

# STATE PREEMPTION OF LOCAL DEMOCRACY

Professor Sarah Fox  
Northern Illinois University College of Law  
[sarah.fox@niu.edu](mailto:sarah.fox@niu.edu)

Michigan Association of Municipal Attorneys—October 17, 2019

# CATEGORIES OF LOCAL AUTHORITY

- **Regulatory** – standard police power, which sometimes includes zoning
  - *E.g.*, Ohio: “local police, sanitary, and other similar regulations”
- **Structural** – freedom to choose “structure” of local government:
  - *E.g.*, partisan or non, strong-mayor or city manager, council elected at-large or by district, term limits, etc.
- **Personnel**
- **Fiscal** – tax, spend, borrow
  - Often highly circumscribed by other state constitutional provisions that limit taxing ability
- **Proprietary**
  - Authority to control city property, licensees, make contracts (and include policy-promoting terms therein)

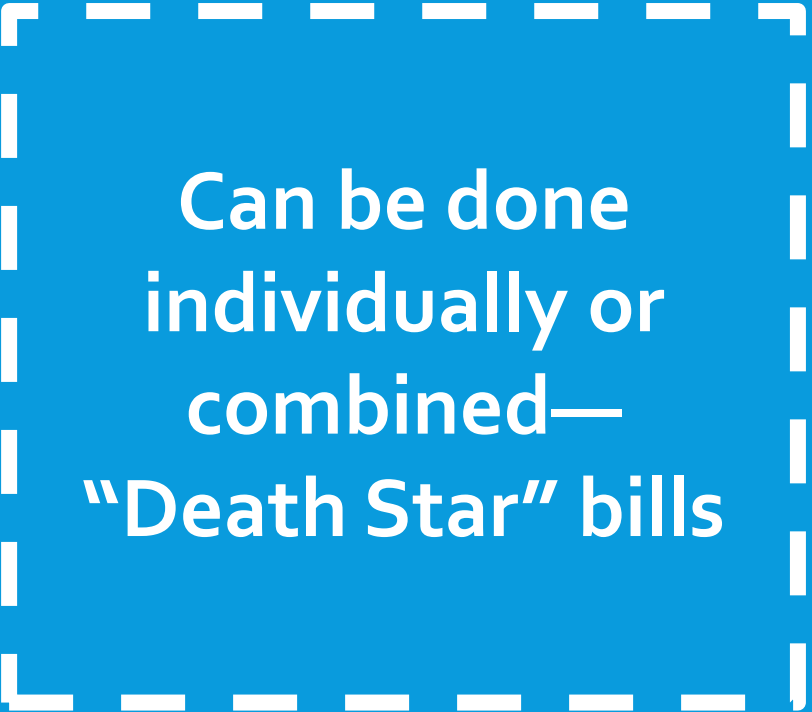
# NEW PREEMPTION

- Targeted political agenda
  - Generally aimed at progressive local policies
  - Industry/American Legislative Exchange Council (ALEC)-led effort
- Deregulatory
  - In many cases, preemption without substantive state legislation
- Punitive
  - Ineligibility for state funding
  - Contempt proceedings
  - Municipal liability

# NEW PREEMPTION IS OFTEN TARGETED

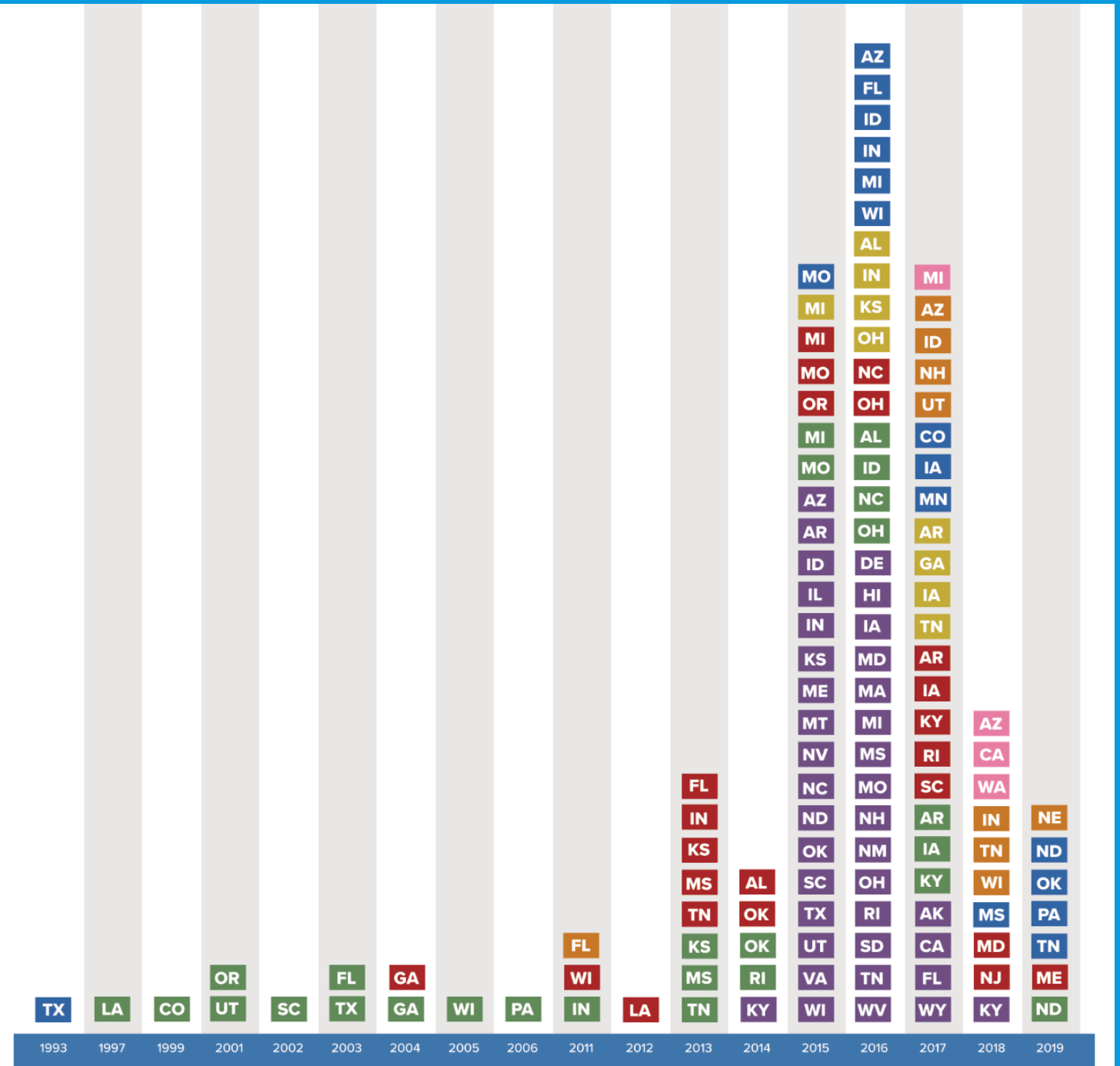
Wide array of subjects—some examples:

- Minimum wage
- Civil Rights
- Public health
  - Nutrition policy
  - Paid sick/family leave
  - E-Cigarettes/Tobacco
  - Gun control
- Environment
  - Fracking
  - Plastic bag bans
  - Zoning
- Immigration



Can be done  
individually or  
combined—  
“Death Star” bills

# Passage of State Legislation Preempting Local Laws About:



# TRENDS IN 2019

Close to 50  
preemption bills  
filed in FL; 62 in  
TX

Anti-sanctuary city  
and immigrant  
enforcement bills  
were filed in 26  
states

Equality  
Federation is  
tracking over 100  
anti-LGBTQ - not  
all of them  
preemption

# TRENDS IN 2019

- North Dakota became the 26th state to preempt local minimum wage laws.
- Oklahoma, Pennsylvania and Tennessee became the 13th, 14th, and 15th states to ban local plastic bags bans.
- Arkansas and Florida became the 10th and 11th states to prohibit the establishment of “sanctuary cities.”
- Maine became the 23rd state to bar local action on paid sick time.
- Pennsylvania is poised to become the 24th state to bar local regulation of 5G small wireless cell deployment.

# NEW PREEMPTION IS OFTEN PUNITIVE

Example:

Local governments that fail to comply with anti-sanctuary city laws will—

Arkansas SB  
411

*Be ineligible for  
state funds or  
grants*

Florida SB 168

*Face contempt  
proceedings,  
removal from  
office*

Montana HB  
146

*Face civil action  
(vetoed by the  
Governor)*

North Carolina  
HB 135

*Trigger loss of  
state funding*



# NEW PREEMPTION ERODES CORE LOCAL POWERS

Municipal  
Election Laws

*AZ*

Contracting  
Powers

*WI, AZ*

Taxing &  
Spending—  
Property Tax,  
Spending Caps

*IA, TX, FL*

Zoning—  
Short-term  
Rentals,  
Vegetable  
Gardens

*Multiple States*

# NEW PREEMPTION ERODES CORE LOCAL POWERS

## TX HB 281

*Bans cities from  
hiring lobbyists,  
joining Municipal  
League*

## FL SB 1140 / HB 829

*Requires localities to  
pay legal fees, etc. to  
winners of  
preemption lawsuits*

## AZ HB 2115

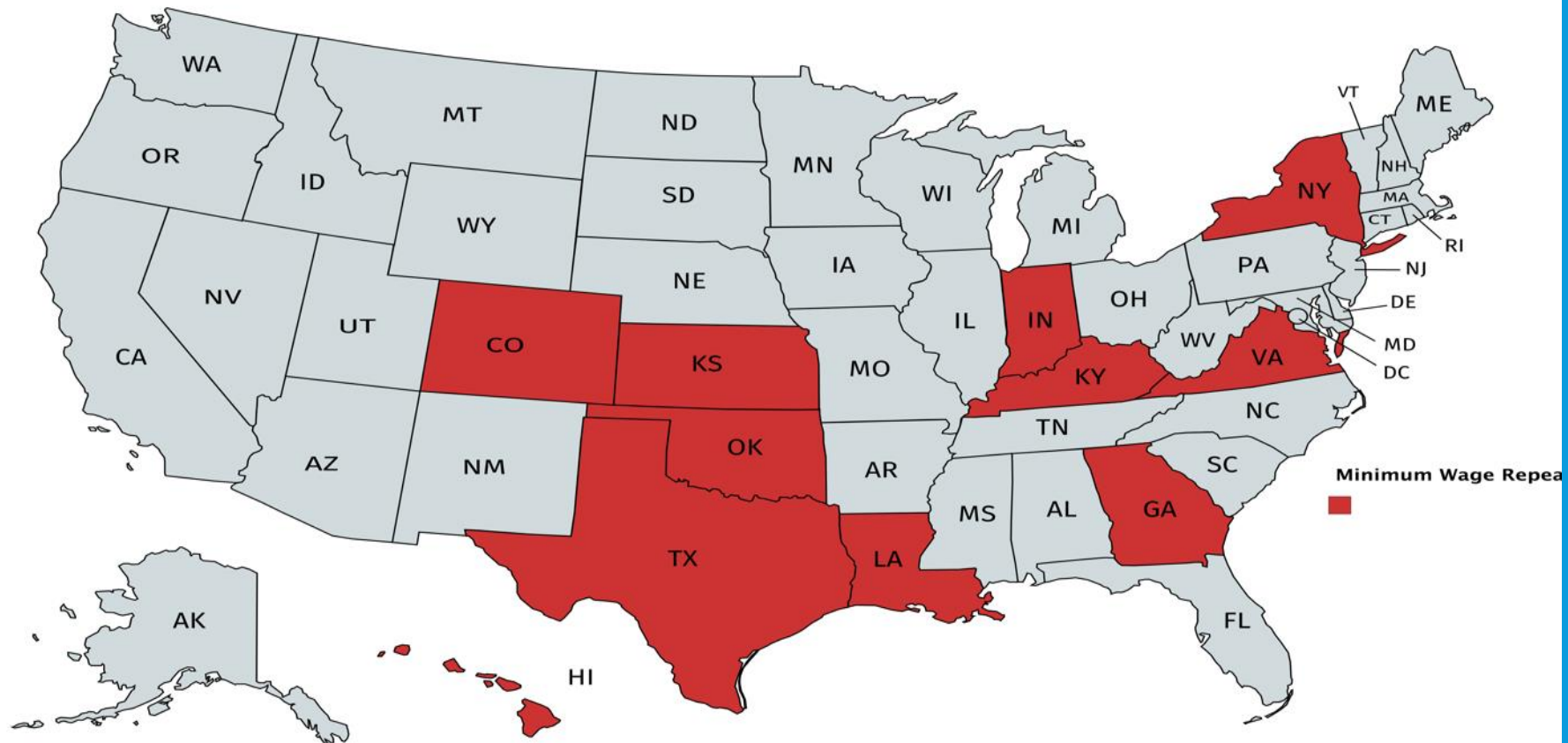
*Declares the  
regulation of  
landlords and tenants  
a statewide concern*

# NEW PREEMPTION IS BROAD

Florida HB 3 would have imposed sweeping and severe limitations on the ability of local governments to pass laws regulating businesses

Texas HB 3899 would have prohibited any municipality from imposing a restriction, condition, or regulation on commercial activity

# ENCOURAGING NEW TREND? REPEAL BILLS



# MICHIGAN REPEAL EFFORT – HB 4500

- introduced April 24, 2019; currently in committee
- would repeal existing law preempting local ordinances regulating the use, disposition, or sale of, prohibiting or restricting, or imposing any fee, charge, or tax on certain containers

# LEGAL STRATEGIES FOR COUNTERING NEW PREEMPTION

- **State Constitutional Challenges**
  - Direct constitutional home rule immunity claims
  - Generality and anti-special legislation claims
  - Procedural claims
- **Federal Constitutional Challenges**
- **Punitive Preemption Challenges**

# NEW PREEMPTION IN THE COURTS

## Examples:

- State ex rel Brnovich v. Tucson, 399 P.3d 663 (Ariz. 2017)
- Protect Fayetteville v. Fayetteville, 510 SW.3d 258 (Ark. 2017)
- Cooperative Home Care v. St. Louis, 514 S.W.3d 571 (Mo. 2017)
- Florida Carry v. Tallahassee, 212 So.3d 452 (Fl. D. Ct. App. 2017)
- Cleveland v. Ohio, 90 N.E.3d 979 (Ohio Ct. App. 2017)
- El Cenizo v. Texas, 264 F.Supp.3d 744 (W.D. Tex. 2017), aff'd in part, 890 F.3d 164(5<sup>th</sup> Cir. 2018)
- Laredo v. Laredo Merchants Ass'n, 550 S.W.3d 586 (Tex. 2018)
- Lewis v. Governor of Alabama, 896 F.3d 1282 (11<sup>th</sup> Cir. 2018)

# NEW PREEMPTION IN THE COURTS

## Examples – The Issues

- Workplace equity (*Coop. Home Care, Cleveland, Lewis*)
- Firearms regulation (*Florida Carry, Brnovich*)
- Sexual preference (*Fayetteville*)
- Immigration (sanctuary) (*El Cenizo*)
- Plastic bag regulation (*Laredo*)
- Punitive preemption (*Florida Carry, Brnovich, El Cenizo*)



# NEW PREEMPTION IN THE COURTS

## Examples – The Doctrines

- Home Rule/State Power (*Florida Carry, Brnovich, Cleveland, Fayetteville, Laredo*)
- Single-Subject Rule (*Cooperative Home Care*)
- Special Legislation/General Law (*Cleveland*)
- First Amendment (*El Cenizo*)
- Fourteenth Amendment Equal Protection (*Lewis*)

# NEW PREEMPTION IN THE COURTS

## Examples – The Results

- Ordinances validly preempted (*Brnovich, Fayetteville, Laredo*)
- State law struck down (*Cooperative Home Care, Cleveland\**)
- State law enjoined in part (*El Cenizo*)
- State law not violated (*Florida Carry*)
- Claim survives motion to dismiss (*Lewis*)

# PROTECT FAYETTEVILLE V. CITY OF FAYETTEVILLE

City Council adopts an ordinance extending civil rights to “lesbian, gay, bisexual, and transgender citizens and visitors.”

Voters approve at special election.

Arkansas passes Act 137, the Intrastate Commerce Improvement Act, providing that local governments “shall not adopt or enforce an ordinance, resolution, rule or policy that creates a protected classification or prohibits discrimination *on a basis not contained in state law*”

Arkansas Civil Rights Act does not protect the groups that would be protected by the Fayetteville ordinance.

Protect Fayetteville sues to block the ordinance; State joins case

# PROTECT FAYETTEVILLE V. CITY OF FAYETTEVILLE

Supreme Court invalidates ordinance

Act 137 clearly stated its purpose of “ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations.”

Local governments cannot extend these protections. Various laws cited by the city and the circuit court as providing some protections to LGBT and transsexuals “are unrelated to nondiscrimination laws and obligations and do not create protected classifications or prohibit discrimination....”

Fayetteville ordinance is inconsistent with state law and is an “obstacle” to the objectives and purposes of the Act

# FLORIDA CARRY, INC. V. CITY OF TALLAHASSEE

- In 1987, Florida “occup[ied] the whole field of regulation of firearms and ammunition”
- In 2011, Florida adopted “penalty provisions” for enactment and enforcement of local firearms regulation:
  - includes civil fine, no public funds for defense against claim, removal from office;
  - suit may be brought by any person or membership organization affected by any ordinance ... “promulgated or caused to be enforced” in violation of preemption

# FLORIDA CARRY, INC. V. CITY OF TALLAHASSEE

Two Tallahassee ordinances, from 1957 and 1984, that prohibit certain discharges of firearms, including in City parks, included in in 2003 recodification of City Code, but unenforceable

Florida Carry sues to force repeal of the ordinances; City Commission debates, but votes to table repeal indefinitely

Florida Carry sues City, Mayor and individual Commissioners under penalty provisions

# FLORIDA CARRY, INC. V. CITY OF TALLAHASSEE

Summary judgment for defendants

- The firearms provisions were not being enforced
- Tabling motion to repeal is not the “promulgating” that the statute punishes

Court declines to address defendants’ cross-appeal that the punitive provisions violate principles of legislative immunity and right of free speech because defendants didn’t violate the law and so were not subject to penalties

# COOPERATIVE HOME CARE, INC. V. CITY OF ST. LOUIS

St. Louis adopts an increase in the minimum wage and plaintiff challenges, arguing local authority and preemption

State Supreme Court holds City's home rule authority includes power to set minimum wage

Also holds that higher local minimum wage does not conflict with state minimum and state minimum wage does not occupy the minimum wage field

Express preemption law is invalid because it was part of a bill that violated the state constitution's "single-subject" requirement



# NEW PREEMPTION IN MICHIGAN

## The Local Government Labor Regulatory Limitation Act

Mich. Comp. Laws 123.1381 et seq.

- Removes the authority of local governments to adopt, enforce, or administer local laws or policies on a variety of subjects, including:
  - Employee background checks
  - Minimum wages
  - Fringe benefits
  - Paid/unpaid leave
  - Work stoppages

# NEW PREEMPTION IN MICHIGAN

## **Mich. Comp. Laws 123.713 (2017)**

- Removes authority of local governments to impose a tax or fee on the manufacture, distribution, wholesale sale, or retail sale of soda and food products

## **Mich. Comp. Laws 123.1102 (2016)**

- Removes authority of local governments to impose a tax, fee, or licensing requirements on, among other entities, “transportation network companies,” and eliminates authority of local governments to pass ordinances regarding such companies and others except as in accordance with the state act

## **Mich. Comp. Laws 123.1102 (1990)**

- Removes authority of local governments to impose restrictions on ownership, registration, purchase, sale, transfer, transportation, or possession of firearms

# LOCAL SOLUTIONS SUPPORT CENTER

A national hub that coordinates and creates efforts to counter the abuse of preemption and strengthen local democracy.

Goals are to raise awareness of state preemption and its consequences, reduce the use of this threat to democracy, and strengthen the power of cities to advance policies that promote equity, inclusion, public health, and civic participation.

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

QUESTIONS?