



At A Glance: Preemption and Covid-19

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Tensions are escalating between states, counties and cities over reopening during the pandemic. Counties and cities are clamoring for more power to make their own decisions about reopening, states are insisting local actions are preempted, and state stay-at home orders are being challenged in courts by businesses, local, and state lawmakers.

States are threatening cities that defy their orders

California - The most significant reopening of the California economy during the coronavirus pandemic started Friday May 8, with tens of thousands of businesses cleared to open with limitations. Nearly two dozen counties want to move further, which the state will allow under strict criteria on the number of cases, deaths and tests. [But Gov. Gavin Newsom sent a stern warning to three Northern California counties that have been defying his orders, saying they could lose federal disaster money.](#)

Leaders in Yuba, Sutter and Modoc counties have allowed businesses to reopen that are outside the scope of Newsom's plan, including dine-in restaurants, hair and nail salons and shopping malls.

Colorado – Even though some Colorado counties have been given charge over their own restrictions, one county that does not have that authority, Weld County, an agricultural area just north of Denver, declared itself [open for business](#) against the advice of its top health official. The county has one of the state's highest rates of infections and deaths. and risks losing state money by reopening, according to a spokesperson for Governor Jared Polis. "[Counties who are out of compliance are in jeopardy of losing state emergency preparedness grants.](#)"

Pennsylvania – On Monday May 11, Governor Tom Wolf sternly rebuked Pennsylvania counties and businesses that plan to reopen without state approval, calling it a "cowardly act" that could cost those areas not only lives but federal stimulus money, too.

Over the past week, a host of lawmakers, district attorneys, and law enforcement agencies in counties still under strict COVID-19 closure orders said they [planned to defy Mr. Wolf and unilaterally move themselves to the next phase of the governor's reopening plan](#). State officials have given 37 counties the go-ahead to ease restrictions, lifting the stay-at-home order and allowing some businesses to reopen if they follow certain safety precautions.

South Dakota – South Dakota Gov. Kristi Noem said on Monday that she'll be [pursuing legal action](#) against two tribes to gain "clarity" on checkpoints being used to screen travelers coming onto reservations. The Cheyenne River and Oglala Sioux tribes set up checkpoints on roads traveling

through the reservations at the beginning of April to curb the spread of COVID-19 onto the reservations.

Noem notified Cheyenne River Chairman Harold Frazier and Oglala President Julian Bear Runner on Friday that she would take legal action in federal court if the two tribes didn't remove their checkpoints by Sunday.

Texas - Texas Attorney General [Ken Paxton](#)'s office has warned officials in Austin, Dallas and San Antonio on Tuesday to roll back “unlawful” local emergency orders that impose stricter coronavirus restrictions than the state has issued — and hinted that there will be lawsuits if they do not. While businesses have the choice of whether to reopen, Governor Abbott has said cities and municipalities do not: His order supersedes any from local officials who wish to extend strict social distancing protocols and keep their local industries shuttered longer.

But some local officials have put out orders that are stricter than the state's, directing individuals to wear masks in public and instructing them to shelter in place. Those directives are unlawful and can't stand, the attorney general's office wrote in letters to Austin Mayor Steve Adler, Travis County Judge Sarah Eckhardt, San Antonio Mayor Ron Nirenberg, Bexar County Judge Nelson Wolff and Dallas County Judge Clay Jenkins.

Counties and cities want to decide

Counties – and some cities - across the country are pushing their governors for permission to make their own decisions about when, where and how fast to reopen. In some states such as [New Hampshire](#), [North Carolina](#), and [Maine](#), local officials are asking their state governments for the authority to loosen restrictions – and in some states, such as Virginia and Maryland, to keep restrictions in place. And in some places, states are letting local governments decide.

Illinois - [A plan to reopen Madison County ahead of the state's Reopen Illinois plan in defiance of Gov. J.B. Pritzker was overwhelmingly approved](#) at a special meeting of the Madison County Board of Health Tuesday May 12. Passage of the resolution leaves a number of issues including what action the state might take against the county or local businesses, especially those licensed by the state; how insurance providers will react to businesses opening against the state guidelines; and whether municipalities will go along with the plan. Other counties, such as Effingham County, also are considering actions similar to Madison County.

Maryland – Governor Larry Hogan's [administration has said that counties can go at their own pace](#), and some officials have said the state's eight largest counties will form a pact to coordinate on reopening plans. While Republicans in more rural areas have decried the strict shutdown orders of Gov. Larry Hogan (R), the Democratic leaders of hard-hit Prince George's and Montgomery counties have already said they won't be part of any reopening Hogan may order in coming days.

Michigan- Last week, Governor Gretchen Whitmer extended the state's stay-at-home order through May 28 and unveiled a six-phase plan for reopening Michigan's economy. The plan said the state will "examine whether different regions within Michigan may be at different phases."
"As we look to the next phases, there certainly could be regional differences," Whitmer said during a press conference.

Meanwhile, In Michigan’s southwest corner, [Berrien County leaders have asked Gov. Whitmer, for more local control](#). Commissioner Mac Elliott, called on the state to release a trove of data it’s using to guide decisions, including information about nursing home cases, hospitalizations and respirator usage. “It is difficult to understand why we are not allowed to at least partly base our re-opening strategy on local facts and trend lines. We can do this without causing permanent damage to local businesses and families, if the Governor immediately provides for local and regional flexibility.”

Oregon - Oregon is maintaining state-level authority but is asking each county to draft its own plan to reopen. Counties must show a decline in cases and meet thresholds for testing, contact tracing and health care capacity. At least [eight counties](#) in the state already have sought state approval for their plans.

Tennessee – After the “Big Four” cities in the state (Chattanooga, Knoxville, Memphis, Nashville) were encouraged to develop [a joint reopening plan](#), the day it was approved, its findings were also [preempted from being implemented by the governor](#).

Virginia - Virginia Gov. [Ralph Northam](#) has signed an executive order authorizing Northern Virginia to reopen its economy more slowly than the rest of the state. “The easing of the Phase Zero restrictions was premised, in part, on the commonwealth’s achievement of certain metrics in responding to the novel coronavirus (Covid-19),” Northam writes in Executive Order 62. “The easing of those restrictions is meant to be a floor, and not a ceiling. As previously acknowledged, some regions may need to move into Phase One more slowly than the rest of the commonwealth.”

However, In an [online town hall meeting](#) in Arlington Virginia, County Board members discussed further restrictions, like a requirement to wear a mask when in public. [This is complicated by Virginia’s status as a Dillon Rule state](#), meaning that localities can only exercise powers directly granted to them by the state. During an interview on the [Kojo Nnamdi show](#), County Board member Katie Cristol acknowledged the Dillon Rule as making a mask ordinance potentially difficult to accomplish,

Washington - Washington Gov. Jay Inslee has announced that 10 small counties with low rates of infection could apply for exemptions to the state’s stay-at-home orders, allowing them to move ahead to the next step of a phased reopening plan. Later in the month, the Democrat said, more counties may begin applying to move up their timelines. In Washington, [a second county sheriff](#) has announced he will not enforce Governor Inslee’s “unconstitutional” order.

Courts are being asked to decide

Despite some victories in cases involving [religious freedom](#) and [abortion rights](#), broader legal challenges to COVID-19 lockdowns so far [have not had much success](#). But the number of challenges are mounting.

California - The State of California, and Governor Gavin Newsom in particular, are facing down more than a dozen lawsuits over their response to the coronavirus pandemic. Most of the lawsuits against Newsom challenge the broad restrictions imposed by the shelter-in-place orders. Others contest the

governor's offer of state assistance to undocumented immigrants, his targeted closure of beaches in Orange County, the refusal to list gunshops as essential services and the arrest of two protestors. [In each instance, the courts have sided with the governor and](#) reinforced his pandemic emergency authority . Many of the lawsuits against Newsom come from the Center for American Liberty, a group helmed by conservative attorney and Republican Party official Harmeet Dhillon.

Illinois - Without explanation, the Illinois Supreme Court rejected a push by Attorney General Kwame Raoul for the high court to validate the governor's use of emergency powers during the public-health crisis. [Raoul's actions were aimed at short-circuiting a series of lawsuits challenging the governor's stay-at-home order](#), including a Clay County judge's decision that exempted state Rep. Darren Bailey, R-Xenia, from the governor's stay-at-home order. Pritzker and Raoul had hoped the justices would issue a ruling that Bailey's since-withdrawn lawsuit and others were legally out of line. Instead, based on Monday's decision, the court is signaling it wants challenges to Pritzker's authority to travel through the traditional appellate court route, rather than going directly to the Supreme Court.

In addition, a Chicago-area church sued Gov. J.B. Pritzker (D) over his stay-at-home orders and three days later [defied those orders](#) by welcoming dozens of worshippers to a Sunday service. Cristian Ionescu, Elim Romanian Pentecostal's senior pastor, said the move to hold services is "not a rebellion for the sake of rebellion," arguing that the Constitution grants them the right to worship during the pandemic.

Kentucky - [A federal judge has struck down a portion of Kentucky Governor Andy Beshear's travel restrictions](#) that were enacted to curb the Covid-19 pandemic. Senior U.S. District Judge William Bertelsman ruled that Beshear's restriction on interstate travel is unconstitutional. The restriction limited the reasons that Kentucky residents could leave the state and required that any person who left the state without a valid reason be self-quarantined for 14-days after their return.

As outlined in Beshear's two executive orders, order [2020-206](#) and [2020-258](#), individuals were only permitted to leave the state for employment, to receive or provide health care, to obtain groceries or other needed supplies, and when they were required to do so by a court order.

Maryland - State lawmakers, businesses, veterans and pastors in Maryland have mounted a legal challenge to Governor Larry Hogan's stay-at-home orders imposed to mitigate the spread of the [coronavirus](#). [The lawsuit was filed in federal court in Baltimore against Hogan and state health officials by a coalition that includes four state delegates and the group ReOpen Maryland](#), which organized protests across the state Saturday against the stay-at-home orders.

The plaintiffs argue the orders issued by Hogan during the coronavirus epidemic violate the U.S. Constitution and Maryland's state constitution, and they are asking the court to block Hogan and state officials from enforcing the stay-at-home mandates

Massachusetts - Sales of firearms will be allowed to resume in Massachusetts on Saturday, according to a preliminary injunction issued by a federal judge. [Gov. Charlie Baker had excluded gun shops from the list of essential businesses](#) allowed to continue operations during the coronavirus emergency. A

complaint filed on behalf of gun shops, individuals and Second Amendment groups challenged that decision.

Michigan - [The Michigan Legislature has filed suit against Michigan Gov. Gretchen Whitmer](#) challenging as "improper and invalid" her emergency orders to combat COVID-19 and seeking a "speedy hearing." House Speaker Lee Chatfield, R-Levering, and Senate Majority Leader Mike Shirkey, R-Clarklake, announced the suit in the Michigan Court of Claims during a press conference inside the Michigan Capitol, reflecting a major escalation of the fight between Republican lawmakers and the Democratic governor.

The lawsuit filing [came six days after the Michigan Legislature approved resolutions authorizing Chatfield and Shirkey](#) to take legal action against Whitmer's unilateral powers on behalf of the GOP-controlled House and Senate. The debate continues to focus on how long the Democratic governor can keep her state of emergency declaration in place without getting approval from GOP lawmakers who want a say in reopening the state's economy.

Mississippi - [Mississippi Supreme Court says no to halting evictions and garnishments during the coronavirus pandemic](#). In its ruling, the state high court said it was beyond the court's authority to halt eviction and garnishment judicial proceedings. **Mississippi Center for Justice filed the motions**. Attorney Will Bedwell said the motion was filed in an attempt to stop an expected and unprecedented rise in Mississippians becoming homeless through evictions after suffering job loss and lost income due to the pandemic.

[A Republican state lawmaker has filed a lawsuit](#) challenging a Democratic mayor's temporary ban on the open carry of guns in [Mississippi](#)'s capital city during part of the coronavirus pandemic. The city of Jackson and Mayor Chokwe Antar Lumumba "exploited the present public health crisis" to limit people's Second Amendment right to carry firearms for self-defense, says the federal lawsuit by state Rep. Dana Criswell of Olive Branch.

[Lumumba signed an executive order banning the open carry of guns in Jackson during the final days of his coronavirus stay-at-home order for the city](#). Lumumba cited the city's current state of emergency in response to the COVID-19 outbreak, saying he was granted powers under [state law](#) that allowed the move.

St. Louis, Missouri - [A federal judge has denied two business owners' motion](#) for a restraining order to end the current stay-at-home orders in St. Louis, blocking efforts to reopen "nonessential" businesses shut down in the ongoing coronavirus pandemic. St. Louis County gym owner Allan Finnegan, who lives in Manchester and operates his Anytime Fitness gym there, and Cherokee Street antique store owner Cherri Elder [filed a lawsuit May 4](#) against the county and city, respectively, seeking to overturn the stay-at-home orders, which they claim are unconstitutionally keeping their businesses closed.

U.S. District Judge Stephen R. Clark, an appointee of President Donald Trump who took office last June, sided with the county and the city in a [22-page ruling](#) Friday, May 8, denying a temporary restraining order that would have ended the city and county lockdowns.

On Monday, May 11, St. Louis County went to court to try to force the closing of fitness centers in Chesterfield and Maryland Heights that have **flouted the county executive's emergency stay-at-home**

order. The county also wants a complete list of every person who entered the House of Pain gyms since the order became effective on March 19, including each person's name and contact information, to be used by the county's contact tracing employees. [And it wants House of Pain to pay the costs of testing everyone on the list for the coronavirus.](#)

Nevada - Hair salon and barber shop owners, an events company, a physician and a man who wants to treat his COVID-19 with malaria drugs touted by President Donald Trump [filed a civil lawsuit in U.S. District Court in Las Vegas against Gov. Steve Sisolak over stay-at-home and other orders](#) he issued in a bid to slow the spread of the coronavirus. It accuses the governor, of abusing administrative power and violating U.S. and state constitutional rights to worship and commerce with his emergency declaration in March and subsequent orders closing places where people congregate, including businesses deemed "non-essential" and casinos.

New Mexico - [The New Mexico Supreme Court ordered the mayor of the small city of Grants on Thursday to comply with a health order and stop nonessential businesses from reopening.](#)

The court issued its ruling just hours after Attorney General Hector Balderas filed a petition seeking an order following Grants Mayor Martin "Modey" Hicks move to let his city's businesses to open despite rising New Mexico COVID-19 cases.

North Carolina - In Greensboro, North Carolina, a group of anti-abortion advocates who routinely stand and pray outside an abortion clinic filed a [federal lawsuit](#) against Mayor Nancy Vaughan and the Greensboro Police Department after several protesters were arrested and cited for violating a stay-at-home order.

Pennsylvania – On May 6, The [U.S. Supreme Court declined to lift an executive order](#) from Pennsylvania Governor Tom Wolf that mandated the closure of all businesses in the state deemed nonessential. A group of businesses and other entities in the state asked the high court last week to block enforcement of Wolf's executive order, which was issued March 19 in response to the coronavirus. There were no noted dissents.

The Pennsylvania businesses argued Wolf's lockdown order was unconstitutional and filed an emergency request with the Pennsylvania Supreme Court arguing it went beyond Wolf's authority. The state court, however, sided with Wolf and rejected the challenge. The businesses then asked the U.S. Supreme Court to review the lower court's decision.

Texas - The Texas Supreme Court on Thursday ordered the release of a jailed Dallas salon owner, hours after Republican [Governor Greg Abbott amended his Covid-19 executive orders to remove jail penalties for business owners who violate the rules.](#)

The high court [granted](#) Shelley Luther's motion for emergency relief while her petition for writ of habeas corpus remains pending before the court.

On Monday May 11, [Texas Attorney General Ken Paxton argued against the expansion of vote-by-mail due to the novel Coronavirus \(COVID-19\) pandemic](#) in a filing submitted with a state court of appeals. A district court in the City of Austin previously ruled in favor of expanded postal voting by interpreting a section of the Texas Election Code which allows residents to cast ballots by mail if they have “a sickness or physical condition that prevents the voter from appearing at the polling place on election day.”

Paxton’s **75-page reply brief** filed with the Court of Appeals for the Fourteenth Judicial District in Houston accuses the Travis County District Court of a “faulty reading of [the] statute” in question and said the case implicates fundamental separation of powers issues regarding the administration of voting laws in the Lone Star State.

Washington - [Republican state lawmakers in Washington state are suing Governor Jay Inslee over his orders](#), which they say are unconstitutional. A group of seven House GOP members [filed a lawsuit](#) in federal court challenging Inslee’s emergency proclamations. Previously, Republican gubernatorial candidates Joshua Freed and Tim Eyman had filed separate legal actions against the governor’s actions. [The 28-page complaint](#) filed by the group of House Republicans, along with four Washington residents, claimed that COVID-19 is mostly a threat to “older and sicker” residents and people in long term care facilities and that the state as a whole no longer faces a public health emergency.

Wisconsin - Final briefs have been filed in a second lawsuit challenging Wisconsin's "Safer at Home" order, this one arguing the order violated peoples' rights to freedom of worship, speech and travel under the Wisconsin Constitution. Justices could decide at any moment whether to take the case, and they could also issue a decision any day in the first lawsuit against the stay-at-home order issued by Gov. Tony Evers' administration in an effort to slow the spread of COVID-19.

The first case, which was **argued before the court a week ago**, seeks to overturn the entire stay-at-home order, arguing Evers' administration broke the law when it issued the order without first getting the Legislature's approval. During the first hearing last week, the Wisconsin state Supreme Court’s conservative judges forcefully questioned the governor’s extension of stay-at-home orders amid the [coronavirus](#) outbreak, with [one justice likening the restrictions to the World War II Japanese internment camps](#).

The state’s highest court heard virtual oral arguments in the lawsuit brought by Republican state lawmakers against Gov. Tony Evers, a Democrat, and Andrea Palm, the state Department of Health secretary, over the administration’s order that nonessential businesses remain closed until at least May 26. “Isn’t it the very definition of tyranny for one person to order people to be imprisoned for going to work among other ordinarily lawful activities?” asked Justice Rebecca Bradley.

