

An aerial photograph of the Philadelphia skyline at sunset. The sky is a mix of orange, yellow, and blue. The city is filled with various skyscrapers and buildings. The Independence Hall, with its iconic clock tower and statue on top, is prominently featured in the center. Other notable buildings include the Comcast Center and the Liberty City Center. The overall scene captures the dense urban landscape of the city.

# Local Control and the Misuse of Preemption

**NLC** NATIONAL  
LEAGUE  
OF CITIES



# Who is NLC?

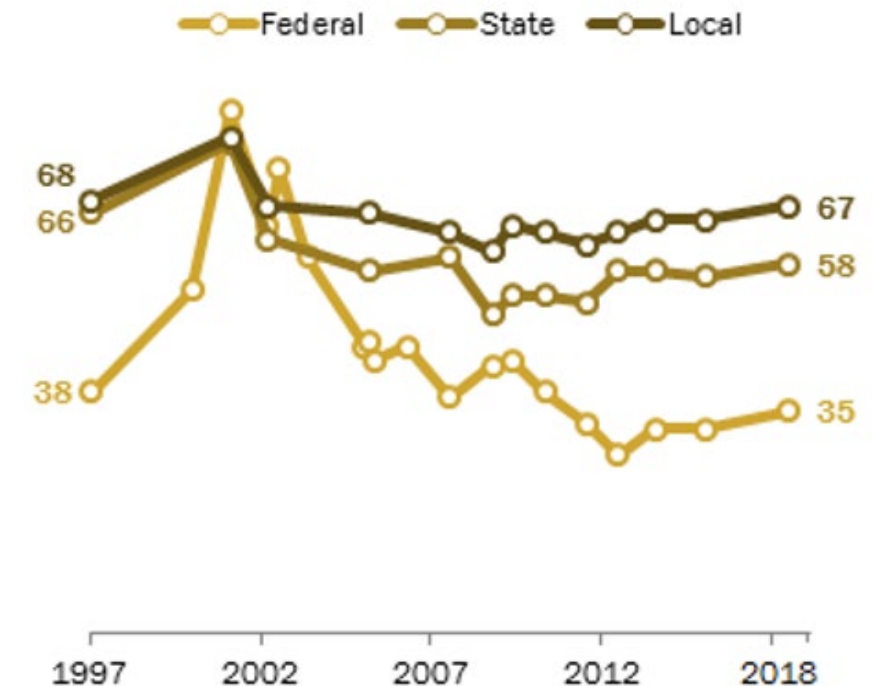
The National League of Cities (NLC)  
is the voice of America's cities,  
towns and villages, representing  
more than 200 million people  
across the country.

# Trends in Governance

While trust in the federal government has declined over years, state and local governments are consistently favored in comparison.

## Federal government consistently viewed less favorably than state and local govt.

*% who have a favorable opinion of \_\_\_ government*



Source: Survey of U.S. adults conducted March 7-14, 2018.

PEW RESEARCH CENTER

# Preemption

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- **Preemption** is when a higher level of government removes or limits the authority of a lower level of government. State preemption can span many policy areas.

**Home Rule** - Delegation of power from state to local governments. This principle creates local autonomy and limits the degree of state interference in local affairs

**Dillon's Rule** - A municipal government may only exercise powers that are specifically granted by the state government.

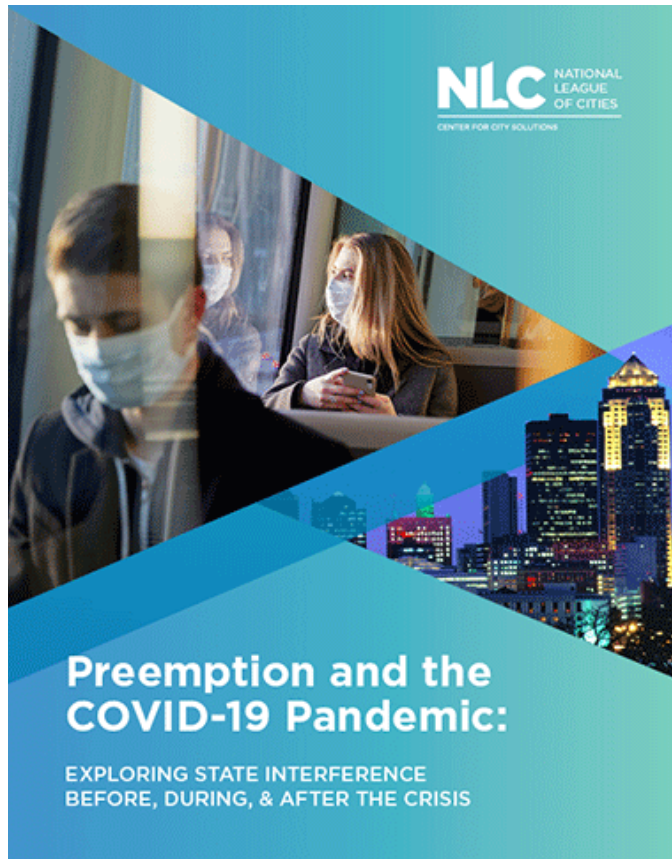
# Local Control: Minimum Wage

## U.S. cities and counties that have adopted their own local minimum wage laws



Sources: Center for Labor Research and Education, University of California at Berkeley; Employment Policy Institute; state and local government websites

# Preemption and COVID-19



While the pandemic clarified the importance of local control, many state governments worked to further limit local control during this time.

# Local Control: COVID-19 Local Action Tracker

777

Distinct Cities

617

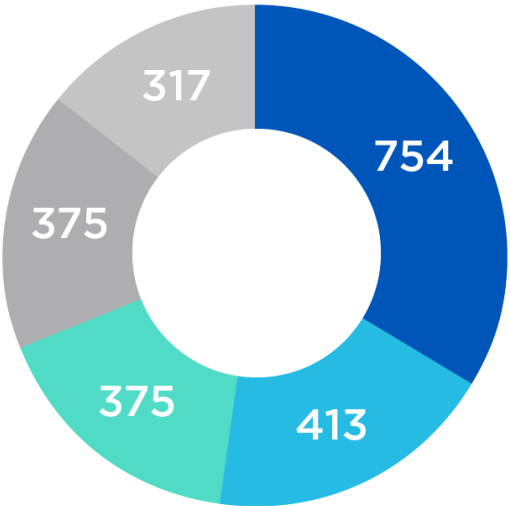
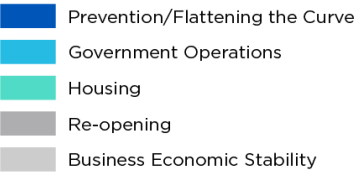
American Rescue Plan  
Act Plans & Proposals

4816

Policies Tracked to  
Date

106M

Population Impacted



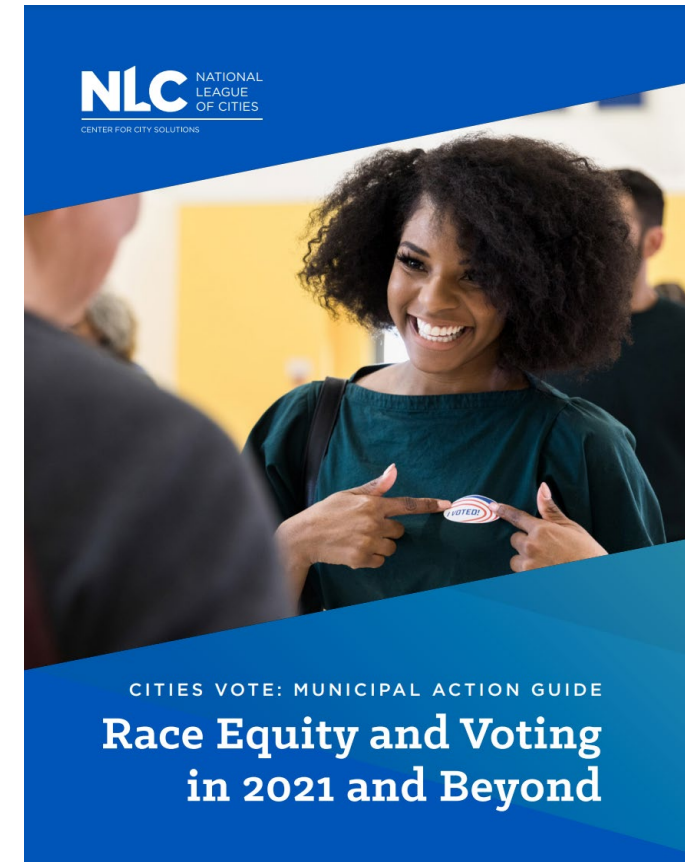
The NLC Local Action Tracker is the most complete collection of municipal responses to COVID-19.

This resource has grown as the pandemic has shifted. We have tracked policies on reopening, vaccination, uses of ARPA funding, and much more.

# Preemption of Local Democracy



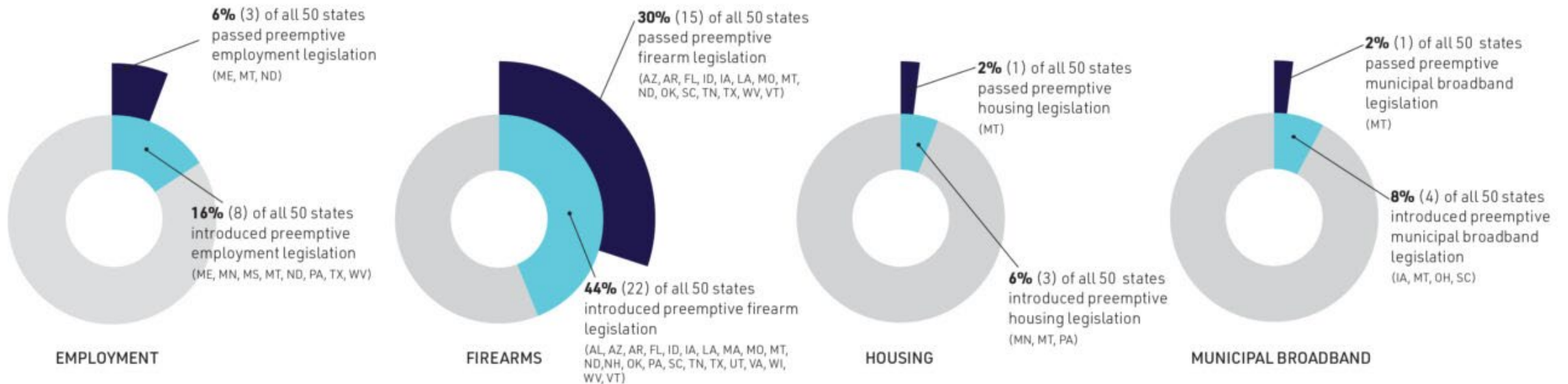
Limited municipal authority became prevalent during the 2020 election as states worked to limit local election laws, especially impacting communities of color.



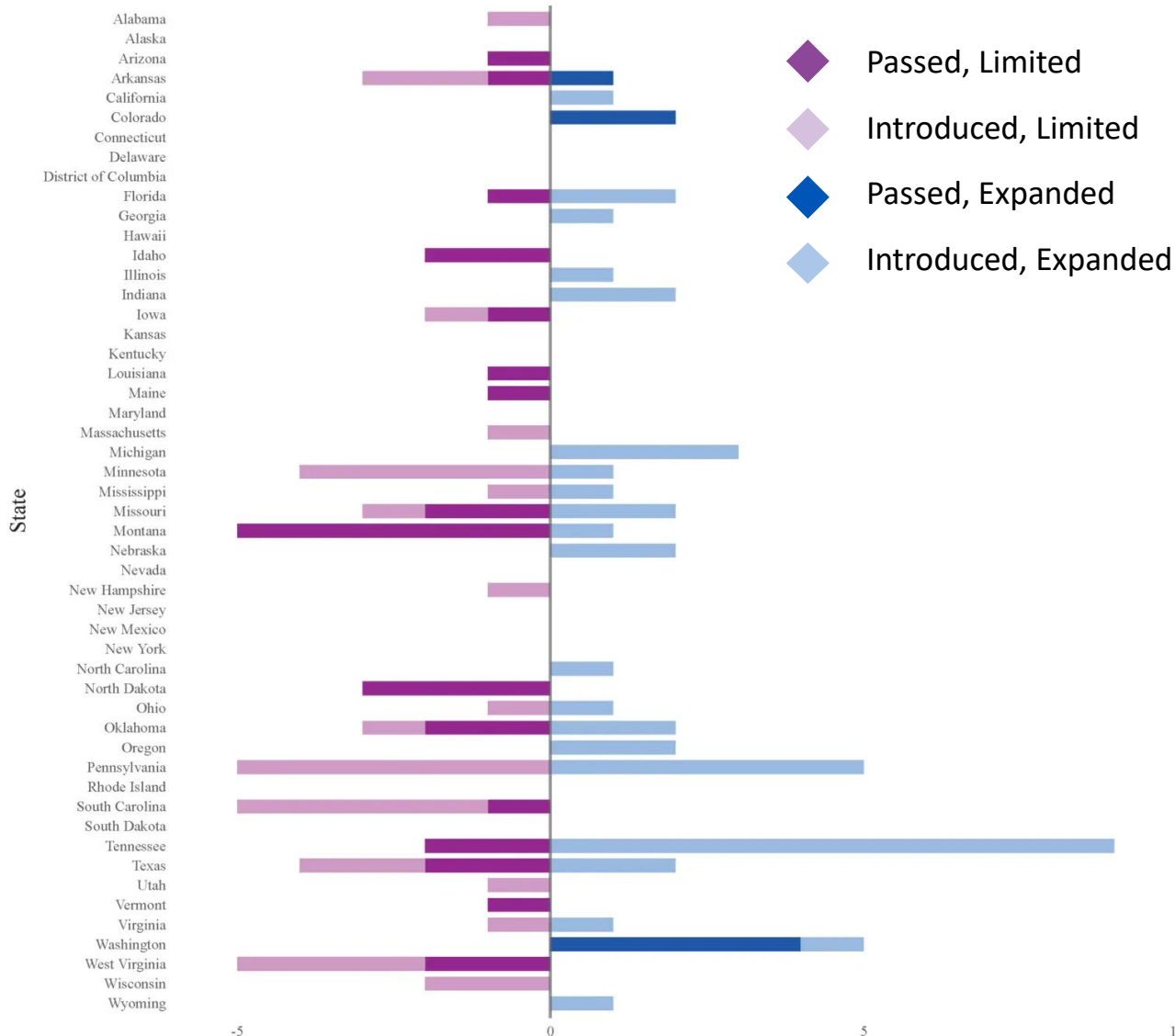


# Trends in Preemption

- Preemption has increased over the past decade



# Trends in Preemption, Cont.



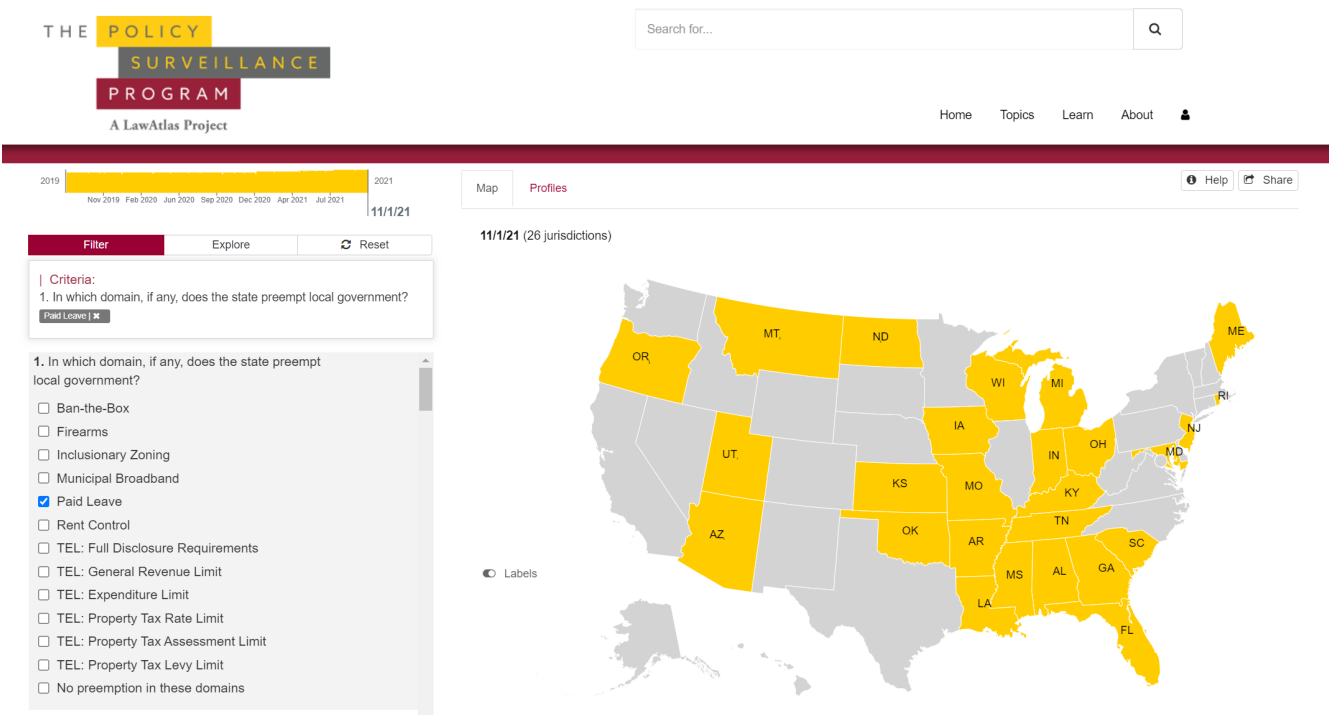
States introduced and passed more bills limiting than expanding local authority in 2021.

# NLC's Advocacy Work



We partner with:

- **Policy Surveillance Program** to track preemptive laws on 15 policies across all 50 states
- **State Municipal Leagues** to advocate for local authority during legislative sessions
- **LSSC** to form national coalitions for local authority and home rule reform
- **Municipal officials** to educate on issues of preemption and home rule



# THE LEGAL FOUNDATIONS OF LOCAL POLICY CHANGE



**Nestor M. Davidson**

Albert A. Walsh Professor of  
Real Estate,  
Land Use and Property Law  
**Fordham Law School**

National League of Cities Webinar  
**June 21, 2022**



## Cities and the Pandemic – Lessons Learned?

- City power before the pandemic
- Conflict in the emergency
- The long road of recovery and pathways for reform

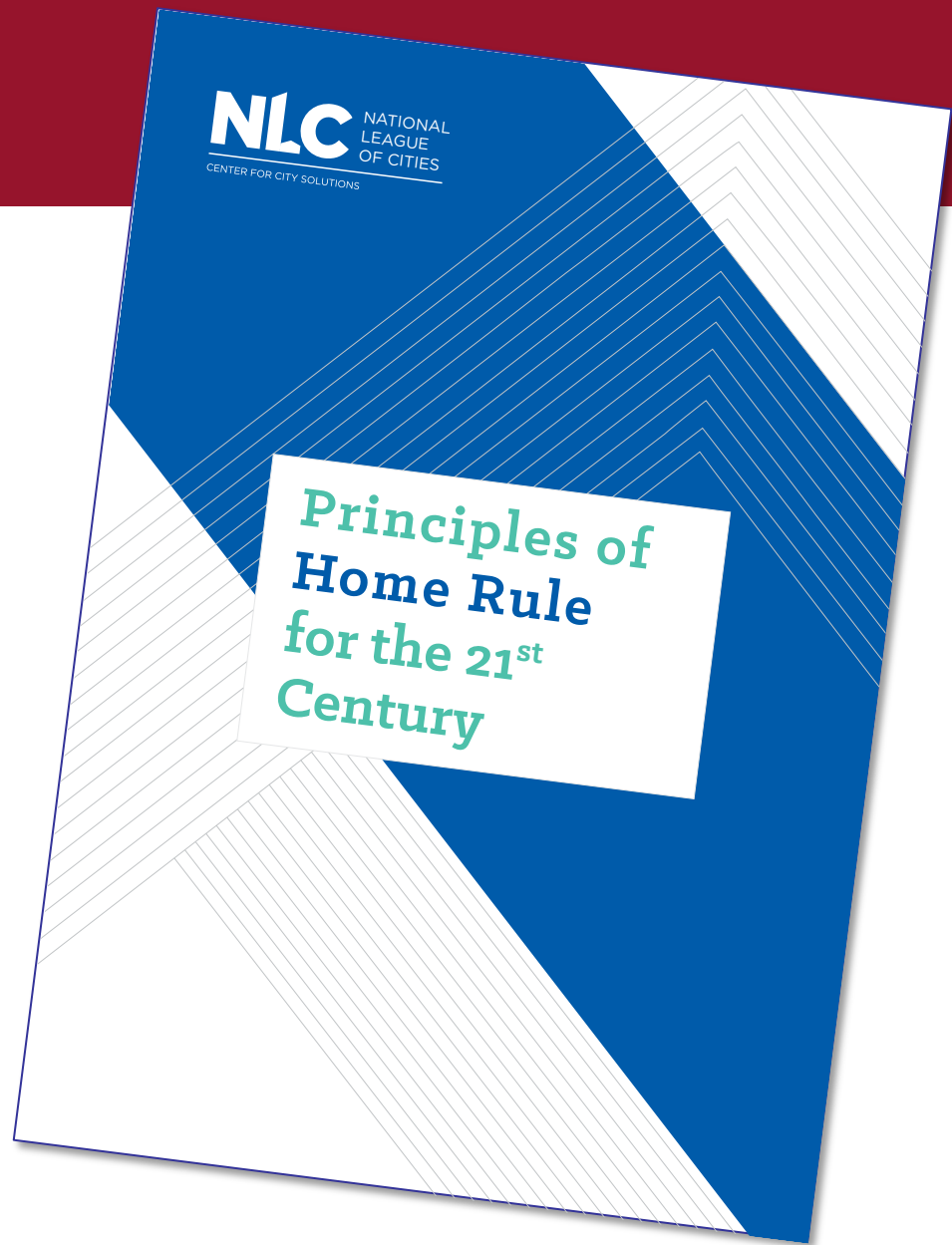
## The Law of Local Power

- “Dillon’s Rule” as a baseline
- The elements of home rule
- Abuse of state preemption

## The Road Ahead

- Uncertainty about authority
- Hollowing out of local fiscal stability
- But new imperative for reform?

Fordham Law  
Lincoln Center | New York City





## Principles of Home Rule

- Local Authority
- Local Fiscal Authority
- Presumption Against State Preemption
- Local Democratic Self-Governance

# Local Control and Health Equity: Preemption at the Point of Sale

with the  
**TOBACCO POINT OF SALE  
PREEMPTION PLAYBOOK**

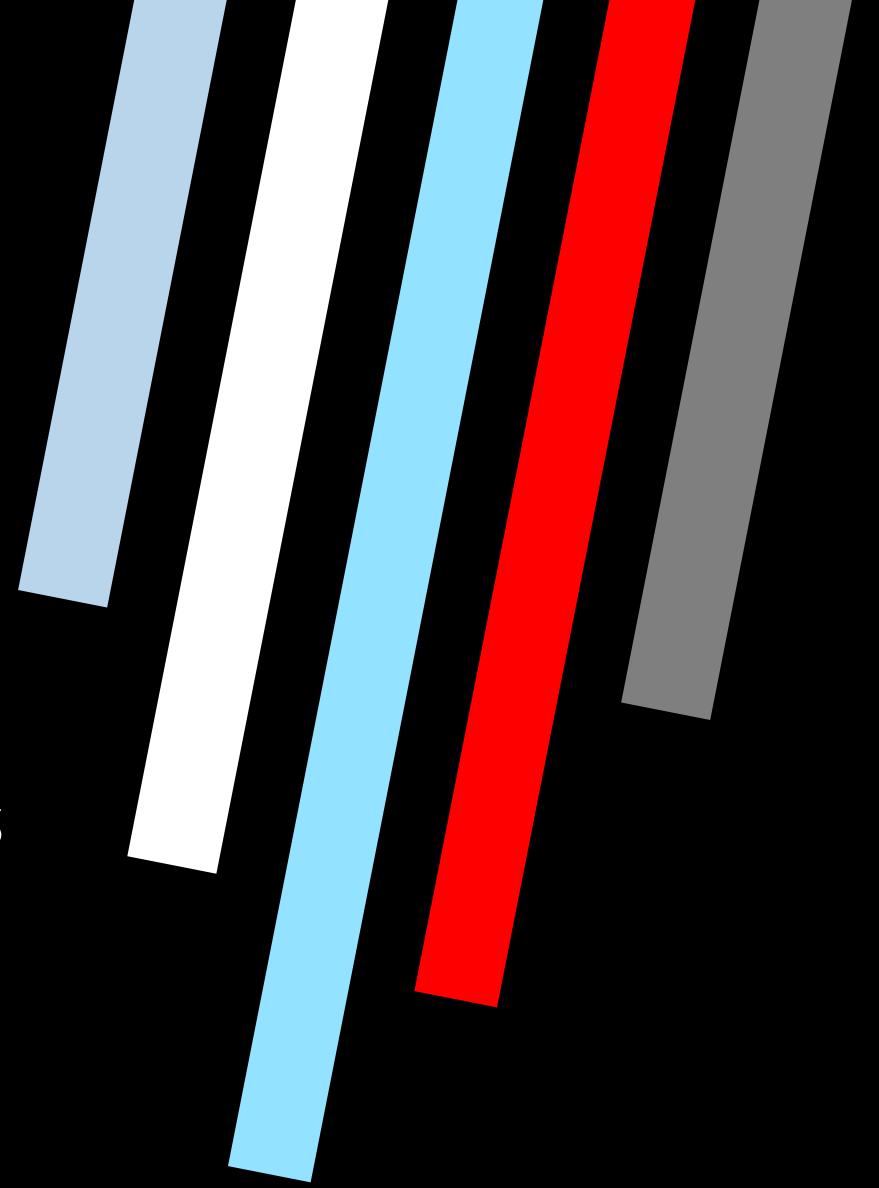
*by ChangeLab Solutions &  
Counter Tools*



# Hello!



**Sara Bartel**  
**Senior Attorney**  
ChangeLab Solutions





ChangeLab Solutions

[www.changelabsolutions.org](http://www.changelabsolutions.org)

## *Our Mission*

Healthier communities for all through  
equitable *laws and policies.*



# Disclaimer

The information provided in this discussion is for informational purposes only and does not constitute legal advice. ChangeLab Solutions and its staff do not enter attorney-client relationships.

ChangeLab Solutions is a non-partisan, nonprofit organization that educates and informs the public through objective, non-partisan analysis, study, and/or research. The primary purpose of this discussion is to address legal and/or policy options to improve public health. There is no intent to reflect a view on specific legislation.

# *Funding Disclaimer*

This training was supported by the Centers for Disease Control and Prevention of the U.S. Department of Health and Human Services (HHS) as part of a financial assistance award to ChangeLab Solutions. The views expressed in written materials or publications and by speakers and moderators do not necessarily reflect the official policies of the Department of Health and Human Services, nor does the mention of trade names, commercial practices, or organizations imply endorsement by the U.S. Government.

# Commercial Tobacco

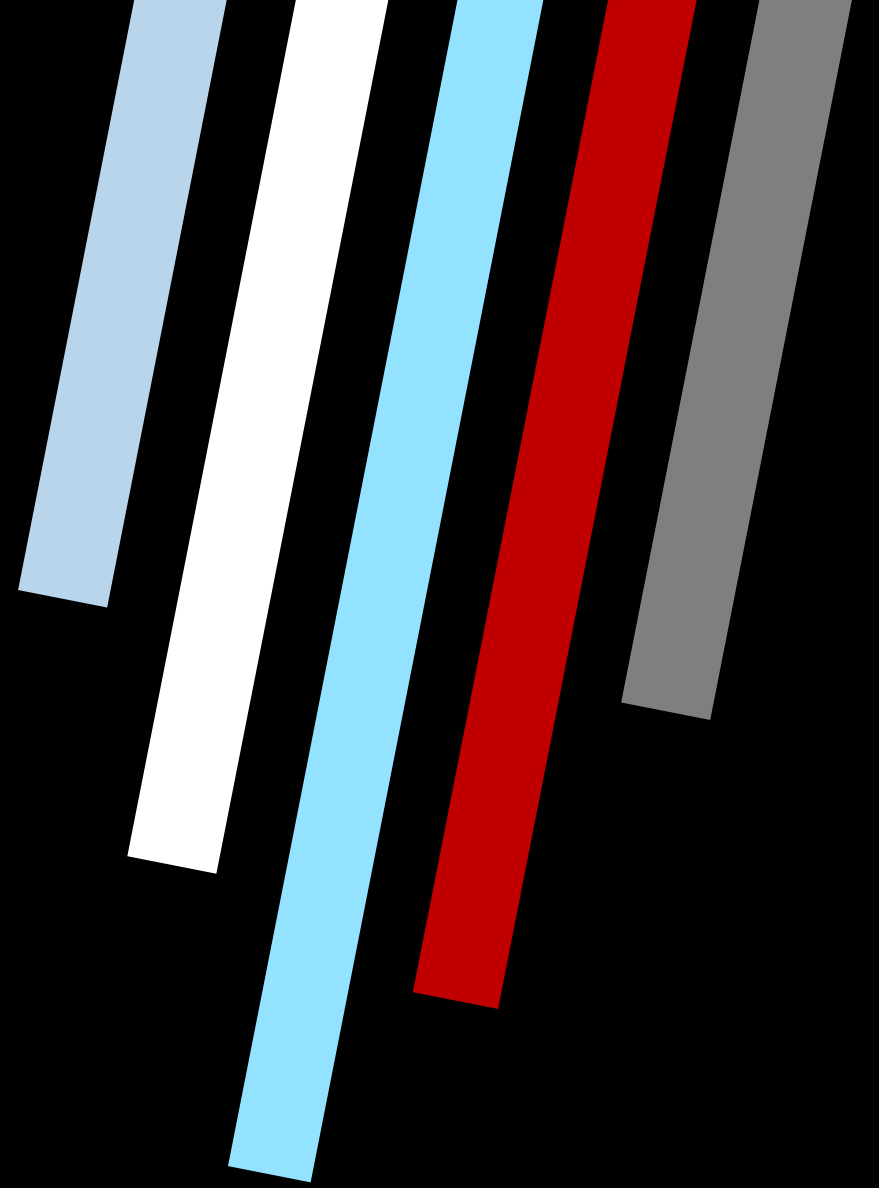
We recognize the important role of ceremonial and traditional uses of tobacco in many Indigenous communities. This conversation and the Preemption Playbook are intended to address commercial tobacco, not tobacco products used as part of an Indigenous practice or other recognized religious or spiritual ceremonies or practices. All references to tobacco and tobacco products here refer to commercial tobacco.

# Agenda

- ❖ Health equity & local control
- ❖ Preemption at the point of sale:  
commercial tobacco as a case study
- ❖ Additional resources



# Health Equity & Local Control



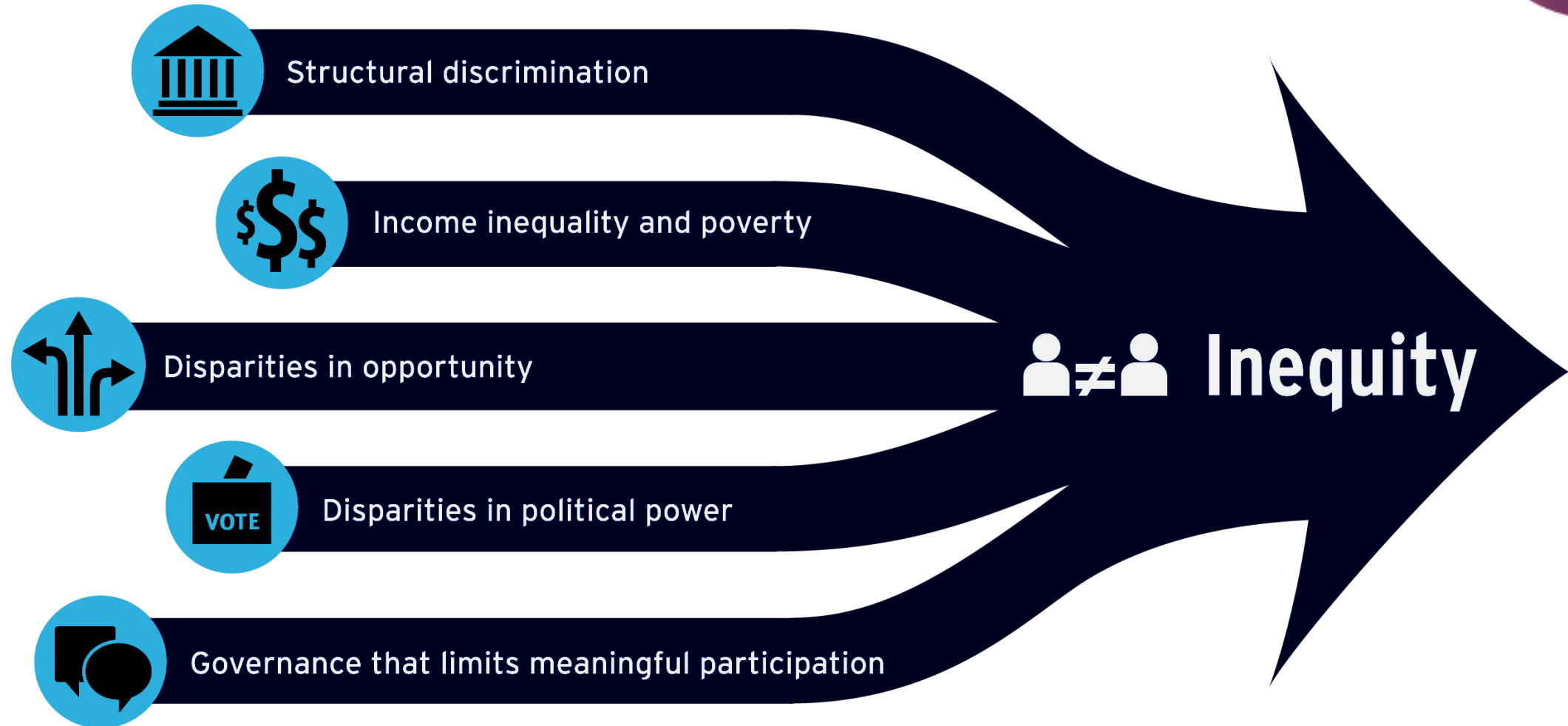


## What is health equity?

When “everyone has a fair and just opportunity to be as healthy as possible. This requires removing obstacles to health such as poverty, discrimination, and their consequences...”

- Paula Braveman

# A Framework For Policy Interventions: Five Drivers of Inequity

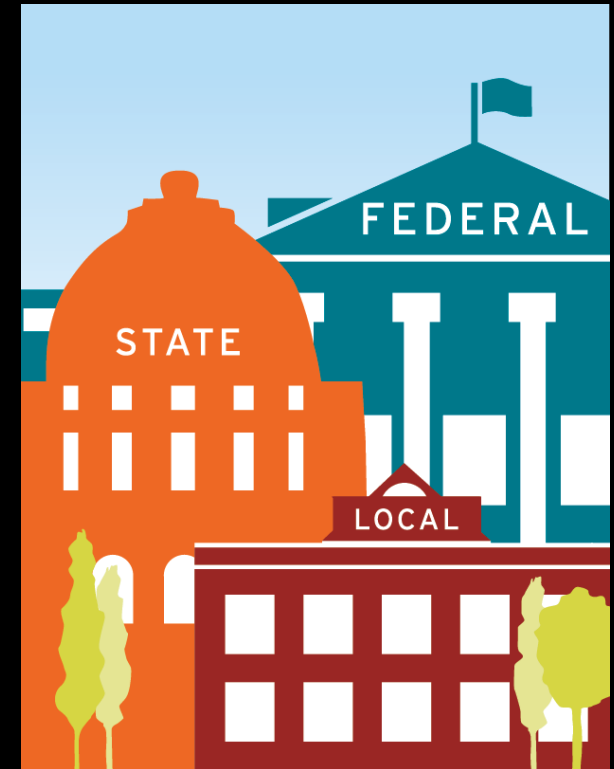


# *Local Power = Community Power*

- **The right data**, community goals, lived experience
- **Lasting change** via “buy in” and building on existing resident power
- **Reduces risk** of well-intentioned policies exacerbating disparities
- **Proof of concept** for scaling up, and for state and national policy change

# *Preemption & Equity*

- Minimum standards
- Community driven policy
- Relevant protections for local industry, resident groups, environment
- Equity via empowerment



# Tobacco Prevention & Equity

- Disparate **health burdens**
- **Industry targeting**
- Historical **policy harms**
- **Over- and under-enforcement**
- **Upstream influences** on decisions





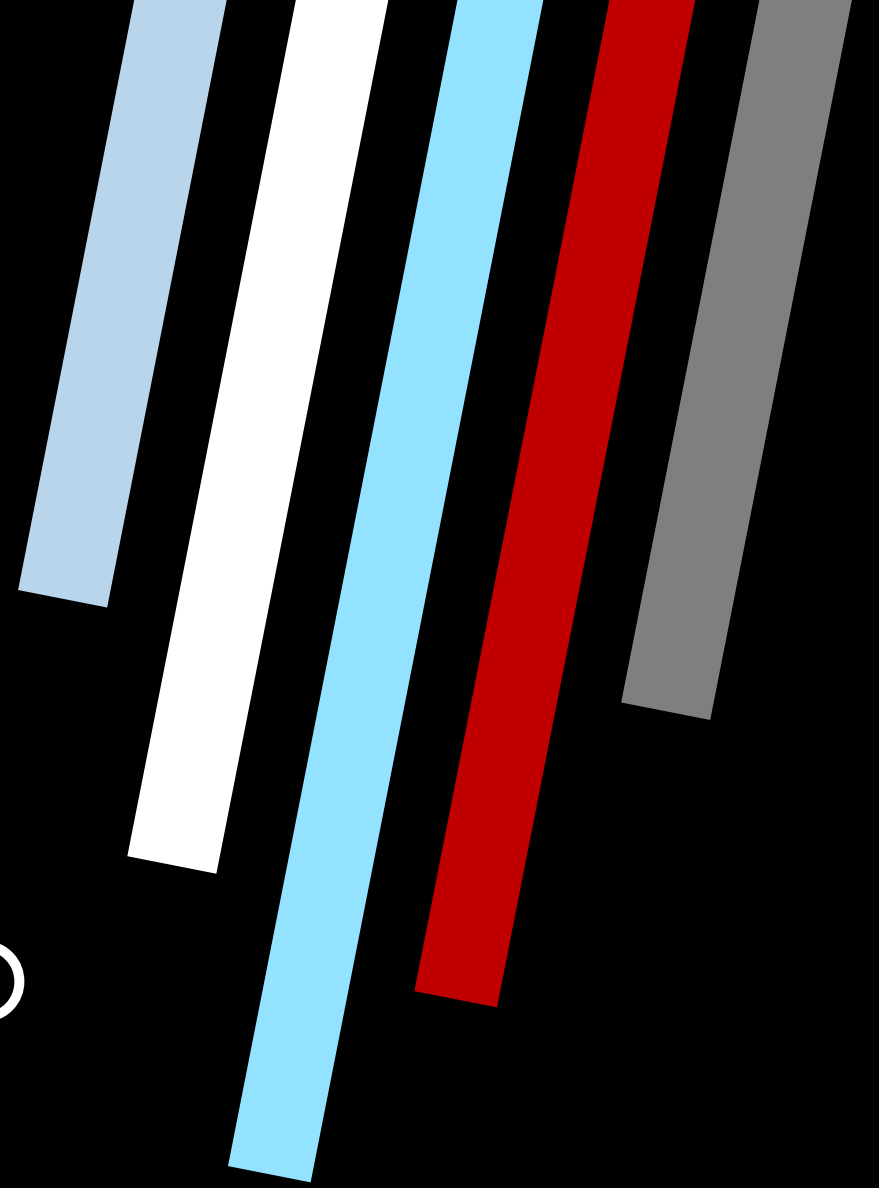
**Act for Public Health** is a collaborative working group that provides resources, technical assistance, and training to help promote public health officials' and staff persons' ability to do their jobs. This group of public health organizations and experts is applying their decades of experience in public health law and policy work to preserve public health authority and infrastructure wherever challenges arise. Join us!

**Act for Public Health** is an initiative of the **Public Health Law Partnership.**

<https://www.changeabsolutions.org/act-public-health>



# Preemption at the point of sale: commercial tobacco as a case study



# TOBACCO POINT OF SALE PREEMPTION PLAYBOOK 2022



ChangeLab Solutions



COUNTER  
TOOLS

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The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult an attorney licensed to practice in their state.



**Section 1: Introduction**

**Section 2: Preemption Basics**

**Section 3: Case Studies**

**Section 4: Local Authority**

**Section 5: Progress Under Preemption**

**Section 6: Preventing and Undoing Preemption**

**Section 7: Reversing Preemption**

**Section 8: Additional Resources**



# *Understanding Preemption: Authority*

- **Dillon's Rule:** Local authority only if granted?
- **Home Rule:** More local autonomy (note this is a scale with wide variety)?

# *Understanding Preemption: Types*

- **MODE:** Express or implied?
- **SCOPE:** Field preemption or limited scope? Specific subject areas/definitions or exceptions?



# *Understanding Preemption: Effects*

- **TIMING:** Retroactive or prospective?
- **EFFECT:** Minimum/floor or ceiling?  
Total “vacuum”?

# Common Preemptive Language

WORD OR PHRASE INDICATING PREEMPTION	EXAMPLE
CONSISTENT WITH	"Any order or ordinance by any political subdivision <b>shall be consistent with</b> and not more restrictive than state law and regulations governing lending or deposit taking entities regulated by the division of finance or the division of credit unions." <sup>43</sup>
DO NOT EXCEED	"A State or a political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of . . . plants, biological control organisms, plant pests, noxious weeds, or plant products that are consistent with and <b>do not exceed</b> [federal] regulations or orders." <sup>44</sup>
EXCLUSIVE	"The department has <b>exclusive</b> regulatory authority over all hazardous waste generation, transportation, storage, treatment and disposal and other management practices in the state." <sup>45</sup>
MATTERS OF STATEWIDE CONCERN	"The general assembly further declares that the licensing and regulation of massage parlors are <b>matters of statewide concern</b> ." <sup>46</sup>
NO MORE STRINGENT	"No political subdivision may enact an ordinance . . . that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, . . . unless the ordinance or resolution is the same as or similar to, and <b>no more stringent</b> than, a state statute." <sup>47</sup>
OCCUPY THE FIELD	"It is the intent of the Legislature to <b>occupy the whole field</b> of health and sanitation standards for retail food facilities, and the standards set forth in this part and regulations adopted pursuant to this part shall be exclusive of all local health and sanitation standards relating to retail food facilities." <sup>48</sup>
PREEMPT	"This part <b>preempts</b> the laws of any State to the extent that such laws are inconsistent with this part." <sup>49</sup>
RESTRICTIVE	"Local laws and ordinances that are inconsistent with, <b>more restrictive than</b> , or exceed the requirements of state law shall not be enacted and are preempted and repealed." <sup>50</sup>
SOLE AUTHORITY	"The Louisiana Wildlife and Fisheries Commission shall have <b>sole authority</b> to control and regulate all aspects of hunting, fishing, and boating in all water conservation districts." <sup>51</sup>

# *Common Preemptive Language*

- “Preempt”
- “Shall/Do not exceed”
- “Exclusive/Sole authority”
- “Matters of statewide concern”
- “Occupy the field”
- “Consistent with”
- “No more stringent”
- “Restrictive”
- “Supersede”
- “Uniform”

## UNDERSTANDING THE GENERAL SCOPE OF LOCAL AUTHORITY

Jurisdictions wishing to adopt a commercial tobacco point-of-sale policy should first seek to understand the general contours of their local authority. Some local governments may exercise only those powers explicitly granted to them by their state legislature, a structure known as **Dillon's Rule**. Other states grant local governments extensive autonomy, known as home rule authority, whereby local governments can directly enact laws without relying on a specific delegation of power by the state legislature. **Home rule** limits the degree of state interference in local affairs but does not eliminate it, and the degree of local home rule authority varies substantially among states. It's critical to understand the general scope of local authority because a local government may lack the authority to adopt a commercial tobacco point-of-sale policy even in the absence of state preemption.

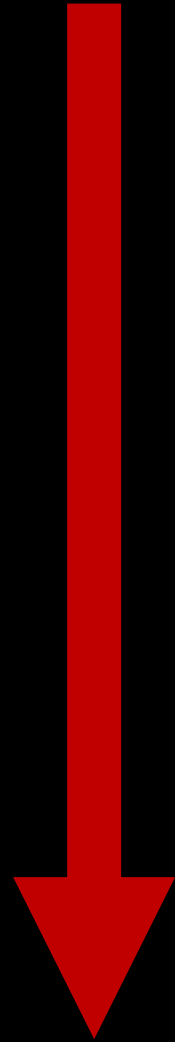
RESOURCE TYPE	DESCRIPTION	POTENTIAL SOURCE
EXISTING LEGAL ANALYSES	Legal technical assistance providers may already have analyzed point-of-sale preemption in specific states. These analyses may directly answer your questions or provide a starting point for further research.	<a href="#">ChangeLab Solutions</a> <a href="#">Public Health Law Center</a>
COMPILATIONS OF STATE TOBACCO LAWS	Many databases of state commercial tobacco laws include information about statutes that expressly preempt local point-of-sale policies.	ALA <a href="#">SLATL Database</a> CDC OSH <a href="#">STAL System</a> <a href="#">State tobacco control programs</a>
LEGAL TREATISES	State legal treatises often include sections addressing the general scope and limitations of municipal authority, including state constitutional provisions, state statutes, and court decisions. Some treatises may also address specific subjects such as tobacco.	Legal research services (e.g., <a href="#">WestLaw</a> , <a href="#">LexisNexis</a> ) Law libraries
STATE ATTORNEY GENERAL OPINIONS	State attorney general opinions offer authoritative (but non-binding) interpretations of state law. This may include opinions specifically addressing local authority related to commercial tobacco policies or local authority more generally.	State attorney general websites Legal databases Law libraries
GUIDANCE FROM MUNICIPAL LEAGUES	Municipal leagues may offer guides and other resources on local government authority and recent events (e.g., new legislation and court decisions) affecting local governments.	<a href="#">National League of Cities</a> <a href="#">National Association of Counties</a> State municipal leagues

- Counter Tools
- ChangeLab Solutions
- Public Health Law Center
- CDC
- National League of Cities
- National Ass'n of Counties
- Local Solutions Support Center
- And more!

Lowest risk

Use  
additional  
caution

Stop and seek  
assistance



ASSESSING PREEMPTION RISK FOR LOCAL POINT-OF-SALE POLICIES	
LOWEST RISK	<p>State law explicitly authorizes the local point-of-sale policy. A state appellate or supreme court has upheld similar local point-of-sale policies.</p> <p>All the following conditions are met:</p> <ul style="list-style-type: none"><li>• A locality has broad home rule authority;</li><li>• State law does not expressly preempt the local point-of-sale policy; and</li><li>• There is no indication of implied preemption.</li></ul>
EXERCISE ADDITIONAL CAUTION	<p>Localities in a Dillon's Rule state where:</p> <ul style="list-style-type: none"><li>• The state has delegated general authority—to regulate for the protection of public health, for example—but has not specifically authorized the local point-of-sale policy;</li><li>• State law does not expressly preempt the local point-of-sale policy; and</li><li>• There is no indication of implied preemption.</li></ul> <p>A locality has limited home rule authority, state law does not expressly preempt the local point-of-sale policy, and there is no indication of implied preemption.</p>
STOP AND SEEK ASSISTANCE	<p>Localities in a Dillon's Rule state that have not been delegated general or specific authority.</p> <p>State law includes express preemption and either:</p> <ul style="list-style-type: none"><li>• The preemption law clearly applies to the local point-of-sale policy; or</li><li>• The scope and applicability of the preemption law is unclear.</li></ul> <p>Evidence suggests that state law may impliedly preempt the local point-of-sale policy.</p>



## SECTION 5

### PROGRESS UNDER PREEMPTION: OPTIONS AT THE POINT OF SALE

Although preemption may eliminate ways to influence the commercial tobacco environment, there are still strategies that local jurisdictions can use to make progress. As a first step, it's important to meet with a local technical assistance provider who can determine or clarify the scope of the preemption and determine where there might be gray areas in interpretation. This is important to ensure that any action taken is on firm legal ground. Local staff should bear in mind alternative needs for communities concerned about preemption, for example:

- Leverage non-policy point-of-sale activities,
- Consider alternative, non-preempted point-of-sale policies,
- Move forward with the local point-of-sale policy, or
- Analyze and share information about preemption-related barriers to the chosen policy approach.

Deciding which action to take will depend upon the level of certainty about the existence and scope of preemption, whether alternative approaches can achieve desired results, the overall legal and political landscape, the level of acceptable risk, and whether stakeholders are prepared to defend against potential legal challenges.



- Leverage non-policy point-of-sale activities,
- Consider alternative, non-preempted point-of-sale policies,
- Move forward with the local point-of-sale policy, or
- Analyze and share information about preemption-related barriers to the chosen policy approach.



# Options Under Preemption

- Hold
- Pivot
- Go for it (in close partnership with your attorneys!)
- Analyze and share information



# *Non-lobbying activities*

## **Guidance on Anti-Lobbying Restrictions for CDC Grantees**

[https://www.cdc.gov/grants/documents/anti-lobbying\\_restrictions\\_for\\_cdc\\_grantees\\_july\\_2012.pdf](https://www.cdc.gov/grants/documents/anti-lobbying_restrictions_for_cdc_grantees_july_2012.pdf)

# *Legal Pathways to Reverse Preemption*

- **State legislation**
- **Ballot measures**
- **Litigation** (after the “go for it” option, or proactively)



## SECTION 8

### ADDITIONAL PREEMPTION RESOURCES

#### Tobacco Preemption Resources

[Untangling The Preemption Doctrine in Tobacco Control](#)  
Public Health Law Center

[Preemption: The Biggest Challenge to Tobacco Control](#)  
Public Health Law Center

[Checked at the Check-Out Counter: Preemption at the Tobacco Point of Sale](#)  
Public Health Law Center

[Preemption Fact Sheet](#)  
CDC State Tobacco Activities Tracking and Evaluation (STATE) System

[State Legislated Actions on Tobacco Issues \(SLATI\)](#)  
American Lung Association

[Protect Local Control](#)  
Americans for Nonsmokers' Rights

#### General Preemption Resources

[Dillon's Rule, Home Rule, and Preemption](#)  
Public Health Law Center

[Assessing and Addressing Preemption: A toolkit for local policy campaigns](#)  
ChangeLab Solutions

[Understanding Preemption: A Fact Sheet Series](#)  
ChangeLab Solutions

[The Consequences of Preemption for Public Health & Equity](#)  
ChangeLab Solutions

[Fundamentals of Preemption](#)  
ChangeLab Solutions

[Webinar: Preemption, Public Health, and Equity: The Search for Local Solutions](#)  
ChangeLab Solutions

[Preemption: What It Is, How It Works, and Why It Matters for Public Health](#)  
ChangeLab Solutions

[Preemption and Public Health Facilitator's resources](#)  
ChangeLab Solutions

[Preemption & Public Health Training](#)  
Public Health Law Academy (ChangeLab Solutions)

[At-A-Glance: Research on Preemption, Public Health, and Equity](#)  
ChangeLab Solutions and Local Solutions Support Center

[City Rights in an Era of Preemption: A State-by-State Analysis](#)  
National League of Cities Center for City Solutions

[Webinar: Federal and State Preemption Basics: What every drafter ought to know](#)  
National Council on State Legislatures

[Preemption Watch Tools](#)  
Grassroots Change

[Combatting preemption: Myths and facts](#)  
Grassroots Change

[Webinar: Municipal Issues in an Era of Preemption](#)  
Stateside

[Preemption Creative Toolkit](#)  
Voices for Healthy Kids

#### Preemption Messaging

[Preemption Case Studies](#)  
Voices for Healthy Kids

[Preemption Message Manual](#)  
Voices for Healthy Kids

[Preemption Message Wheel](#)  
Voices for Healthy Kids

[Preemption Key Messaging](#)  
Voices for Healthy Kids

[Message Guide: State Preemption and the Effects of Limiting Local Power](#)

Local Solutions Support Center

[Protecting Local Democracy: A Messaging and Research Toolkit](#)  
Local Solutions Support Center

#### Legal Technical Assistance Providers

[ChangeLab Solutions](#)

[Public Health Law Center](#)

#### Organizations Working on Preemption

[Local Solutions Support Center](#)

[American Heart Association \(AHA\)](#)

[Voices for Healthy Kids \(AHA\)](#)

[National League of Cities](#)

[National Association of Counties](#)

[Local Municipal Leagues](#)

#### Commercial Tobacco Control Organizations

[Counter Tools / Counter Tobacco](#)

[ChangeLab Solutions](#)

[The Center for Black Health & Equity](#)

[CDC Office of Smoking and Health \(OSH\)](#)

[CDC OSH National Networks](#)

[Public Health Law Center](#)

[Campaign for Tobacco-Free Kids](#)

[Truth Initiative](#)

[American Heart Association](#)

[American Lung Association](#)

[National Cancer Institute](#)

- Tobacco and preemption resources
- Messaging materials
- Technical assistance providers
- Organizational partners



**Additional Resources**

**Act for Public Health** is a collaborative working group that provides resources, technical assistance, and training to help promote public health officials' and staff persons' ability to do their jobs. This group of public health organizations and experts is applying their decades of experience in public health law and policy work to preserve public health authority and infrastructure wherever challenges arise. Join us!

**Act for Public Health** is an initiative of the **Public Health Law Partnership.**

<https://www.changeabsolutions.org/act-public-health>





## Assessing & Addressing Preemption: A Toolkit for Local Policy Campaigns

September 2020



ChangeLab Solutions



## Why Preemption Matters for Public Health

Preemption is a legal concept that allows a higher level of government (like federal or state government) to limit or even eliminate the power of a lower level of government (like state or local government) to regulate a specific issue.

Preemption can allow for the creation of minimum standards and also can affect community-driven policymaking and health equity. To learn more, take our training Preemption & Public Health at [www.publichealthlawacademy.org](http://www.publichealthlawacademy.org).

### Standards



Government can set minimum standards for health for all – such as Paid Family and Medical Leave. Local governments may be able to go beyond state baseline requirements. For example, many low-wage workers lack access to paid sick leave, so policies that ensure paid sick leave can prevent localities from losing out on the health benefits of a more healthy workforce.

### Community-Driven Policymaking



Local governments often develop policies that reflect the unique challenges and experiences of their communities. Practitioners should be aware of preemptive laws that block local efforts to protect residents' health. For example, state laws can prevent localities from passing local health ordinances.

### Health Equity



Depending on how it is used, preemption can either allow or block policies that foster equitable health outcomes. For example, many low-wage workers lack access to paid sick leave, so policies that ensure paid sick leave can prevent localities from losing out on the health benefits of a more healthy workforce.

THE MILBANK QUARTERLY  
A MULTIDISCIPLINARY JOURNAL OF POPULATION HEALTH AND HEALTH POLICY

### Original Scholarship

## Equity First: Conceptualizing a Normative Framework to Assess the Role of Preemption in Public Health

DEREK CARR,\* SABRINA ADLER,\*  
BENJAMIN D. WINIG,\*  
and JENNIFER KARAS MONTEZ†

\*ChangeLab Solutions; †Department of Sociology and Aging Studies Institute, Syracuse University

### Policy Points:

- Preemption is a legal doctrine whereby a higher level of government may limit or even eliminate the power of a lower level of government to regulate a certain issue. Some state legislatures have used preemption with increasing regularity to thwart local policies aimed at reducing health inequities.
- Despite recent trends, preemption is not inherently antithetical to public health, equity, or good governance but rather reflects its wielder's intent. For assessing preemption fail to

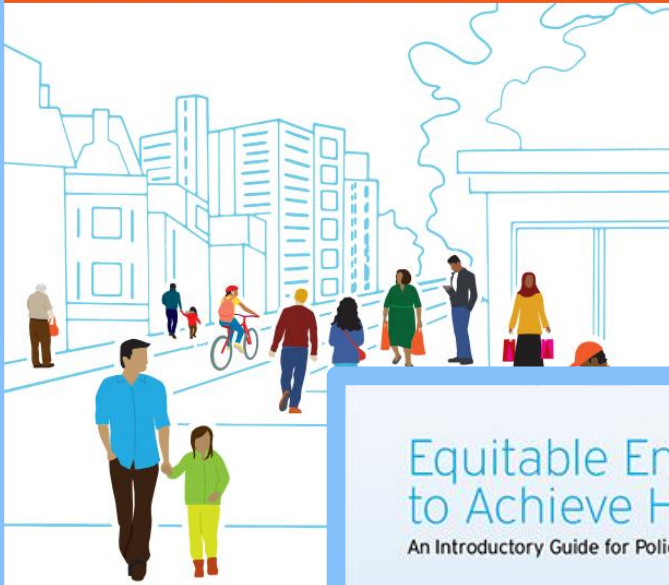


# Preemption, public health, and health equity

<https://www.changelabsolutions.org/good-governance/preemption>

## A Blueprint for Changemakers

Achieving Health Equity Through Law & Policy



ChangeLab Solutions

## Equitable Enforcement to Achieve Health Equity

An Introductory Guide for Policymakers and Practitioners



ChangeLab Solutions

## Blueprint for Changemakers

- Power and efficacy of local policy solutions
- Engage diverse community members in the policy process

## Equitable Enforcement Guide

- Minimize harm of ensuring compliance
- Equitable options for administrative, civil, and criminal enforcement in a variety of public health policy areas







# Model Policies, Playbooks, Fact Sheets, Infographics, and more

<http://changelabsolutions.org/tobacco-control>



# Framing Health Disparities

- *Justice in the Air* brief
- Framing recommendations
- Talking points
- Examples

<https://www.changelabsolutions.org/product/branding-tobacco-disparities>





**ChangeLab Solutions**

[www.changelabsolutions.org](http://www.changelabsolutions.org)

*Thank you!*

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[ChangeLabSolutions.org](http://ChangeLabSolutions.org)

