

# CONFRONTING PREEMPTION

## **THE PROBLEM**

Corporate and special interests are systematically working at the state level to stifle the power of local governments, which provide essential hubs of policy innovation and progressive political power. The Koch-Brothers-backed American Legislative Exchange Council (ALEC), the architect of this strategy, has in a vast number of states moved state legislators and courts to gut the ability of local governments to take action on a range of critical issues. States across the country now restrict local policymaking on: the minimum wage (27), construction labor agreements (23), paid leave (19), inclusionary housing (11), rent control (27), tobacco products (31), nutrition and food policy (9), gun control (43), anti-discrimination measures (3), local hire (2), and ridesharing (37). This strategy has been particularly effective because while the vast majority of states give local governments broad powers under “home rule” principles, most states also permit the state to “preempt” or otherwise limit those powers through legislation.

ALEC and others have taken the strategy to extremes, even winning laws that punish localities and local officials for their policy choices. Florida has a law that threatens local officials with civil penalties and removal from office for their votes on local gun safety issues. In 2016, Arizona adopted a law that allows the state to withhold all state funds from any local government that takes action that a single official finds inconsistent with state law. The Governor of Texas, Greg Abbott, recently began actively advocating for the complete removal of local government authority to take any action without the permission of the state.

## **THE SOLUTION**

There are two potential avenues for stopping particular state bills and laws that interfere with local authority. First, are broad based campaigns involving both local officials and advocacy groups to educate state legislators about the downsides of preemption, inoculate against preemption of new local proposals, and

fight new preemption bills as they arise. Second, legal challenges to preemption laws may be available. Such laws may run afoul of state home rule principles or the federal Constitution and laws, especially where they are punitive (as in the Florida example) or discriminatory.

However, legislative victories may be temporary and legal victories may be narrow, such that neither may prevent recurrence of state interference, even on the same issue. A more fundamental shift in the political (and possibly legal) landscape will be needed to protect the ability of cities to move progressive policy over the long term. Orchestrating such a shift will require careful work, because reform efforts that focus on “local control” alone ignore the fact that not all localities will use that control for progressive ends. Efforts to protect local authority should be clearly grounded in progressive values and use messaging and framing that reflects those values.

## **ROLE FOR LOCAL OFFICIALS**

Local officials have a vital role to play in the movement to protect local authority. They can:

- Push the attorneys for the local government to be accurate and complete in their understanding and presentation of the law related to local authority and to be willing to aggressively defend the city against state interference.
- Work with advocates and colleagues in other parts of the state to form statewide coalitions that can pressure state officials to protect the power of cities to adopt progressive policy.
- Find ways to smartly navigate preemption as they craft local policy, for example by focusing in areas protected from state interference under state home rule principles.

### Examples

We have seen quite a few coalitions of both local officials and advocates successfully defeat preemption bills recently. In Minnesota, local officials and advocates persuaded Governor Dayton to veto a bill that

would have voided minimum wage and paid sick days laws in **Minneapolis** and **St. Paul** just before they were about to take effect. In Louisiana, similar coalitions have now successfully turned back state legislation targeting **New Orleans'** local hire and inclusionary housing laws. In Florida, a similar coalition defeated a state bill that would have only permitted localities to regulate in ways that the legislature had expressly authorized.

We have also seen cities and advocates fighting back against state interference through litigation. In Pennsylvania, **Pittsburgh** is aggressively defending its paid sick days law against a legal challenge by a business association under the state home rule statute and the case will soon be heard in the state Supreme Court. In Ohio, the city of **Cleveland** won an important ruling in its favor in case challenging a state law that preempts the city's long-standing local hire law. The court found that the state law ran afoul of the state constitution's grant of authority to localities. In Alabama, a number of individuals and groups are challenging a state law that preempts local minimum wage ordinances and that was adopted shortly after **Birmingham's** city council voted to create a city minimum wage of \$10.10, the first of its kind in the state. Their lawsuit alleges that the state law violates federal equal protection principles by discriminating against African American workers, who would have disproportionately benefitted from Birmingham's minimum wage rule, and the Voting Rights Act, by stripping the political power of voters in an overwhelmingly African American city.

The Birmingham case is one of a number of instances in which predominantly white legislatures acted to strip majority people-of-color cities of the power to protect the basic needs and livelihood of their residents, a trend that should provoke further legal and political challenges.

## **RESOURCES**

The **Legal Effort to Address Preemption Project**, housed at Fordham Law School's Urban Law Center, brings together legal academics and advocates to provide legal research and support to the field. **The Campaign to Defend Local Solutions**, based in Florida, is one of the nation's leading organizations devoted to supporting cities and local elected officials facing preemption, by providing communications, media, and litigation support, research, and resources. **Preemption Watch** helps advocates better understand and counter preemption by providing tools, research, and case studies and a bi-weekly newsletter with coverage of federal and state preemption threats. **The Partnership for Working Families** provides legal, communications, and organizing support to campaigns to stop state interference with progressive local measures.

*Co-authored by the Partnership for Working Families*

