



At A Glance: Preemption and the Pandemic August 20, 2020

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**Four States Find the Preemption Habit Hard to Break
Lawsuits and Legislation Challenging State and Local Power**

State/Local Conflicts in Florida, Georgia, Iowa and Texas Where Preemption Has Become a Habit

Four states with histories of using preemption broadly before the pandemic to block local government action across a wide range of policies, are continuing to use preemption to shut down local lawmaking during the public health crises. The governors of Florida, Georgia, Iowa, and Texas have stopped or slowed cities and counties from issuing their masking order and stay at home orders. And now Florida, Iowa and Texas are trying to force local school boards to open classes in-person. Georgia Governor has dropped his lawsuit challenging Atlanta's masking order and revised his own executive order to allow localities to require masks – but **only** on public property and not inside businesses or other private property.

And to demonstrate what a go-to strategy preemption is in Texas, Governor Abbott and allies are threatening to freeze property tax revenue in Austin or any other city that defunds law enforcement. The Abbott administration has also forced a Texas city to reschedule an election it has moved to 2021.

Florida

Hearings conclude today in the Florida Education Association (FEA) – led lawsuit against the state's emergency order that [forces districts to physically reopen public schools five days a week](#). The FEA, the Orange County teachers union, and a parent have been joined in their lawsuit by the national NAACP and the NAACP Florida Chapter. Gov. Ron DeSantis, the Department of Education, and Commissioner Richard Corcoran were sued after they ordered schools to open for in-person learning by the end of August.

The lawsuit seeks to invalidate the order, claiming that it violates a constitutional requirement for safe and secure schools. The suit is seeking a temporary injunction “to stop the reopening of schools until it is safe to do so” because of the ongoing coronavirus pandemic. The state filed a motion to dismiss the lawsuit, but [a judge denied the motion last week](#).

Gov. DeSantis has also threatened to [withhold up to \\$200 million](#) in funding from the Hillsborough County School District, which covers Tampa and is one of the nation's largest, if it did not [reopen for in-person learning](#).

In addition, Florida DeSantis is not just pushing schools to open but also demanding they stay open even after cases are diagnosed. "On a phone call with school district superintendents late last week, Education Commissioner Richard Corcoran urged them to be 'surgical' when dealing with covid-19 cases, as opposed to 'sweeping' — and told them [not to close a school without calling state officials first to discuss it](#)."

Georgia

Gov. Brian Kemp dropped his lawsuit against Atlanta officials and Mayor Keisha Lance Bottoms over the city's mask mandate and stay at home orders following weeks of negotiations toward a settlement amid the COVID-19 pandemic. Over the weekend, Kemp issued a new executive order that allows local governments to enact mask requirements but only on government-owned property.

Local mask requirements can't be enforced on residential property and can only be enforced on private property, including businesses, if the owner or occupant consents to enforcement, the order says. "[This order also protects Georgia businesses from government overreach](#) by restricting the application and enforcement of local masking requirements to public property," Kemp said in a news release accompanying the order, which is in effect through Aug. 31. "While I support local control, it must be properly balanced with property rights and personal freedoms."

Cities have said they believe they do have the power to enforce local mask orders, said Rusi Patel, a lawyer for the Georgia Municipal Association. "[GMA believes in local control and believes Georgia laws provide a large degree of local control, even in times of emergency](#). We filed a brief in the litigation supporting this concept a few weeks ago," Patel wrote in an email. "However, the question of legality is one for the courts at the end of the day."

Iowa

The Iowa City School District and the Iowa State Education Association (ISEA) have filed a lawsuit challenging Gov. Kim Reynolds's requirements that school districts offer 50 percent of instruction in-person. [The plaintiffs are asking the ability to control school reopenings at the local level](#).

"The relief we are seeking — what we are asking the court to determine, is that ultimate authority to determine the content and to effectuate the content of a plan for a return to school lies with individual school boards of every school district across the state of Iowa," according to an ISEA spokesperson.

The lawsuit alleges that Reynolds violated her responsibility under the Iowa constitution to protect the health and welfare of the citizens of the state by requiring schools to offer 50

percent in-person instruction, as well as exceeded her authority under [Senate File 2310](#) in ordering the number of in-person instruction hours a school must have.

In addition, the refusal of Gov. Reynolds to require Iowans to wear masks in public has prompted at least four cities and a county to adopt their own local ordinances, [setting up what could be a legal battle over whether local officials have the authority to impose mask rules in the absence of a governor's mandate](#). The Ames City Council this week became the latest local government to draft a masking ordinance [defying the governor, attorney general and city attorney](#).

Texas

Superintendents and principals have received changing and conflicting guidance from Texas officials on reopening schools. Early last month, state officials said opening schools on time for face-to-face instruction was mandatory, then changed course. Now districts can stay online longer if they request — and are granted — a waiver. Meanwhile, [several local health authorities issued orders mandating that schools remain closed, which Attorney General Ken Paxton said were invalid](#).

And disagreements about reopening are also being aired within Texas counties. Superintendents leading 10 Houston-area school districts penned a letter this week [opposing Harris County's recommendation for reopening](#), arguing that face-to-face instruction should resume earlier than county health officials suggest.

In addition, the state is threatening preemption on other fronts. [Gov. Greg Abbott and other top Republican officials vowed Tuesday to freeze property tax revenue in any city that defunds law enforcement](#). The group unveiled the plan after the city of Austin voted last week to cut police funding by one third to invest in social services. The new proposal would be taken up when Texas lawmakers meet again in 2021, though its success will likely hinge on the upcoming election, as Democrats seek to seize control of the Republican-led state House.

Finally, in a unanimous vote, [Mayor Craig Morgan and the Round Rock City Council](#) reversed their [decision to delay their citywide elections until May 2021](#). The election will now be held on November 3, 2020. [Attorney General Ken Paxton](#) issued an opinion stating that Mayor Craig Morgan and the city council's moratorium on the election ran afoul of state law.

Lawsuits and Litigation Challenging State and Local Authority

California

[The State of California in a legal brief slammed the "inaccurate and outdated beliefs" of parents who are suing the state to force schools to reopen](#) amid the coronavirus pandemic. The state fired back after more than a dozen parents [filed a lawsuit](#) last month requesting a temporary

restraining order on Gov. Gavin Newsom's order for schools in counties on the state's watch list to conduct virtual learning.

In an opposition brief, California officials countered the parents, saying they were depending on incorrect beliefs early in the pandemic that COVID-19 had a "minimal effect on children of any age."

"In contending that the order and guidance are not based on scientific data, plaintiffs rely on their inaccurate and outdated beliefs that school-age children do not spread COVID-19, and that opening schools for in-person instruction in counties with high COVID-19 rates poses a negligible health risk," the brief reads. "Yet COVID-19 knows no age boundaries," it continues. "People of all ages, including children, are susceptible to the disease."

On July 17, [Newsom ordered that schools](#) in counties on the state's watch list for spikes in the coronavirus cases can't immediately reopen with in-person classes in the new academic year. That affects most of California's public and private schools, including those in Orange, Los Angeles, San Bernardino and Riverside counties. Schools can reopen in person only after their home county has been off the monitoring list for 14 consecutive days.

Idaho

Republican legislators in Idaho warned of abuses of power and concerns about totalitarianism as they [pushed to take away health districts' ability to close schools](#) due to the coronavirus.

Said state Sen. Steven Thayne: "Listening to the experts to set policy is an elitist approach. I'm fearful of an elitist approach. I am also fearful it leads to totalitarianism, especially when you say, 'We are doing it for the public good.'"

Illinois

A panel of state lawmakers on Tuesday let stand Gov. J.B. Pritzker's emergency rule that would fine businesses up to \$2,500 for not enforcing mandatory face mask rules. After the vote by the Joint Committee on Administrative Rules, Pritzker issued a statement saying [the rule "will help ensure that the minority of people who refuse to act responsibly won't take our state backward."](#)

Under the rule, businesses that don't enforce a mask mandate will first be given a written notice. If they don't then voluntarily comply, they will be ordered to have patrons leave their property in order to come into compliance with public health guidance. If businesses still do not comply, they can be given a Class A misdemeanor, subject to a fine of \$75 to \$2,500. The rule also requires schools and childcare facilities to enforce mask rules.

Michigan

Earlier this month, Michigan became the first state in America to require farmers and food processors to routinely screen and test all employees for Covid-19. The emergency order, issued by the state's health department, also applies to operators of migrant housing, where the virus has spread in close quarters.

This week, the order was challenged by the Michigan Farm Bureau and business plaintiffs who are [arguing that the state's efforts to protect workers in industries that are predominantly Latino is racist, in violation of the Equal Protection Clause and is unconstitutional](#). An emergency motion seeking a preliminary injunction while the case was argued in court was also filed Tuesday.

Minnesota

Minnesota's governor is now facing a challenge over his executive orders. The Chicago-based Thomas More Society, a public interest law firm championing conservative and religious liberty issues has [filed a complaint](#) in U.S. District Court for the District of Minnesota alleging executive orders issued by Gov. Tim Walz requiring face coverings at religious services violate the First Amendment's free exercise clause. Complainants, including three Christian churches and churchgoers, allege the orders violate their religious liberties by limiting capacity at churches, requiring physical distancing, and requiring face masks. The complaint seeks declaratory and injunctive relief.

Ohio

A bill has been introduced in the State Senate which would allow local boards of health to reject orders from the Ohio Department of Health (ODH) or the Ohio Director of Health during a pandemic. [Senate Bill 348](#) would further place local business leaders on each local board to ensure a community's economic conditions are weighted against state health mandates.

South Carolina

North Carolina Lt. Gov. Dan Forest has dropped a legal challenge over Gov. Roy Cooper's emergency powers. Forest [filed a lawsuit](#) against Gov. Roy Cooper in early July, claiming the governor abused his power in issuing emergency orders in response to the coronavirus pandemic. Forest (R) claimed those orders required approval by [the Council of State](#), a 10-member group of executive branch officials.

A state court [on Tuesday](#) declined to block the emergency orders and said Forest was unlikely to succeed in his claim. The lieutenant governor filed [a motion](#) Wednesday to dismiss the case. Forest is challenging Cooper in the Nov. 3 general election. Forest spokesman Jamey Falkenbury said the lieutenant governor "is appealing to the people of North Carolina" instead of continuing with the lawsuit.

Texas

A group of Texas business owners, former state legislators, and organizations [filed suit in the Eastern District of Texas challenging the state's adoption of contact tracing to track and monitor the spread of Covid-19](#). The complaint lists more than 1,300 plaintiffs, who claim the contact tracing measures violate their Fourth Amendment right to privacy, and their First Amendment right to freedom of association.

And finally: [‘This is no longer a debate’: Florida sheriff bans deputies, visitors from wearing masks](#)

On Tuesday, as Florida set [a new daily record for covid-19 deaths](#), Marion County Sheriff Billy Woods prohibited his deputies from wearing masks at work. In addition, Wood said that visitors to his offices would be asked to remove their masks. If they refuse, Mr. Woods said, they will be asked to leave.