At A Glance: Preemption and the Pandemic
June 22, 2020

Masks have become another flashpoint and source of friction between state and local governments responding to the pandemic. In recent weeks several states have seen a record number of coronavirus cases but Governors are reacting very differently to the resurgence and to demands from local governments for the authority to implement and enforce their own public health safeguards.

Governor Kate Brown of Oregon and Governor Gary Hebert of Utah have put their reopening plans on pause. But Arizona Governor Doug Ducey, Texas Governor Greg Abbott, and Florida Governor Ron DeSantis have refused to reimpose restrictions, frustrating local government leaders who have been preempted from enacting their own stay at home or social distancing orders.

In some states, Governors are treating mask wearing and social distancing as matters of personal responsibility— not something governments should mandate. The simple act of wearing a mask—or a “face diaper,” as some conservatives derisively call it— has become a new front in the culture war.

But last week, the governors of Arizona, Florida and Texas did reverse state preemption of mandatory masking orders, giving local governments the authority to decide. At the same time, Nebraska’s Governor Pete Ricketts, warned local governments they would not be receiving federal COVID-19 funds if they imposed mask or other local rules.

Arizona

When Governor Ducey first issued his stay-at-home order, in late March, he simultaneously preempted cities and counties in Arizona from acting on their own. The governor partially reversed course on June 17, declaring that local officials would be allowed to require masks—but not restrict businesses—in their communities, removing a barrier to local control. Today we’re seeing facts on the ground and differing circumstances around the state support flexibility and a localized approach,” Mr. Ducey said.

The change is one that several mayors in the state had been requesting, with Tucson's Regina Romero instructing the city to start making the change before the governor's announcement.
The state’s four border counties and 900 medical professionals also pressured Ducey to change his stance.

Many cities and counties have moved quickly to mandate the use of masks in public. Now debate is raging over whether Arizonans will comply, a sign of how deeply politicized the issue has become. At an emergency meeting held Friday to discuss the new mask rule in Arizona’s largest city, schoolteacher Gus Cha said members of the Phoenix City Council weren’t qualified to make such a decision. “You are not my doctor,” said Mr. Cha. “You are not my family’s doctor. I do not recognize your authority to mandate a medical treatment for my family.”

California

On Thursday June 18, California Governor Gavin Newsome mandated that Californians wear face masks in all indoor and outdoor public areas, placing him at odds with conservative regions such as Orange County that have framed the masks as an infringement on personal liberty. Orange County’s chief health officer recently resigned after she received death threats for her countywide mask order.

Florida

On Friday June 19, Florida Gov, Ron DeSantis announced that the state will not overrule local governments when it comes to requiring masks to be worn in public.

DeSantis said he will allow local governments to make decisions that work for them, including executive orders that require face coverings in public. Orange County put mandatory mask executive order in effect on June 20. DeSantis said the state's view is to not tie any criminal penalties to mask orders. The Orange County order does not list any criminal penalties for not wearing a mask, but does encourage businesses to bar entry to those who do not follow the policy. DeSantis previously has preempted local governments on coronavirus-related measures. For example, Orange County had announced a two-week stay-at-home order on March 24, but an order by the governor which began on April 3 later took the place of the county order.

Nebraska

Governor Pete Ricketts has told counties that they won’t receive any of the $100 million in federal COVID-19 money if they make mask wearing mandatory. With millions of dollars at stake, local officials said they had little choice but to comply with the governor’s order. Otherwise, they’d have to find local options for replacing the federal money, such as higher property taxes.

In Lincoln, the state’s second-largest city, officials were preparing to require all visitors to wear masks when entering the City-County Building. But the draft rules were promptly dropped when officials were informed that Lancaster County wouldn’t receive CARES Act money if it instituted a mask requirement.
Dakota County, home to a Tyson meatpacking plant, has been one of the hardest-hit counties in the nation for COVID-19. Visitors to the courthouse there were not only required to wear a mask when entering, but their temperatures also were checked and they were asked a series of questions about coronavirus exposure. Those health precautions have now been jettisoned.

**Texas**

Governor Greg Abbott has eased his order that stopped local governments from enforcing an individual mask mandate. Last week, nine mayors of all political stripes, including those from Dallas, Houston, San Antonio, Fort Worth, Arlington, Plano and Grand Prairie, sent a joint letter to Abbott asking for local control. “If you do not have plans to mandate face coverings statewide, we ask that you restore the ability for local authorities to enforce the wearing of face coverings in public venues where physical distancing cannot be practiced…A one-size-fits-all approach is not the best option. We should trust local officials to make informed choices about health policy.”

The Governor said local governments could order businesses to require face masks in their stores, but localities could not mandate mask wearing in public. He said that much like businesses can require a patron to wear shoes and a shirt, they can require them to wear masks.

"So, here's the bottom line," the governor said. "I had two standards: One, no Texan can be put in jail for failing to follow these standards. Two, no government can mandate individuals to wear face masks. That said, when people go out and about, as they're walking around town, they don't need to wear a face mask, but when they go into a store or other business, those businesses can require, and that's exactly what it looks like local governments will begin to do."