gathering ban or limitation, and those exceptions are truly for essential activities, the order may survive.

State courts have struggled to balance the seeming contradiction of local government as a subordinate of state government with its own sphere of sovereignty under Home Rule.<sup>179</sup> While Home Rule powers differ by state and can either be derived from the state constitution or by state statute, local laws will only prevail over state laws as to matters of purely local concern.<sup>180</sup> As a general rule, matters of public health and education are considered general, not local, concerns.<sup>181</sup> Even so, most courts consider whether Home Rule doctrine prevails on an ad hoc basis—often taking into account which level of government is best equipped to implement intrastate public policy.<sup>182</sup> It is

176. The ten full-time legislatures are California, Michigan, New York, Pennsylvania, Alaska, Hawaii, Illinois, Massachusetts, Ohio, and Wisconsin. *Full and Part-Time Legislatures*, NAT'L CONF. STATE LEGISLATURES (July 28, 2021), <https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx> [https://perma.cc/PK5J-ZVYE].

177. See Hodge et al., *supra* note 10, at 677–79. The authors outline other legal interventions to combat COVID-19 denialism that goes beyond the scope of this Article.

178. See *Tandon v. Newsome*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65 (2020) (per curiam).

179. See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1337–38 (2009).

180. REYNOLDS, JR., LOCAL GOVERNMENT THIRD EDITION, *supra* note 34, § 35.

181. *Id.* § 39.

182. See Baker & Rodriguez, *supra* note 179, at 1354.

through this lens that local government may convince a court to strike down both mask and vaccine mandate bans.

Some state constitutions provide that local school boards are vested with the authority to supervise and operate the public schools of their respective locales.<sup>183</sup> Seven local Virginia school boards have argued that Governor Youngkin’s executive order, providing an opt-out on local school mandates, violates the Virginia Constitution since the supervision of the state’s schools is of purely local concern.<sup>184</sup> The circuit court granted the school boards’ injunction staying the governor’s executive order, though it reached its decision on other grounds.<sup>185</sup> Parents and students in Florida’s school system likewise argued that their governor’s mask mandate ban violated the Florida Constitution—though the circuit court judge denied the Home Rule claim as it could not find that “the law of Florida clearly sets forth the issues in this case as solely local.”<sup>186</sup> That should not deter other localities from using Home Rule to challenge these bans. With words in the state constitution like “supervise” and “operate,” local governments may reasonably argue that the day-to-day function of the local public schools are of local concern.

Local governments may have a stronger argument that vaccine mandates for local government employees are of purely local concern. First, the frequently cited Supreme Court case *Jacobson v. Massachusetts* held that the Massachusetts statute empowering localities to mandate vaccination was permissible under the state’s police power and did not violate the Fourteenth Amendment of the U.S. Constitution.<sup>187</sup> More recently, in *In re Newark*,<sup>188</sup> the New Jersey appellate division held that the city of Newark could mandate that its city employees be fully vaccinated under the concept of managerial

183. See, e.g., VA. CONST. art. VII, § 7; FLA. CONST. art. IX, § 4(b).

184. See Verified Complaint for Declaratory and Injunctive Relief at 1–3, *Alexandria City Sch. Bd. v. Youngkin*, No. CL-22000224-00 (Va. Cir. 2022) (six additional school districts signed onto plaintiff school district’s complaint).

185. *Alexandria City Sch. Bd.*, No. CL-22000224-00, at 7–8. The circuit court found that the Virginia legislature explicitly delegated to local school boards the power to resume in-person school and empowered local boards to fully follow the guidance of the Centers for Disease Control and Prevention. See *id.*

186. The circuit court held that the governor’s executive order “exercised without authority is illegal, null and void, and unenforceable.” *Scott v. DeSantis*, No. 2021-CA-001382, at 2 (Fla. Cir. Ct. 2021), <https://flaglerlive.com/wp-content/uploads/scott-v-desantis.pdf> [<https://perma.cc/2RMF-4FQN>]. The circuit court’s order was vacated a week later, and the lawsuit was ultimately dismissed as moot. *Scott v. DeSantis*, No. 2021-CA-001382, at 2 (Fla. Dist. Ct. App. 2021) (dismissed as moot), [https://www.1dca.org/content/download/816824/opinion/212685\\_DA08\\_12222021\\_142149\\_i.pdf](https://www.1dca.org/content/download/816824/opinion/212685_DA08_12222021_142149_i.pdf) [<https://perma.cc/XF2F-7BAT>].

187. *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25, 31 (1906). In *Jacobson*, in connection with the Massachusetts statute, the City of Cambridge Department of Health passed a regulation mandating that all persons be vaccinated for smallpox. *Id.* at 12–13.

188. 264 A.3d 318 (N.J. Super. Ct. App. Div. 2021).

prerogative.<sup>189</sup> Unlike *Jacobson*, there was no express state statute authorizing the city of Newark to issue an employee vaccine mandate.<sup>190</sup> Rather, the appellate division found that the mayor's right to direct and supervise its workforce, coupled with the current state and federal state of emergencies in response to the pandemic, supported the city's authority requiring its employees be vaccinated.<sup>191</sup> Second, the Supreme Court has not yet interfered in state health-care vaccine mandates, allowing health-care vaccine mandates in both Maine and New York to continue even though the mandates do not provide for religious exemptions.<sup>192</sup> Since the Court has shown a willingness to enjoin other COVID-19 public health measures, such as gathering restrictions, as a violation of the Free Exercise Clause, it may continue to evade the state vaccine mandate issue or ultimately find it constitutional.<sup>193</sup>

A related issue is whether the state legislature can preempt a local government from requiring its workers to get vaccinated as a condition of employment. While current case law is sparse in this area, some state courts have found local governments' exercise of powers in relation to its municipal function, including matters affecting the "personnel and administration" of municipal offices, are matters of local concern.<sup>194</sup> For example, in *City & County of Denver v. State*,<sup>195</sup> the Colorado Supreme Court held that a state statute prohibiting municipalities from adopting residency requirements for municipal employees interfered with the power of Home Rule municipalities.<sup>196</sup> That power, granted by the Colorado Constitution, gave municipalities authority over "[t]he creation and terms of municipal officers, agencies and employment; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees . . ."<sup>197</sup> Similarly, a state legislature attempting to preempt a municipality from issuing

189. *Id.* at 331. In accordance with New Jersey statutory law, the mayor is the chief executive officer of the city and has authority to supervise all city departments and city employees. *Id.* at 325 (citing N.J. STAT. ANN. §§ 40A:61-4(a), 40:69A-40). A public employer has managerial prerogative when it, among other things, "exercises a commonly held recognized managerial prerogative 'such as the right to hire or direct the workforce.'" *Id.* (quoting Bd. of Educ. of Woodstown-Pilesgrove Reg'l Sch. Dist. v. Woodstown-Pilesgrove Reg'l Educ. Ass'n, 410 A.2d 1131, 1134 (N.J. 1980)).

190. *Id.* at 325.

191. *Id.* at 327.

192. See *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021) (mem.) (denying petitioners' application to enjoin enforcement of Maine's health-care vaccine mandate); *Dr. A. v. Hochul*, 142 S. Ct. 552 (2021) (mem.) (denying petitioners' application to enjoin enforcement of New York's health-care vaccine mandate).

193. See Gitter, *supra* note 88, at 3-4.

194. See, e.g., *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1242, 1246-47 (Pa. 2004) (finding the city did not exceed its Home Rule powers in enacting an ordinance designating same-sex "life partnership" as marital status since employee benefits is a matter of purely local concern).

195. 788 P.2d 764 (Colo. 1990) (en banc).

196. *Id.* at 772.

197. *Id.* at 770 (internal quotation marks omitted) (quoting COLO. CONST. art. XX, § 6(a)).

an employee vaccine mandate with a comparable Home Rule charter may well interfere with a municipality's constitutional Home Rule powers.

When the social mitigation ban comes from the state executive via executive order, local government can argue that the governor lacked the authority to issue such order in the first place.<sup>198</sup> A governor may not have the authority to issue such an order and, therefore, has acted *ultra vires*.<sup>199</sup> While a governor may be provided with emergency powers during a disaster or public health emergency, those powers are for the protection of the health, welfare, and safety of his citizenry.<sup>200</sup> Imposing a mask or vaccine mandate ban would achieve the opposite result. Moreover, local governments, along with the governor, may be given emergency powers. Unless the state's disaster statute provides the governor with the authority to preempt local government in an emergency, the governor does not have that power. One state appellate court in Texas has already recognized the state executive's overreach when it found that the governor likely did not have the authority to use his emergency powers under the Texas Disaster Act to issue a statewide mask mandate ban.<sup>201</sup>

Local authority at both the county and municipal level should be able to provide responsive regulation to its citizens particularly during a public health emergency. This structure is the very embodiment of our federalist system, which recognizes that "[t]he federal structure allows local policies 'more sensitive to the diverse needs of a heterogenous society,' permits 'innovation and experimentation,' enables greater citizen involvement in 'democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'"<sup>202</sup> Ideally, these local emergency powers should be granted to local authorities expressly by the state legislature. Some states already allow for local authorities to declare a local state of emergency, and some states expressly give those local officials some emergency powers.<sup>203</sup>

198. See *Zale*, *supra* note 32; *Abbott v. Harris County*, 641 S.W.3d 514, 519–20 (Tex. App. 2022).

199. See *Zale*, *supra* note 32.

200. See *Deere*, *supra* note 89, at 728–29, 729 n.43 (“To perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population in coping with a disaster or emergency.” (quoting MISS. CODE ANN. § 33-15-11(c)(4) (2020))); MO. ANN. STAT. § 44.100 1(3)(j) (Westlaw through WID 37 of the 2022 Second Reg. Sess. of the 101st Gen. Assemb.) (“Perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population.”); OKLA. STAT. ANN. tit. 63, § 683.9(5) (Westlaw through legislation of the Second Reg. Sess. of the 58th Leg.) (“To perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population . . .”).

201. See *Abbott*, 641 S.W.3d at 528.

202. Briffault, *The Challenge of the New Preemption*, *supra* note 11, at 2018 (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)).

203. See, e.g., KY. REV. STAT. ANN. § 39A.100(3) (Westlaw through the 2022 Reg. and Extra. Sess. and the Nov. 2020 election) (providing chief local officers with authority to declare local emergency and enumerating some specific powers); KAN. STAT. ANN. § 48-932(a) (Westlaw through laws enacted during the 2022 Reg. Sess. of the Kan. Leg. effective on July 1, 2022) (providing authority

The Kansas Legislature, while providing local officials with some emergency powers, has expressly provided recourse in the courts for those businesses or individuals “aggrieved” by an emergency action of local government.<sup>204</sup> Specifically, it states that “[t]he court shall grant the request for relief unless the court finds such action is narrowly tailored to respond to the state of local disaster emergency and uses the least restrictive means to achieve such purpose.”<sup>205</sup> This provision provides these “aggrieved” citizens more protection than currently permitted under traditional federal constitutional analysis.<sup>206</sup> Some states allow for local authorities to issue orders to protect the health, safety, and welfare of its citizens under Home Rule.<sup>207</sup> Under Home Rule, local officials are provided either statutory or constitutional protection from state interference in local affairs.<sup>208</sup>

For those states where local government does not have clearly defined emergency powers, the state legislatures should amend their respective emergency disaster statutes to include them. Defining the scope of these powers at the outset will likely reduce the frequency of challenges to local emergency orders by both citizens and state executives alike. More importantly, local officials will be able to issue emergency orders that are more reflective of their constituents’ needs. For example, citizens in major urban centers, such as St. Louis or Indianapolis, are more likely to want greater social mitigation measures during a pandemic than their state’s rural counterparts. These local orders can simply supplement the state’s base level of protections.

Local governments can be empowered to respond to emergencies without being granted limitless power. It is reasonable for the state to have a check on local power during an emergency. It should be a check, though, and not preemption. The state legislature could put statutory guardrails in place as a check on local government power in an emergency. For example, in some state disaster statutes, a local official may declare a local emergency, but such

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to local state officials to declare a local state emergency); TEX. GOV’T CODE ANN. § 418.108 (Westlaw through the end of the 2021 Reg. and Called Sess. of the 87th Leg.) (providing local officials with authority to declare state of emergency and authorizing them with certain powers such as to evacuate and to control the movements of persons in the area).

204. KAN. STAT. ANN. § 48-932(e)(1) (Westlaw).

205. *Id.*

206. Current federal constitutional jurisprudence reviews laws under strict scrutiny only when those laws violate a fundamental right such as the right to participate in religious services under the Free Exercise Clause under the First Amendment. *See* Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 DUKE L.J. ONLINE 1, 4 (2020). In those cases, a law will survive strict scrutiny if it is narrowly tailored to achieve a compelling state interest and the law uses the least restrictive means to achieve that purpose. *Id.*

207. *See supra* note 200 and accompanying text.

208. Sheila R. Foster, *As COVID-19 Proliferates Mayors Take Response Lead, Sometimes in Conflicts with Their Governors*, GEO. L. LIBR., <https://www.law.georgetown.edu/salpal/as-covid-19-proliferates-mayors-take-response-lead-sometimes-in-conflicts-with-their-governors/> [<https://perma.cc/FH2T-YSTC>].

declaration is usually limited to seven days unless extended by the local governing body.<sup>209</sup> States without this important check could incorporate it into their own disaster statutes. If state government finds that local government should no longer be operating with emergency powers, it can always step in and end it by amending the emergency disaster statute. If these statutory guardrails prove too burdensome on the state legislature, the state disaster statute can limit the duration of a local emergency and require state consent for emergencies exceeding a certain period like thirty or sixty days. This type of statutory guardrail is already in place in many states as a check on a governor's emergency powers.<sup>210</sup>

However, it would be a mistake to empower the governor with such oversight—as in the case of Florida.<sup>211</sup> While providing the governor with emergency powers may be necessary during a public health crisis or other disaster, adding to those powers would concentrate too much power in the state executive. It would allow for the state executive to unilaterally preempt local regulations in a time of emergency. That check on local emergency power should come from within local government first and then perhaps the state legislature as a final check.

The judiciary would provide another check on local officials exceeding their authority to issue emergency local orders. Should local officials issue orders beyond the authority given to them by statute or state constitution, the judiciary should strike down those orders. Likewise, the judiciary should also strike down local orders that do not survive constitutional scrutiny. This check on local government would prevent local officials from unnecessarily infringing upon their citizens' constitutional rights or from issuing orders in direct conflict with orders at the state level.

Local jurisdictions can align and piggyback off federal protections. This is most clearly seen with the local mask mandates offering protection to those with disabilities. Currently, the federal appellate courts are split on whether state mask mandate bans violate the ADA, so local governments in jurisdictions less hospitable to ADA claims in this context would be better off proceeding with state court claims.

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209. See, e.g., TEX. GOV'T CODE ANN. § 418.108(b) (Westlaw) (permitting a local official to declare a local state of emergency for a period of no longer than seven days unless extended by a local governing body); IND. CODE § 10-14-3-29(a) (2022) (same); ALASKA STAT. ANN. § 26.23.140(a) (LEXIS through 2022 legislation, Chs. 1–40) (same).

210. Deere, *supra* note 89, at 792–94 app. A.

211. See Fla. Exec. Order No. 21-175 (July 30, 2021), <https://www.flgov.com/wp-content/uploads/2021/07/Executive-Order-21-175.pdf> [<https://perma.cc/HDE3-64M9>].

More attention should be paid to successful state-local partnerships in the pandemic. New Orleans is a blue city in a red state<sup>212</sup> that has imposed significant social mitigation measures when the state has loosened restrictions. In North Carolina, another red state,<sup>213</sup> Democratic Governor Roy Cooper stated in his executive order concerning measures to mitigate COVID-19 transmission that “[m]ost of the restrictions in this executive order are minimum requirements, and local government can impose greater restrictions.”<sup>214</sup> In New Jersey, Governor Phil Murphy ended the statewide school mask mandate on March 7, 2022, but he indicated as a part of his announcement that local officials could continue mask requirements or restore them if there was a spike in cases.<sup>215</sup>

## V. CONCLUSION

Local governments have been and continue to be in the best position to respond in an emergency. Smaller in size, they can more easily act at a moment’s notice. As the on-the-ground government leaders, they can also more easily pivot than their state partner, particularly a part-time legislature that may only meet for thirty or sixty days per year. Local government actions are also more reflective of community desires and needs. A large, densely packed city may have greater need for more social mitigation measures than a rural county.

Local governments face numerous barriers to providing responsive emergency regulation but none larger than state preemption of local orders. State preemption of social mitigation laws hampers local governments’ ability to respond in an emergency. Robbed of essential tools to fight the pandemic, local governments are put in an untenable predicament: comply with the antimitigation laws or protect your citizens. This form of obstructing preemption strikes at the very heart of the democratic process. And these preemptive measures are coming not just from state legislatures but from state executives who are using their emergency executive powers to achieve a political purpose rather than to protect their citizens during a public health emergency.

212. 2022 *Cook PVI: District Map and List*, COOK POL. REP. (July 12, 2022), <https://www.cookpolitical.com/cook-pvi/2022-partisan-voting-index/district-map-and-list> [https://perma.cc/3LWA-2A3B].

213. 2022 *Cook PVI: State Map and List*, COOK POL. REP. (July 12, 2022), <https://www.cookpolitical.com/cook-pvi/2022-partisan-voting-index/state-map-and-list> [https://perma.cc/37AC-B7DL].

214. N.C. Exec. Order No. 224 (July 29, 2021), <https://files.nc.gov/governor/documents/files/EO224-COVID-19-Measures.pdf> [https://perma.cc/8E AU-AKLT].

215. Tracey Tulley, *N.J. Governor To End School Mask Mandate in Move to ‘Normalcy’*, N.Y. TIMES, <https://www.nytimes.com/2022/02/07/nyregion/nj-school-mask-mandate-murphy.html> [https://perma.cc/4R5B-P5GJ] (staff-uploaded, dark archive)] (last updated Feb. 9, 2022).

These barriers are not insurmountable. First, local government orders can better withstand a civil rights challenge if their orders are carefully crafted to apply generally and are not riddled with exceptions. Second, the state courts have shown a willingness to strike down state preemptive bans where those bans violate the state constitution or other state statutes. In jurisdictions with strong municipal Home Rule charters, local governments may succeed in showing that local government employee vaccine mandates are of purely local concern. Some federal courts will strike down some of the school mask mandate bans as a violation of the ADA. Instead of bans, the state government should impose some statutory guardrails on local government power in an emergency. That way, local governments may respond, but state government may step in as a check on local power.

Finally, more focus should be paid to successful state-local partnerships during the pandemic. Modeling the success of red-state-blue-city partnerships like Louisiana and New Orleans would allow governments to focus their efforts on responding to the emergency rather than intrastate conflict. With an unpredictable virus and climate change causing more natural disasters, local governments' ability to respond in an emergency will be critical not just now but for the foreseeable future.