

# State Legislative Strategies to Pass, Enhance, and Obscure Preemption of Local Public Health Policy-Making



Jennifer L. Pomeranz, JD, MPH, Diana Silver, PhD, MPH

**Introduction:** Local governments are often innovators of public health policy-making, yet states are increasingly preempting or prohibiting local control over public health issues. Previous research identified examples of strategies used by state legislatures to pass preemption in ways that may obscure public discussion about preemption or the topics preempted or enhance the strength of a previously passed preemptive law.

**Methods:** To systematically identify strategies to pass, obscure, or enhance preemption, in 2019, the authors conducted a content analysis of the full text of the bills from which preemptive laws in 5 policy areas (tobacco control, firearms, paid sick leave, food and nutrition, and civil rights) passed over a 5-year period (2014–2018) for preemptive laws that remained in effect as of January 2019.

**Results:** This research identified 5 methods state legislators used during the 5-year period to pass and support preemption: (1) pass preemptive bills quickly (11 laws); (2) obscure preemption by adding it to pre-existing bills on nonrelevant substantive topics (4 bills), bundling preemption of multiple nonrelated topics (4 bills), or titling bills in a way that does not reflect the substance of the bill (1 bill); (3) repeal and replace preemption (2 laws); (4) preempt litigation (1 law); and (5) enact punitive preemption (7 laws).

**Conclusions:** Strategies employed to pass preemption obscure public debate about preemption and the underlying public health and social justice issues at stake while minimizing the ability of local governments to protect their populations and the nation to learn from local policy successes.

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## INTRODUCTION

Local governments often enact laws that more vigorously protect the health, safety, and welfare of their residents than the federal or state governments.<sup>1</sup> Policies passed locally also create evidence of effectiveness that can encourage federal or state policy enactment, as in the cases of federal menu labeling and state smokefree air laws.<sup>2</sup> However, states are increasingly eliminating or undermining local authority by passing preemptive laws across public health policy areas.<sup>3,4</sup>

Preemption, or ceiling preemption, occurs when a higher level of government withdraws or limits the authority of a lower level of government to act.<sup>5</sup>

Although the federal government can and has preempted state and local control over public health issues, state legislatures are increasingly preempting local control and concentrating power in their statehouses.

Previous research documented powerful industry lobbying, such as by the firearm, tobacco, and food industries, to encourage the passage of preemptive

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From the Department of Public Health Policy and Management, School of Global Public Health, New York University, New York, New York

Address correspondence to: Jennifer L. Pomeranz, JD, MPH, Department of Public Health Policy and Management, School of Global Public Health, New York University, 715 Broadway, 10th Floor, New York NY 10003. E-mail: [jlp284@nyu.edu](mailto:jlp284@nyu.edu).

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laws to avoid regulation.<sup>6,7</sup> In addition to direct lobbying and campaign contributions, industry groups disseminate model legislation that includes preemption and use trade associations and other organizations to encourage passage of preemptive laws.<sup>8,9</sup> Ultimately, however, state legislators must champion and vote for preemptive bills.

Previous research identified examples of strategies used by state legislatures to pass preemptive laws in ways that may obscure public discussion about preemption or the topics preempted or enhance the strength of a previously passed preemptive law.<sup>10</sup> Examples identified in previous work include adding preemptive clauses to pre-existing bills on disparate topics then passing the bill quickly into law<sup>4,10</sup> and preempting multiple topics at once—each with their own base of support.<sup>8,11</sup> States have also preempted litigation against the restaurant and firearms industries,<sup>4,12</sup> which shields them from standard legal liability. A primary goal of litigation is to shift the burden from those harmed by dangerous products to the manufacturers of those products.<sup>9</sup> At the same time, through media coverage and the disclosure of industry documents, litigation can influence public discussion about the need for regulation and ultimately lead to policy enactment, as was the case for tobacco.<sup>13</sup> As such, the preemption of litigation is at once a form of preemption but also inherently, a strategy to reduce the policy agenda—setting benefits of litigation.

States have also enacted punitive laws that enhance the effect of previously passed preemptive laws. Punitive preemption authorizes lawsuits against local governments or local officials for actions the state deems preempted.<sup>3</sup> Punitive preemption thus threatens to punish local officials for engaging in the democratic process and therefore reduces the likelihood that the topics preempted will even be discussed—let alone addressed—at the local level.<sup>14</sup> As such, the very act of passing punitive preemption laws is a strategy to enhance the effect of preemption laws.

Strategies to pass and enhance preemption may hinder robust debate among policymakers and prevent stakeholders from mobilizing in opposition during the policy-making process, as well as prevent challenges to such laws once enacted. To date, scholars have noted examples of tactics employed to pass preemption in a single subject area<sup>4,10</sup> or have explored specific tactics,<sup>8,9,11</sup> as identified above. However, there has not been a systematic investigation into the tactics used to enact and enhance preemptive laws over a period of time or for multiple policy areas. To fill this gap, this study evaluates legislative strategies to pass preemptive laws, laws that preempt litigation, and laws authorizing punitive preemption over a 5-year period in 5 public

health areas: tobacco control, firearm safety, paid sick leave, food and nutrition policy, and civil rights.

## METHODS

### Study Sample

In 2019, the authors conducted a content analysis of the full text of the bills from which preemptive laws were passed over a 5-year period. This period encompassed the 2016 election, which yielded changes to the makeup of many statehouses. Using nongovernment organization databases,<sup>12,15–17</sup> this study identified all preemptive laws in existence as of January 2019 in 5 areas (tobacco control, firearms, paid sick leave, food and nutrition policies, and civil rights). [Appendix Table 1](#) (available online) lists the specific topics reviewed in each policy area (e.g., food and nutrition policies included menu labeling, food and drink taxes, and trans-fat bans, among other topics). Using LexisNexis, the authors researched and evaluated all bills and amendments to bills that were successfully enacted into law in 2014–2018 for the identified topics. The 5 policy areas were selected on the basis of the previous research suggesting recent state legislative activity preempting local law in these public health domains.<sup>3,4,18</sup>

### Measures

To examine time from introduction to passage for each bill or amendment, LexisNexis, states' legislative websites, Ballotpedia.org, and legiscan.com were used to identify the dates of the legislative sessions and the dates of bill introduction, passage in both houses of the state legislature (or Nebraska's unicameral legislature), and enactment. Because not all state legislative calendars provided the legislature's sitting days for all calendar years, this study could not investigate each state's holiday calendar. To be consistent, the days between proposal and passage were counted according to the number of working calendar days. Investigators also examined whether preemptive laws were passed during the regular session or in the "rush" at the end of it, known as the legislative logjam.<sup>19,20</sup> Definitions of this time period vary from the final day, 3 days, week, or 10% of the session days.<sup>20</sup>

To further investigate the speed of passage of recent preemptive laws, the legislative history was reviewed for all state laws preempting local paid sick leave and food and nutrition policies; the timeline for passage of the laws passed from 2014 through 2018 was compared with those passed before 2014. Laws preempting localities from enacting tobacco and firearm policies were enacted starting in the 1980s and 1990s, respectively,<sup>6</sup> and there were few laws preempting civil rights,<sup>18</sup> so similar comparisons in these policy areas were not possible.

To identify whether additional tactics could be gleaned from the bills, each bill's text and title were reviewed, and the date that preemption was proposed or added was identified. All versions of the bill were examined and evaluated for any differences between the bill as introduced, as amended throughout the legislative process, and as enacted.

Finally, this study evaluated the state legislatures' influence on accessibility of the judicial system to further preemptive goals by identifying and evaluating all state laws preempting litigation or authorizing punitive preemption passed 2014–2018 related to the 5 policy areas. Of note, state legislatures may have utilized more

than 1 strategy to pass preemptive bills; in this case, the bill or law would be reported in the results for each tactic.

## RESULTS

This research evaluated the following number of preemptive bills passed 2014–2018 for the 5 policy areas: tobacco control (14 bills), firearms (62 bills), paid sick leave (16 bills), food and nutrition policies (4 bills), and civil rights (3 bills). Five methods state legislators used during the 5-year period to pass and support preemptive laws were identified: (1) pass preemptive bills quickly (11 laws); (2) obscure preemption by adding it to pre-existing bills on nonrelevant substantive topics (4 bills), bundling preemption of multiple nonrelated topics (4 bills), or titling bills in a way that does not reflect the substance of the bill (1 bill); (3) repeal and replace preemption (2 laws); (4) preempt litigation (1 law); and (5) enact punitive preemption (7 laws). Each result is described in turn.

Most preemptive bills and amendments passed 2014–2018 progressed through the legislature in approximately 2–6 months; however, 11 bills and amendments were identified that passed through this stage in <1 month (Table 1). These bills passed through both houses on the same day (3 bills or amendments), 1–2 days (3 amendments), 3–4 days (2 bills or amendments), 9–10 days (2 bills), and 18 days (1 bill). One bill was enacted during a 1-day special session for that bill topic, 3 were enacted during the final days of the regular legislative session, and 2 were enacted during the final days before summer recess.

Table 2 compares the timeline for passage of all paid sick leave and food policy preemption laws amended or passed in state legislatures before and after 2014. Of the 39 laws in total, 19 were passed before 2014 (2008–2013), and 20 were passed 2014–2018. Yet, of the 9 that progressed from introduction to passage in both houses in a matter of days (0–18 days), 8 of them were enacted between 2014 and 2018 (and the ninth was enacted in 2013), indicating a recent trend.

State legislatures used several strategies to obscure preemption. This study identified 4 instances where preemption was added to pre-existing bills on nonrelated substantive topics. Paid sick leave preemption was added to a bill outlawing puppy mills in Ohio. Food and nutrition policy preemption was added to a California state budget bill. Preemption of tobacco control policies was added to a bill addressing kidney disease and funding dialysis centers in Hawaii and a Pennsylvania state budget bill that, only days prior, simply established scholarship programs. It is noteworthy that all 4 of these bills

passed rapidly through the legislature (same day to 3 days) and are identified in Table 1.

The authors also identified 4 bills that preempted multiple topics simultaneously. A North Carolina bill preempted both paid sick leave and civil rights and anti-discrimination laws (discussed further below). Paid sick leave preemption was also combined with the preemption of bans, taxes, and fees on bags (plastic or paper) in Missouri and restrictions on the sale of containers (e.g., bags) in Iowa. Food policy preemption was added to the preemption of rent control in Kansas.

In Arkansas, a bill that preempted local civil rights laws was titled “The Intrastate Commerce Improvement Act,” which did not capture the prohibition in the bill.

This study identified 1 instance of a state legislature repealing preemption of local civil rights and paid sick leave laws and replacing it with a bill using different language but with the same preemptive effect. In 2016, the North Carolina legislature amended the state’s equal rights employment protections to safeguard against discrimination based on “biological sex” rather than sex; establish single-sex multiple occupancy bathrooms and changing facilities based on “biological sex”; and preempt local laws that would prohibit discriminatory practices or impose requirements on employers pertaining to wages, benefits, or leave. This bill passed during a 1-day special session (Table 1). In 2017, the legislature repealed the original law and “biological sex” mandates but replaced it with a new bill, titled “An Act to Reset,” which through different wording enacted the same preemption of local antidiscrimination and employee benefit laws, but this time with an expiration date of December 1, 2020.

One state enacted a law protecting the firearm industry from lawsuits during the study period. Utah’s law provided broad immunity from litigation brought by any individual or public or private entity, including political subdivisions, to firearm, component, and ammunition manufacturers, sellers, and trade associations, with few exceptions.

This research identified 7 punitive preemption laws that were passed during the study period. These laws authorized individuals “adversely affected” to bring lawsuits for civil penalties, damages, fees, and costs against local governments for acting in a way the state deemed preempted in the context of firearms (e.g., enacting ordinances, posting notices, and excluding firearm license holders from buildings), as presented in Table 3. Three of these also provided membership organizations (e.g., the National Rifle Association) identical standing to sue. Laws in Arizona and Mississippi additionally permitted local officials to be sued, subjected to fines, or terminated for violating state preemption. Arizona prohibited

**Table 1.** Time From Proposal to Passage in the State Legislature for Bills <1 Month

State (topic)	Legislative session	Introduced or added	Passed both houses	Total weekdays from introduction/addition to passing both houses	Signed by governor
Arkansas (preempts local civil rights laws) (A.C.A. §§ 14-1-401-14-1-403)	Regular session (2015): January 12, 2015 through April 2, 2015. Special session: May 26 through May 28, 2015.	February 2, 2015: introduced as AR SB 202	February 13, 2015	9 days	February 24, 2015 Became law without governor's signature
Arkansas (preempts local paid sick laws) (A.C.A. §11-4-222)	Regular session (2017): January 9, 2017 through May 1, 2017.	March 6, 2017: introduced as AR SB 668	March 21, 2017	10 days	March 24, 2017
California (preempts new SSB taxes) (Cal Rev & Tax Code §§7284.8–7284.16)	Regular session (2018): January 3, 2018 through August 31, 2018. Summer recess: July 7, 2018 through August 5, 2018.	June 25, 2018 <sup>a</sup> : added to CA AB 1838 (originally introduced January 10, 2018)	June 28, 2018	3 days	June 28, 2018
Hawaii (preempts local regulation of the sale of cigarettes, tobacco products, and electronic smoking devices) (HRS § 328J-11.5)	Regular session (2018): January 17, 2018 through May 3, 2018. Special sessions: July 10, 2018 and October 25, 2018	April 27, 2018 <sup>b</sup> : added to HB 1895 (originally introduced January 18, 2018)	May 1, 2018	2 days	July 10, 2018
Kansas (preempts 7 types of local food, nutrition, and agriculture policies) (Kan. Stat. Ann. §12.16,137)	Regular session (2016): January 11, 2016 through June 1, 2016. Special session: June 23, 2016 through June 24, 2016	April 29, 2016 or April 30, 2016: added to SB 366 (originally introduced January 26, 2016). Note that food policy preemption was previously introduced as HB 2595 on February 2, 2016 and debated but this bill failed	May 1, 2016 (Sunday)	1–2 days	May 17, 2016
Kentucky (preempts local paid sick laws) KRS § 65.016	Regular session (2017): January 3, 2017 through March 30, 2017. Veto session from March 16, 2017 to March 27, 2017.	January 3, 2017: introduced KY HB 3	January 7, 2017 (Saturday)	4 days	January 9, 2017
Michigan (preempts local food or drink taxes) MCLS §§ 123.711–123.713	Regular session (2017): January 11, 2017, through December 28, 2017.	September 20, 2017: introduced as HB 4999	October 16, 2017	18 days	October 26, 2017
Missouri (preempts local paid sick laws) §285.055 R.S. Mo	Regular session (2015): January 7, 2015 through May 15, 2015. Special session: May 27, 2015 Because bills were vetoed after the General Assembly adjourned, the General Assembly reconvening for a veto session commencing September 16, 2015.	May 5, 2015 <sup>c</sup> : added to HB 722 (originally introduced January 28, 2015)	May 6, 2015	1 day	Vetoed July 10, 2015; Veto overridden September 16, 2015

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**Table 1.** Time From Proposal to Passage in the State Legislature for Bills <1 Month (*continued*)

State (topic)	Legislative session	Introduced or added	Passed both houses	Total weekdays from introduction/addition to passing both houses	Signed by governor
North Carolina (preempted local regulation of discriminatory practices or any requirement on employers pertaining to wages, benefits, or leave) NC HB 2B	Regular session (2016): April 25, 2016 through July 1, 2016. Special session: February 18 through 19, 2016. Special session: March 23, 2016 to discuss Charlotte’s ordinance that would have gone into effect on April 1, 2016, which would have allowed people to use the bathroom according to the gender with which they identify.	March 23, 2016: introduced as NC HB 2B	March 23, 2016	Same day	March 23, 2016
Ohio (preempts local paid sick laws) ORC Ann. 4113.85	Regular session (2016): January 5, 2016 through December 31, 2016.	December 7, 2016 <sup>d</sup> : added to SB 331 (originally introduced May 17, 2016)	December 7, 2016	Same day	December 19, 2016
Pennsylvania (preempting local regulation of the sale of tobacco products by dealers licensed) 72 P.S. § 232-A	Regular session (2018): January 2, 2018, through November 30, 2018. Summer recess: June 26, 2018 through September 21, 2018.	June 22, 2018 <sup>e</sup> : added to HB 1929 (originally introduced November 17, 2017)	June 22, 2018	Same day	June 22, 2018

AB, Assembly Bill; HB, House Bill; SB, Senate Bill; SSB, sugar-sweetened beverage.

<sup>a</sup>Not at the end of the session but 9 days before summer recess.

<sup>b</sup>4 days before end of regular session.

<sup>c</sup>8 days before end of regular session.

<sup>d</sup><6 days. Bischoff LA. From guns to abortion, Ohio lawmakers passed more than 50 bills in 6 days. Dayton Daily News. December 29, 2016. [www.daytondailynews.com/news/from-guns-abortion-ohio-lawmakers-passed-more-than-billsdays/IBBOqbRGq6iUKIAPVpZrO/](http://www.daytondailynews.com/news/from-guns-abortion-ohio-lawmakers-passed-more-than-billsdays/IBBOqbRGq6iUKIAPVpZrO/).

<sup>e</sup>Not at the end of the regular session but 1 day before summer recess with a lot of activity at this time (Governor signed \$32.7 billion spending package June 22, 2018; passed the Senate same day and the House the day before).

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**Table 2.** Comparison Time to Enactment Paid Sick and Food Policy Preemption by Year of Passage (Pre/Post-2014)

Topic/years	Pre-2014 >1 month	Pre-2014 <1 month	2014–2018 >1 month	2014–2018 <1 month	Total
Paid sick	9 bills (1–3 months) 2009–2013	0 bills	11 bills (1–5 months)	5 bills (0–10 days)	25 paid sick preemption laws as of 2018
Food policy	9 bills (1–4 months) 2008–2013	1 bill in 2013 (14 days)	1 bill (<2 months)	3 bills (1–18 days)	14 food policy preemption laws enacted through state legislatures as of 2018 <sup>a</sup>
Total	18 bills	1 bill	12 bills	8 bills	39 laws

<sup>a</sup>In addition, Washington preempted sugary beverage taxes in 2018, but this law passed through a ballot initiative.

localities from defending themselves by arguing that they acted on the advice of counsel or in good faith, and Mississippi prohibited public officials from using public funds in their defense.

## DISCUSSION

To our knowledge, this is the first study to systematically identify and evaluate tactics state legislatures have used to pass, obscure, or enhance the preemptive effect of state laws. Many of the strategies employed serve to obscure the content of the bills and limit or eliminate debate about them. The quick passage of preemptive bills, sometimes with 0 days between proposal and passage, minimizes open debate on the purpose of the bill and reduces opponents' ability to organize and legislators' ability to consult constituent groups. Quick introduction and passage during the end-of-session logjam, and potentially just before summer recess, may be an additional obfuscation strategy because legislators have less time to deliberate during these busier time periods.<sup>20</sup>

With the exception of North Carolina, all the states that combined multiple topics into 1 bill have single-subject rules in their state constitutions.<sup>21–26</sup> Single-subject rules require bills to solely address 1 topic to improve transparency for voters and policymakers and avoid burying topics in bills to prevent logrolling.<sup>27</sup> Logrolling occurs when topics with a minority of support are joined into an omnibus bill that will receive majority support or by attaching riders, which are unpopular provisions attached to an otherwise popular bill (e.g., Hawaii's kidney bill with tobacco preemption added). Even if a state legislature violates its own state's single-subject law, the remedy for such a violation rests in civil litigation. Lawsuits are time and resource intensive and often cost prohibitive for public health groups to mount. At the same time, lawsuits based on alleged violations of single-subject rules have had mixed results because single-subject rules are often vague, and courts struggle to determine what constitutes a single subject.<sup>27,28</sup> Victories in court also may be temporary because legislators can refile the bill as a single subject. For all of these reasons,

legal challenges are rare, so state legislators routinely pass multi-subject laws without consequence or public discussion.<sup>11</sup>

North Carolina has a history of combining preemption of multiple topics. For example, in 2013, North Carolina combined preemption of private and public lawsuits against the restaurant industry together with preemption of local regulation over portion sizes.<sup>4</sup> However, the state's need to repeal preemption in 2017 occurred because the legislature combined preemption of local antidiscrimination and employee benefits laws with a novel and discriminatory state requirement to "ensure that multiple occupancy restrooms, showers, and other similar facilities be 'designated for and only used by' persons based on the 'biological sex' listed on their birth certificate."<sup>29</sup> This law led to a lawsuit, negative media attention, and businesses boycotting the state, which created economic and political pressure to repeal.<sup>30</sup> Because North Carolina reenacted the preemption portions of the law, it is unknown whether it will indeed expire in 2020 or whether the legislature will take up the issue again.

State legislators outside of North Carolina seemed to strategically select specific types of bills to which they added preemption. Of the 4 bills where preemptive clauses were added to pre-existing bills, 2 were instances where preemption of a public health topic (tobacco control and paid sick leave) was added to a bill that would have broad public health and community support (funding dialysis centers and banning puppy mills). The other 2 preemptive clauses were added to state budget bills with multiple topics and thus multiple stakeholders. Legislators are thus adding preemption to bills that have strong or widespread support, making it more difficult for preemption opponents to contest or ultimately defeat the bill.

During the study period, 1 additional state preempted litigation by private and public individuals and entities, including local governments, against the firearm industry. Previous research identified 33 states that had preempted lawsuits against the firearm industry before the study period<sup>12</sup> and 26 states that had previously

**Table 3.** Punitive Preemption Laws Enacted 2014–2018

<b>State: law/ amendment added/ enacted (year)</b>	<b>Sue locality/causes of action/fine</b>	<b>Defense locality mentioned</b>	<b>Sue person</b>	<b>Defense person mentioned</b>	<b>Who can sue?</b>
Arizona; A.R.S. § 13–3108 (2016)	Yes/ civil penalty of up to \$50,000 against the political subdivision. Can sue for declaratory and injunctive relief and actual damages; if the plaintiff prevails, plaintiff can also get: (1) reasonable attorney fees and costs. (2) the actual damages incurred not to exceed \$100,000.	It is not a defense that the political subdivision was acting in good faith or on the advice of counsel	Yes/person may be subject to termination	No	A person or an organization whose membership is adversely affected by a preempted ordinance, regulation, tax, measure, directive, rule, enactment, or policy of a political subdivision
Iowa; Iowa Code § 724.28 (2017)	Yes/declaratory and injunctive relief for damages.	No	Not specified	No	A person adversely affected by a preempted ordinance, measure, enactment, rule, resolution, motion, or policy of a political subdivision
Mississippi; Miss. Code Ann. § 45-9-53 (2014)	Yes/permanent injunction against county or municipality.	(Locality gets 30 days to cure)	Any elected county or municipal official under whose jurisdiction the violation occurred may be civilly liable for up to \$1,000 (unless s/he did not vote for or tried to cure violation); plus, all reasonable attorney’s fees and costs incurred by the party bringing the suit	Public funds may not be used to defend or reimburse officials who are found by the court to have violated this section.	A citizen of this state, or a person licensed to carry a concealed pistol or revolver. . . who is adversely affected by an ordinance or posted written notice adopted by a county or municipality
Nevada; Nev. Rev Stat Ann. §§ 268.418; 244.364; 269.222 (2015)	Yes/declaratory and injunctive relief and damages attributable to the violation. Plus: (1) reimbursement of actual damages, reasonable attorney’s fees, and costs incurred if, within 30 days after commencement of the action but before final determination, the locality repeals the preempted ordinance or regulation; (2) liquidated damages in an amount equal to 2 times the actual damages, reasonable attorney’s fees, and costs incurred if >30 days after commencement of the action but before final determination, the locality repeals the preempted ordinance or regulation; (3) liquidated damages in an amount equal to 3 × the actual damages, reasonable attorney’s fees and costs	No	Not specified	No	“Any person” or membership organization who is adversely affected by the enforcement of an ordinance or regulation by a city, county, or town

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**Table 3.** Punitive Preemption Laws Enacted 2014–2018 (continued)

State: law/ amendment added/ enacted (year)	Sue locality/causes of action/fine	Defense locality mentioned	Sue person	Defense person mentioned	Who can sue?
North Carolina; N.C. Gen. Stat. §§ 14-415.23; 14-409.40 (2015)	incurred by the person if the court's final determination is in favor of the person. Yes/ declaratory and injunctive relief and for actual damages; prevailing party awarded reasonable attorneys' fees and court costs.	No	Not specified	No	A person adversely affected by any ordinance, rule, or regulation promulgated or caused to be enforced by any unit of local government
Tennessee; Code Ann. § 39-17-1314 (2017)	Yes/ Declaratory and injunctive relief; and Damages, which are: (1) The greater of: (A) Actual damages, including consequential damages, attributable to the ordinance, resolution, policy, rule, or other enactment; or (B) 3 times the plaintiff's attorney's fees; (2) court costs, including fees; and (3) reasonable attorney's fees; provided, that attorney's fees shall not be awarded under this subdivision (3) if the plaintiff recovers under subdivision (1) (B).	No	Not specified but damages are only eligible from the county, city, town, municipality, or metropolitan government	No	An individual or membership organization that is adversely affected by an ordinance, resolution, policy, rule, or other enactment
Texas; Tex. Gov't Code § 411.209	Yes/if government entity states or implies that a license holder who is carrying a handgun is prohibited from a place owned or leased by the governmental entity, a state agency or a political subdivision is liable for a civil penalty of: (1) not <\$1,000 and not more than \$1,500 for the first violation; and (2) not <\$10,000 and not more than \$10,500 for the second or a subsequent violation. The attorney general may also file a petition for a writ of mandamus or apply for other appropriate equitable relief. The attorney general may recover reasonable expenses incurred in obtaining relief under this subsection, including court costs, reasonable attorney's fees, investigative costs, witness fees, and deposition costs.	No	No	No	An individual can file a complaint with the attorney general and then the attorney general or appropriate county or district attorney may sue to collect the civil penalty (penalty deposited into the victims of crime fund)



preempted lawsuits against the food industry.<sup>4</sup> By preempting lawsuits against entire industries, legislatures have reduced the policy agenda—setting and transparency benefits of litigation.<sup>9,13</sup> Preempting litigation may also further deregulatory objectives because lawsuits have been found to educate the public on the need for increased regulation or spur voluntary changes by industries seeking to reduce their exposure to legal liability.<sup>9,13</sup>

This research identified 7 new punitive preemption provisions enacted between 2014 and 2018. Before 2014, 3 states enacted similar laws (Florida,<sup>31</sup> Kentucky,<sup>32</sup> and Oklahoma<sup>33</sup>). At this point, punitive preemption has been enacted in the context of firearms, which, along with straightforward preemption in all 10 states, abrogates the ability of local officials to address the specific firearm violence concerns in their communities.<sup>14</sup> Even the threat of litigation, including the costs and fees related to defense, intimidates localities with limited resources and reduces the likelihood that preempted topics will ever be openly discussed in communities throughout the state.<sup>3</sup>

This study focused on strategies state legislatures used to pass and obscure preemption. Two states, Tennessee and North Carolina, preempt local authority in all 5 policy areas in this study. Previous research has documented the sheer volume of state preemption of public health policy areas. For example, as of January 2020, approximately 43 states preempt local control over firearms,<sup>12</sup> 23 states preempt local paid sick leave policies,<sup>15</sup> and 32 states have enacted at least 1 type of preemptive tobacco law.<sup>34</sup>

### Limitations

A major strength of this study is the review of the full text of preemptive bills and amendments enacted into law over a 5-year period in 5 public health policy areas. Potential limitations include a possible failure to capture all successful preemptive or punitive bills and amendments despite the thorough review of available databases. In addition, the authors may not have identified all strategies to pass preemption, including those not utilized during the 5-year period of interest in the policy areas, championed solely by industry entities, and not identifiable by reviewing the text of bills enacted into law alone. Examples of these latter strategies include the use of industry-drafted model legislation, ballot initiatives, strategies used in bills that failed, and preemption of ill-defined topics.<sup>7</sup> This warrants further research.

### CONCLUSIONS

Strategies employed by state policymakers and other proponents of preemption obscure public debate about preemption and the underlying public health and social

justice issues at stake. This research suggests that the use of strategies to obscure preemption may be accelerating. By doing so, state legislatures concentrate power at state capitals and limit the capacities of local governments to protect their residents from public health harms while minimizing the nation's ability to learn from local policy experiments aimed at improving public health.

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### SUPPLEMENTAL MATERIAL

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