

# THE FIREARM PREEMPTION PHENOMENON

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*Forty-five states have adopted express preemption statutes curtailing or entirely prohibiting local gun regulation, and several jurisdictions now threaten localities with penalties for violating such restrictions. These measures have been remarkably effective in reducing the breadth and variety of gun laws nationwide, but their consequences have only just begun to attract attention. Public debates over guns tend to center on the Second Amendment while overlooking state-level obstacles to local lawmaking, and the scholarship on state-local preemption lacks an analysis devoted exclusively to the gun-policy space.*

*To fill these gaps, this Article provides a comprehensive account of the firearm preemption phenomenon. Part I argues for greater local autonomy with respect to gun rights and regulations, highlighting what is at stake when states preclude communities from responding to local problems and preferences. In Part II, the Article traces the rise of firearm preemption and offers a framework for classifying the relevant statutes. Part III examines the mechanisms through which these laws derail local gun policymaking, and Part IV evaluates strategies for restoring and expanding local authority over firearms.*

*Ultimately, the Article demonstrates that state preemption is the primary barrier to local gun regulation and a severe constraint on opportunities for addressing many firearm-related challenges. Absent a concerted effort to scale back firearm preemption provisions, local governments will remain incapable of realizing their potential as sites for effective gun lawmaking. These conclusions yield new insights for both the firearms-law literature specifically and the ongoing dialogue around state-local relations more broadly.*

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## INTRODUCTION

In the weeks after a mass shooting claimed seventeen lives at a high school in Parkland, Florida, intensifying frustration with state and federal inaction on gun reform prompted concerned citizens to press demands for change at the local level.<sup>1</sup> Leaders in Coral Gables were among the first to heed this call, unveiling in February 2018 what would have become Florida’s “first citywide ban on [military-style] assault rifles.”<sup>2</sup> The city’s mayor expressed high hopes for the measure, which he described as an integral “domino in the process of improving . . . safety” statewide.<sup>3</sup>

Just one month later, city officials announced that they had no choice but to abandon their plan.<sup>4</sup> The municipality could not risk defying section 790.33 of Florida’s state code, a provision proclaiming the legislature’s intent to “occupy[] the whole field of regulation of firearms . . . to the exclusion of all” local measures.<sup>5</sup> This preemption statute not only deems all local gun policies “null and void,” but also

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<sup>1</sup> See, e.g., Ray Sanchez, Chris Boyette & Elliott C. McLaughlin, *Florida Legislature Rejects Weapons Ban with Massacre Survivors En Route to Capitol*, CNN (Feb. 21, 2018, 9:31 AM), <https://www.cnn.com/2018/02/20/us/florida-legislature-weapons-ban/index.html> [<https://perma.cc/A3YK-DACY>]; Nicholas Fandos & Thomas Kaplan, *Frustration Grows as Congress Shows Inability to Pass Even Modest Gun Measures*, N.Y. TIMES (Feb. 15, 2018), <https://nyti.ms/2BxHsRZ> [<https://perma.cc/VV9P-3N5C>].

<sup>2</sup> Douglas Hanks, *The Short Life of a City Gun Ban in Florida: Coral Gables Drops Plan to Defy the State*, MIA. HERALD (Mar. 20, 2018, 7:42 PM), <https://www.miamiherald.com/news/local/community/miami-dade/article206115859.html> (last visited Feb. 19, 2022).

<sup>3</sup> Douglas Hanks, *Daring Florida to Oust Them, City Commissioners Pursue Their Own Ban on Assault Rifles*, MIA. HERALD (Feb. 28, 2018, 7:30 PM), <https://www.miamiherald.com/news/local/community/miami-dade/article202523304.html> (last visited Feb. 19, 2022).

<sup>4</sup> Hanks, *supra* note 2.

<sup>5</sup> FLA. STAT. § 790.33 (2021).

threatens local governments and officials with serious penalties—including removal from office, hefty personal fines, and massive municipal liabilities—for violating the state’s restriction.<sup>6</sup> Coral Gables policymakers quickly realized that these sanctions were “too severe to ignore,” and dismayed local leaders dropped their proposal to avoid “millions of dollars” in potential costs.<sup>7</sup> The city now ranks among the many Florida localities that have considered acting on recent calls for more stringent gun regulation, only to back down when faced with the consequences of the state’s firearm preemption law.<sup>8</sup>

State-local preemption, or the notion that state law supersedes any inconsistent local measure, is certainly nothing new. In a traditional preemption dispute, a court is tasked with determining whether “a new local law conflict[s] with preexisting state law,”<sup>9</sup> and that conflict may be either “express” or “implied.” Express preemption is relatively straightforward: state laws that explicitly bar localities from enacting certain regulations will prevail over contrary local policies.<sup>10</sup> The implied preemption analysis tends to vary more from one jurisdiction to another, but the inquiry usually boils down to whether or not a particular state statute evinces an implicit legislative intent to displace local law.<sup>11</sup> Whether “express” or “implied,” a judicially identified conflict between a state law and a local regulation renders the latter void and unenforceable.

This traditional form of preemption has long played an essential role in structuring the state-local relationship. Classic preemption disputes routinely “determine[] the degree to which state policies [can] coexist with local additions or variations,” thereby “harmoniz[ing] the efforts of different levels of government in areas [where] both enjoy regulatory authority.”<sup>12</sup> Preemption can also be useful in mitigating the potential costs of localism: for example, states can override certain local

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<sup>6</sup> *Id.*; see also Hanks, *supra* note 2.

<sup>7</sup> Hanks, *supra* note 2.

<sup>8</sup> See Lisa J. Huriash, *These 10 Cities Want to Regulate Guns. They Sued Florida over It.*, SUN SENTINEL (Apr. 2, 2018, 4:45 PM), <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-reg-cities-sue-for-gun-laws-20180402-story.html> [https://perma.cc/ZX8K-4FGV].

<sup>9</sup> Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018) [hereinafter Briffault, *The New Preemption*].

<sup>10</sup> Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2233 (2017).

<sup>11</sup> See RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 466 (8th ed. 2016); Phillips, *supra* note 10, at 2234–35 (providing a summary of implied preemption principles).

<sup>12</sup> Briffault, *The New Preemption*, *supra* note 9, at 1997.

laws to ensure that specific policies are administered uniformly or to rein in local actions with negative extraterritorial effects.<sup>13</sup>

In the past few decades, however, increasing state hostility toward localities has spawned an “explosion” of express preemption statutes that stifle regulation across a “wide range of policy areas.”<sup>14</sup> Several scholars have offered detailed evaluations of this trend, documenting aggressive state efforts to preempt local policies on paid sick leave, climate change, living wage ordinances, employment discrimination, food establishments, and smoking, to name a few.<sup>15</sup> These sweeping preemption statutes often “displace local action without replacing it with substantive state requirements,” making clear that such laws are aimed “not at coordinating state and local regulation but at preventing any regulation at all.”<sup>16</sup>

Even more troubling is the recent emergence of statutory provisions that impose harsh consequences on local governments for adopting prohibited regulations, a phenomenon described interchangeably as “punitive preemption” or “hyper preemption.”<sup>17</sup> In a growing number of states, localities with potentially preempted laws not only face the prospect that those rules will be invalidated, but also risk inviting civil liability, financial sanctions, removal from office, or criminal penalties.<sup>18</sup> These punitive measures, which significantly raise the stakes of violating a preemption statute, are designed to deter regulatory efforts among local officials who might otherwise be inclined to test the bounds of their authority.

No policy issue better exemplifies these trends than firearm regulation, which has proven to be the most popular target of express state-local preemption. The Florida statute described above is illustrative. Aggressive firearm preemption measures first surfaced in

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<sup>13</sup> See BRIFFAULT & REYNOLDS, *supra* note 11, at 468.

<sup>14</sup> Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1164, 1166–67 (2018).

<sup>15</sup> See, e.g., Briffault, *The New Preemption*, *supra* note 9, at 1998–2008; Schragger, *supra* note 14, at 1169–84; Phillips, *supra* note 10, at 2225–53; see also NICOLE DUPUIS ET AL., NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS: 2018 UPDATE 6–24 (2d ed. 2018), <https://www.nlc.org/resource/city-rights-in-an-era-of-preemption-a-state-by-state-analysis> [<https://perma.cc/V6CX-4YAH>].

<sup>16</sup> Briffault, *The New Preemption*, *supra* note 9, at 1997.

<sup>17</sup> Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1494–95 (2018); RICHARD BRIFFAULT, LOC. SOLS. SUPPORT CTR., PUNITIVE PREEMPTION: AN UNPRECEDENTED ATTACK ON LOCAL DEMOCRACY 11–12 (2018), <https://www.abetterbalance.org/wp-content/uploads/2018/10/Punitive-Preemption-White-Paper-FINAL-8.6.18.pdf> [<https://perma.cc/J6TU-8N4G>] [hereinafter BRIFFAULT, PUNITIVE PREEMPTION].

<sup>18</sup> See BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17; Scharff, *supra* note 17, at 1495–1507.

the early 1980s, when legislators in Florida and many other states encountered mounting interest-group pressure to block local gun rules. Forty-five states have since adopted express preemption statutes that curtail or entirely eliminate local capacity to pursue firearm policies beyond those in place under state and federal law.<sup>19</sup> Florida also counts itself among the class of states that have taken these restrictions even further, embracing punitive provisions that threaten localities with sanctions for firearm preemption violations. These patterns mark a sharp departure from tradition, as “local autonomy with regard to gun regulation was the norm throughout most of American history.”<sup>20</sup>

Though firearm preemption is widespread, its consequences have only just begun to attract public attention. Political debates over gun rights and restrictions tend to center instead on the Second Amendment, resulting in a constitutionally oriented popular discourse that overlooks legislative barriers to gun regulation. Further, while many scholars have evaluated recent trends in state-local preemption generally, few have focused exclusively on the firearm space. Accordingly, the discussion below provides a descriptive account of the firearm preemption phenomenon, tracing the history, contours, and effects of a statutory landscape that currently amounts to the most severe legal constraint on local gun policy.

This Article also makes the case for dismantling—or at the very least, dramatically scaling back—broad firearm preemption measures, a shift that would leave localities with the flexibility to supplement whatever regulatory floor exists under state and federal law. The result would be a distribution of state-local power that allows for more effective, creative, and responsive firearm lawmaking. Local governments would be free to craft and test policies that reflect community preferences and that target distinct gun-related problems within their borders. Relatedly, in states where political deadlock often stymies progress on firearm issues, local regulatory authority could supply a mechanism for meaningful compromise: localities with high rates of gun violence and significant demand for stricter laws could take action to meet those needs, relieving pressure on state legislatures where rural and conservative interests exercise disproportionate influence. In short, local governments can play a vital role in developing a firearm regulatory regime that is both comprehensive and politically sustainable, one that works to reduce gun violence substantially while accommodating diverse firearm-related attitudes. But absent a

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<sup>19</sup> Briffault, *The New Preemption*, *supra* note 9, at 1999. This count includes Colorado, which recently repealed its firearm preemption legislation in large part but left certain narrow provisions in place. *See infra* text accompanying notes 174–76.

<sup>20</sup> Joseph Blocher, *Firearm Localism*, 123 *YALE L.J.* 82, 133 (2013).

concerted effort to roll back firearm preemption provisions, local governments will remain incapable of realizing this potential.

Some caveats and qualifications must be addressed up front. First, this analysis proceeds on the assumption that reasonable local gun laws are compatible with contemporary Second Amendment jurisprudence, as scholars have demonstrated elsewhere.<sup>21</sup> The arguments here should not be taken to suggest that greater local autonomy over firearms would “exempt” localities from constitutional requirements.<sup>22</sup> Indeed, broad state preemption provisions—often framed as essential safeguards against the infringement of constitutional rights—tend to obliterate more local power than is actually necessary to protect Second Amendment interests. The takeaway, then, is that rolling back state preemption provisions would allow local governments to tailor and implement additional gun regulations in a manner that is consistent with, not violative of, Second Amendment precedent.

Second, in stressing the value of local gun policy, this Article in no way seeks to diminish the role that state and federal lawmaking must play in crafting a comprehensive firearm regulatory scheme. Nor does the Article contend that *all* firearm laws can or should be administered at the local level. As with any other general policy area, certain issues in the firearm space will be more susceptible to local regulation than others. For example, while localities are well positioned to adopt and enforce public-carry rules that reflect community norms and public safety needs, other matters—such as firearm manufacturing, background checks, or illicit arms trafficking—are better addressed at higher levels of government. For this Article’s purposes, though, the fundamental point is that local governments are uniquely situated to implement targeted solutions for a range of gun-related problems—a function that is all the more critical when sensible proposals for state

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<sup>21</sup> Professor Joseph Blocher, for example, offers a compelling argument for “firearm localism,” or the notion that constitutional understandings of firearm rights “can and should incorporate the longstanding and sensible differences regarding guns and gun control in rural and urban areas.” *Id.* at 85. Blocher demonstrates that geographic variation in gun regulations is consistent with longstanding historical tradition and can be squared with contemporary Second Amendment jurisprudence. *See id.* at 84–90, 107–24, 140–46. Indeed, the significant body of case law upholding local and municipal gun regulations in the wake of *Heller v. District of Columbia*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), reinforces Blocher’s conclusion that the local tailoring of firearm policies is constitutionally viable. *See, e.g.*, *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018); *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012).

<sup>22</sup> *Cf.* Blocher, *supra* note 20, at 89 (“Firearm localism would not exempt cities from the Second Amendment, nor would it permit evisceration of the right to keep and bear arms for self-defense. It would instead mean giving cities extra leeway with regard to matters like the regulation of assault weapons or concealed carrying.”).

and federal reform, many of which enjoy broad popular support, are so easily thwarted.

Third, the intent here is not to cast preemption itself as a categorical evil. If applied with precision and care, preemption might serve as a valuable tool in calibrating a firearm scheme that strikes an appropriate balance between state and local regulatory power. States could, for example, narrowly supplant certain local laws with their own gun regulations to advance interests in uniformity and administrative efficiency, while still leaving localities with substantial latitude to adopt firearm-related rules. But in most states, the purpose of statutory firearm preemption was never to finetune a policy framework that more effectively synchronizes state and local regulation. Instead, many legislatures have wielded preemption as a bludgeon, wiping out local control over huge swaths of firearm lawmaking. The goal often was, and remains, deregulatory: localities are frequently preempted in gun-related policy areas where the state itself has not enacted any substantive measures. In short, the problem is not necessarily preemption *per se*, but rather, the aggressive and deliberate use of that power to suppress local action. While the exact costs of expansive firearm preemption legislation cannot be quantified, considerable anecdotal evidence suggests that many localities would have implemented more robust regulatory regimes absent these laws.

That said, this Article does not intend to understate the prevalence of local gun rules in the current regulatory landscape: local ordinances that have *not* been preempted still comprise a majority of all firearm laws on the books nationwide.<sup>23</sup> But rather than undermine the general critique of firearm preemption, this datapoint simply reinforces the notion that localities can serve as crucial sites for shaping and implementing gun policy—at least when state legislatures give them the leeway to do so.

The remainder of this Article is organized as follows: Part I explores the virtues of greater local flexibility in the firearm context, highlighting exactly what is at stake when states prevent localities from responding to local gun-related needs and preferences. These restrictions on local lawmaking are examined in Part II, which traces the rise of firearm preemption measures and offers what appears to be

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<sup>23</sup> See ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 181 (Christopher J. Kelaher ed., 1st ed. 1995) (noting the “central, often ignored fact” that a sizeable majority of American gun regulations “exist at the state and local levels”). See generally LEGAL CMTY. AGAINST VIOLENCE, *REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS* (2008), <https://www.issueab.org/resources/483/483.pdf> [<https://perma.cc/A5TZ-ETCE>] (surveying federal, state, and local laws across six areas of gun policy).

the first detailed framework for classifying such laws. Part III then turns to concrete examples of state-local clashes over gun regulation to illustrate the mechanisms through which preemption statutes derail and deter firearm policymaking in practice. The path forward is explored in Part IV, where the Article highlights key considerations for audiences interested in scaling back firearm preemption. After demonstrating the limited utility of legal challenges to state preemption measures, this Part identifies a range of political possibilities for chipping away at limitations on local gun laws. The Article ultimately ends with a call to action, urging greater mobilization around the issue of preemption to create space for local progress on firearm rights and regulations.

#### I. THE CASE FOR GREATER LOCAL AUTONOMY IN FIREARM REGULATION

The implications of state firearm preemption cannot be fully appreciated without first recognizing the benefits to be derived from local action on certain gun issues. Those benefits are the subject of this Part, which first summarizes the legal principles governing local power and then examines the salience of common arguments for localism within the firearms context. The discussion demonstrates the value in permitting localities to supplement state and federal law with their own firearm policies, a lesson that underscores the opportunities lost when legislatures aggressively preempt local gun laws.

##### A. *An Overview: The Legal Status of Local Governments*

A brief overview of basic principles governing the legal status of localities provides necessary context for evaluating the arguments in favor of local control over firearms. In the federal system, local governments were traditionally viewed as “convenient agencies” or “political subdivisions” of the state without any inherent power to act.<sup>24</sup> That understanding has animated a longstanding principle known as “Dillon’s Rule,” or the default assumption that localities cannot exercise any powers beyond those conferred via specific grants of authority from the state.<sup>25</sup> Local governments operating under this regime were

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<sup>24</sup> *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

<sup>25</sup> JOHN F. DILLON, 1 *THE LAW OF MUNICIPAL CORPORATIONS* § 9b, at 93 (2d ed. 1873) (“[Municipalities] possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or other statutes applicable to them.”); see also BRIFFAULT & REYNOLDS, *supra* note 11, at 327–30.

empowered to act only on a “narrow range of subjects” and enjoyed minimal “opportunities . . . to engage in substantive policymaking.”<sup>26</sup> Few local actions raised preemption questions under a Dillon’s Rule system, as “state and local regulation rarely overlapped.”<sup>27</sup>

Beginning in the late nineteenth century, growing dissatisfaction with local powerlessness prompted a “pro-democratic effort to increase local autonomy.”<sup>28</sup> The product of that movement was the widespread embrace of “home rule,” or a “commitment to local lawmaking capacity codified in the constitutions and statutes of the vast majority of states.”<sup>29</sup> All but three states have enacted some sort of home rule provision: forty-one states have authorized home rule through constitutional amendments, and an additional six have done so via statute.<sup>30</sup>

While the contours of these provisions differ from state to state, their common purpose was to grant local governments a significant degree of autonomy over their own affairs.<sup>31</sup> Home rule has “vastly expanded the areas in which [localities can] govern,”<sup>32</sup> allowing local governments to take action on various issues without specific authorization from the state. This broadening of local power, however, increased “the potential for much greater overlap between state and local legislation,” resulting in more frequent clashes over competing laws that touch on the same regulatory space.<sup>33</sup> Typically, these conflicts have been resolved through a traditional preemption inquiry, in which a court determines whether or not state law displaces the local regulation at issue. Preemption has thus served as the “primary battleground for determining the parameters of local authority in modern home-rule regimes.”<sup>34</sup>

The “steady expansion” of home rule since the late nineteenth century “demonstrates the widespread popularity of local autonomy.”<sup>35</sup>

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<sup>26</sup> Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1123 (2007) [hereinafter Diller, *Intrastate Preemption*].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1124; see also BRIFFAULT & REYNOLDS, *supra* note 11, at 330.

<sup>29</sup> Briffault, *The New Preemption*, *supra* note 9, at 2011.

<sup>30</sup> *Id.* at 2011 n.111; see Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045 app. B at 1105–14 (2017) (providing state-by-state summaries of home rule provisions and the powers available to local governments).

<sup>31</sup> See BRIFFAULT & REYNOLDS, *supra* note 11, at 330 (defining “home rule” as an “expansion of local decision-making authority” that provides “some local governments with broad powers to act” even absent “specific state authorization”).

<sup>32</sup> Diller, *Intrastate Preemption*, *supra* note 26, at 1126.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1127.

<sup>35</sup> *Id.*

The following Section examines the normative justifications for such autonomy, focusing specifically on their relevance to firearm policy.

### B. *Making the Case for Local Power to Regulate Firearms*

The legal principles outlined above provide the backdrop for recurring debates over the virtues and vices of localism. Though these disputes often take on a partisan valence, scholars have identified a number of normative and institutional arguments that justify local autonomy for its own sake.<sup>36</sup> Local empowerment, for example, provides citizens with “opportunities for participation in public decision making . . . that are simply unavailable” at the state or federal level.<sup>37</sup> Greater autonomy fosters a sense of “community” and cohesion, for it allows residents to “engage in self-government” based on “shared concerns and values.”<sup>38</sup> Proponents of localism also point to its utility as a “form of decentralization”: local governments can “take into account varying local needs” and “tailor public services and regulation to their particular communities.”<sup>39</sup> Relatedly, localities “provide thousands of arenas for innovation,”<sup>40</sup> where local officials can lead the way in testing and refining new policies.<sup>41</sup> Professor Richard Briffault offers a succinct distillation of these arguments, describing “grass-roots participation, intergovernmental competition, political responsiveness, subnational

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<sup>36</sup> Cf. Briffault, *The New Preemption*, *supra* note 9, at 2027. For some compelling and oft-cited defenses of localism, see generally David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999), and Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253 (2004) [hereinafter Briffault, *Home Rule for the Twenty-First Century*].

<sup>37</sup> Briffault, *Home Rule for the Twenty-First Century*, *supra* note 36, at 258.

<sup>38</sup> *Id.* at 259; see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1151 (1980) (arguing that cities and other local governments can serve as “vehicle[s] for new forms of association and popular participation”).

<sup>39</sup> Briffault, *Home Rule for the Twenty-First Century*, *supra* note 36, at 258–59; see also Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1256–57 (2014) (arguing that the “smaller scale of local government,” “lower constituents-to-official ratio[s],” “physical proximity of government decisionmakers to their constituents,” and streamlined legislative processes facilitate policymaking that better reflects community interests).

<sup>40</sup> Briffault, *Home Rule for the Twenty-First Century*, *supra* note 36, at 259.

<sup>41</sup> See Frug, *supra* note 38, at 1151–52 (“[O]ne advantage of decentralization is the possibility of experimentation . . . [I]f some successes are achieved, changes in the city entity could spread in other directions.”); see also Diller, *supra* note 39, at 1271–80 (surveying a wide range of local innovations in public health policy).

diversity, and innovation” as the “values regularly associated with local autonomy.”<sup>42</sup>

Briffault, however, would be the first to acknowledge that local power is not always wielded for desirable ends.<sup>43</sup> Local governments might pursue agendas that “interfere with state regulatory programs” or undermine “legitimate state interests in uniformity.”<sup>44</sup> Broad local autonomy, many critics add, results in a hodgepodge of regulations and the concomitant uncertainty for parties striving to comply across multiple jurisdictions.<sup>45</sup> Localism may also morph into parochialism, as communities often exercise their power in ways that encourage isolation, exclude outsiders, and produce negative externalities for those beyond their borders.<sup>46</sup> The lesson, then, is that the state-local relationship is at its best when it strikes a proper balance between statewide policymaking and local control.<sup>47</sup> That balance need not look the same across all policy areas. States can afford broad local power in some spheres while constraining it in others, depending on the benefits and drawbacks of localized approaches to discrete substantive issues.

Applying that logic in the context of firearms, states would do well to leave local governments with substantial regulatory authority. To be sure, several critiques of localism remain relevant in this arena. Perhaps the most common criticism lodged against local firearm rules is that a patchwork of ordinances creates unpredictability for law-abiding gun owners.<sup>48</sup> Yet such compliance costs simply cannot outweigh the benefits of permitting variation in local gun laws, which are best

<sup>42</sup> Richard Briffault, “What About the ‘Ism?’” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1315 (1994) [hereinafter Briffault, *Contemporary Federalism*].

<sup>43</sup> See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 392–435 (1990) [hereinafter Briffault, *Our Localism: Part II*] (canvassing critiques and weaknesses of many justifications for localism).

<sup>44</sup> RICHARD BRIFFAULT ET AL., AM. CONST. SOC’Y, THE TROUBLING TURN IN STATE PREEMPTION: THE ASSAULT ON PROGRESSIVE CITIES AND HOW CITIES CAN RESPOND 5 (2017), [https://www.acslaw.org/wp-content/uploads/2017/09/ACS\\_Issue\\_Brief\\_-\\_Preemption\\_0.pdf](https://www.acslaw.org/wp-content/uploads/2017/09/ACS_Issue_Brief_-_Preemption_0.pdf) [<https://perma.cc/X4PE-8C93>].

<sup>45</sup> See BRIFFAULT & REYNOLDS, *supra* note 11, at 468 (noting that one of the primary critiques of local regulation “focuses on the . . . costs” of compliance with “varying local laws”).

<sup>46</sup> See Diller, *Intrastate Preemption*, *supra* note 26, at 1132–33.

<sup>47</sup> Cf. Briffault, *Our Localism: Part II*, *supra* note 43, at 453 (“Rather than seeking a state-local relationship characterized by either complete state dominance or one of complete local autonomy, elements of both perspectives should be combined.”).

<sup>48</sup> See, e.g., *Strong Firearms Preemption Laws Are More Important than Ever*, NAT’L RIFLE ASS’N INST. FOR LEGIS. ACTION (Nov. 11, 2019), <https://www.nrila.org/articles/20191111/strong-firearms-preemption-laws-are-more-important-than-ever> [<https://perma.cc/MBC3-6K5J>] (arguing that an “incomprehensible patchwork of local ordinances” forces “unsuspecting gun owners . . . to forego the exercise of their Second Amendment rights or risk running afoul of convoluted . . . local rules”).

illustrated through a closer look at two particularly salient virtues of localism: the accommodation of diverse preferences, and the ability to test and refine regulations that meet community needs.

### 1. Political Virtues: Responsiveness and Accommodation

Among the many arguments advanced in favor of local autonomy is the notion that localities are more responsive to the norms, attitudes, and preferences of their residents.<sup>49</sup> When endowed with the flexibility to act, local officials can craft policies that reflect distinct political conditions within their borders.<sup>50</sup> Autonomy thus affords a mechanism for accommodating viewpoints on contentious issues: rather than forcing narrowly endorsed positions or disappointing compromises onto the public, states can leave room for an array of local approaches that are sensitive to community views.<sup>51</sup>

Satisfying diverse attitudes has proven particularly challenging in the context of firearm policy, a subject on which Americans often hold sharply conflicting opinions. Notably, large segments of the public do agree on some basic propositions regarding firearms. Sizeable majorities believe that law-abiding citizens should be permitted to own guns,<sup>52</sup> that gun violence is a serious issue,<sup>53</sup> and that the Second Amendment “protects an ‘individual’ right to bear arms” while “permit[ting] reasonable gun control laws.”<sup>54</sup> National surveys also reveal overwhelming bipartisan support for several specific reforms,

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<sup>49</sup> See, e.g., Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 23 (2010) (“[L]ocalities represent *better* sites for pursuing federalism’s values because they are closer to the people, offer more realistic options for voting with one’s feet, and map more closely onto communities of interest.”); see also Diller, *Intrastate Preemption*, *supra* note 26, at 1130 (arguing that localities are able to “pass ordinances on issues that neither the state nor federal governments address” because localities are “closer to [their] voters”).

<sup>50</sup> See Briffault, *Contemporary Federalism*, *supra* note 42, at 1315.

<sup>51</sup> See, e.g., Briffault, *The New Preemption*, *supra* note 9, at 2027 (“Instead of having to resolve hotly contested issues statewide, . . . local autonomy enables different communities to have different rules.”); Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 289 (2016) [hereinafter Diller, *Reorienting Home Rule: Part 1*] (noting that the concentration of “political preferences” within local borders can “facilitate policy consensus on issues that might cause gridlock at other levels of government”).

<sup>52</sup> KIM PARKER ET AL., PEW RSCH. CTR., AMERICA’S COMPLEX RELATIONSHIP WITH GUNS 61 (2017), <https://www.pewresearch.org/social-trends/2017/06/22/americas-complex-relationship-with-guns> [<https://perma.cc/C7LP-XYJC>] (finding that sixty-four percent of survey respondents “say most people should be able to legally own guns”).

<sup>53</sup> *Id.* at 53 (“Overall, half of all U.S. adults say gun violence is a very big problem in this country, and an additional 33% say it is a moderately big problem.”).

<sup>54</sup> Blocher, *supra* note 20, at 90.

including universal background checks and restrictions on assault-rifle sales.<sup>55</sup> But beyond these limited areas of agreement, firearms remain one of the most divisive issues in American politics.<sup>56</sup> State and federal reform efforts repeatedly fall prey to partisan bickering and legislative gridlock, and the policies that do get enacted are often products of narrow political victories that leave many constituents dissatisfied.

Increased local capacity to regulate guns offers an avenue for accommodating—rather than aggravating—these sharp divisions in views on firearms. The utility of localism in this arena arises from the realities of political geography: within individual states, residents who share similar gun-related preferences tend to congregate together. Perhaps the best approach to examining this trend is to highlight the “consistent underlying differences” in firearm views between urban, rural, and suburban areas,<sup>57</sup> as these labels provide a rough framework for classifying localities.<sup>58</sup> Scholars have devoted significant attention to the distinctions between urban and rural “gun culture,” producing a large body of work that powerfully illustrates the local clustering of firearm attitudes.<sup>59</sup>

Consider, for example, recent findings on rates of gun ownership, which supply a metric for demonstrating stark interlocal differences in opinions on and familiarity with guns. Though the exact statistics vary across surveys, multiple studies have reaffirmed the same key pattern: Firearm prevalence differs dramatically across rural, suburban, and urban communities, with “rural dwellers far more likely than those who

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<sup>55</sup> PARKER ET AL., *supra* note 52, at 62 (finding that eighty-four percent of Americans “favor requiring background checks for private gun sales and at gun shows,” seventy-one percent “favor creating a federal government database to track all gun sales,” and sixty-eight percent favor “banning assault-style weapons”); *see also* Colleen L. Barry et al., *Trends in Public Opinion on U.S. Gun Laws: Majorities of Gun Owners and Non-Gun Owners Support a Range of Measures*, 38 HEALTH AFFS. 1727, 1731–32 (2019) (relying on surveys from thirty-nine states to conclude that large majorities support “universal background check[s],” gun-safety courses for first-time owners, and bans on sales of semi-automatic weapons to buyers under twenty-one years old).

<sup>56</sup> *See* Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1292 (2003) (“Few issues divide the American polity as dramatically as gun control.”); *see also* PARKER ET AL., *supra* note 52, at 61–72 (highlighting major points of division in nationwide public opinion on firearm policy).

<sup>57</sup> Blocher, *supra* note 20, at 91.

<sup>58</sup> In relying on the rough categories of “urban,” “rural,” and “suburban,” the analysis here admittedly paints in broad brushstrokes. Significant differences in views on firearms can and frequently do exist between residents in urban and rural communities, and these classifications interact with other demographic variables—partisan identity, gender, race, educational attainment, and so on—to shape gun-related preferences. This Section, however, aims not to document the determinants of firearm-related views, but instead to demonstrate that such views often cluster geographically within the borders of each state. The rural-urban divide provides the most convenient (and indeed, the most widely studied) framework for doing so.

<sup>59</sup> *See, e.g.*, SPITZER, *supra* note 23, at 7–14; Blocher, *supra* note 20, at 90–107.

live in urban areas to say they own a gun.”<sup>60</sup> One recent survey concluded that forty-six percent of Americans living in rural areas own a firearm, compared with twenty-eight percent and nineteen percent of suburban and urban residents, respectively.<sup>61</sup> Another nationwide study found that firearm ownership was “highest in counties with no town over 10,000 (54.2%) and lowest in the central cities of the largest 12 metropolitan areas (12.7%),”<sup>62</sup> with prevalence rates that varied from twenty percent to thirty-one percent in the suburbs.<sup>63</sup> Residents in rural communities are also “particularly likely to have grown up with a gun in their household,”<sup>64</sup> a factor that tends to increase the probability of future firearm ownership.<sup>65</sup>

Gun owners in urban and rural communities often report distinct explanations for purchasing their firearms, a pattern that further underscores notable differences in local experiences with guns. Beyond “personal protection,” which just recently emerged as a leading reason for firearm ownership across all communities,<sup>66</sup> rural owners are far more likely than their urban counterparts to list recreational use and social ties as key reasons for keeping a gun.<sup>67</sup> Roughly forty-eight percent of rural gun owners identify hunting as an “important reason” for acquiring a firearm, while only twenty-seven percent of urban gun owners do so.<sup>68</sup> Additionally, sixty percent of gun owners in rural areas—compared with forty-four percent in urban locales and thirty-eight percent in the suburbs—report that “all or most of their friends . . . own guns,”<sup>69</sup> a distinction that is salient because individuals “who have strong social ties to other gun owners are more likely . . . to see their gun ownership as important.”<sup>70</sup> These interlocal differences,

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<sup>60</sup> PARKER ET AL., *supra* note 52, at 19.

<sup>61</sup> *Id.*

<sup>62</sup> TOM W. SMITH & JAESOK SON, NAT’L OP. RSCH. CTR., GENERAL SOCIAL SURVEY FINAL REPORT: TRENDS IN GUN OWNERSHIP IN THE UNITED STATES, 1972–2018, at 2 (2019).

<sup>63</sup> *Id.* at 6 tbl.4.

<sup>64</sup> PARKER ET AL., *supra* note 52, at 23 (reporting that seventy-two percent of rural residents grew up “with a gun in their household,” compared with thirty-seven percent in the suburbs and thirty-nine percent in cities).

<sup>65</sup> *Id.* (observing that “adults who grew up with guns in their households are far more likely than those who did not to be gun owners themselves,” a trend that “is most pronounced among those who grew up in rural areas”).

<sup>66</sup> *See id.* at 4, 21.

<sup>67</sup> *Id.*; *see also* ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 14 (1st ed. 2011) (noting that guns are associated with a “cultural heritage of hunting” and recreational use in rural areas).

<sup>68</sup> PARKER ET AL., *supra* note 52, at 21.

<sup>69</sup> *Id.* at 33.

<sup>70</sup> *Id.* at 32.

Professor Joseph Blocher explains, are “historically consistent,”<sup>71</sup> but they “tend to be obscured” in debates over firearms “that focus[] solely on states and the federal government.”<sup>72</sup>

Relying on a “wealth of public opinion research,” scholars have demonstrated that the geographic patterns in both rates of and reasons for firearm ownership reflect sharp urban-rural distinctions in the underlying “social meanings” associated with guns.<sup>73</sup> In rural communities, firearms tend to “symbolize a cluster of positive values,”<sup>74</sup> including “honor,” “courage,” and “individual self-sufficiency.”<sup>75</sup> The “possession[] and use of firearms” is “generally celebrate[d],”<sup>76</sup> and gun ownership is frequently understood to be an essential component of individual identity.<sup>77</sup> Meanwhile, many urban residents view firearms not only as “threats . . . to safety,”<sup>78</sup> but also as symbols of violence, disorder, “distrust[,] and indifference toward others.”<sup>79</sup> These conflicting associations with guns are deeply entrenched and consistently reinforced within discrete communities,<sup>80</sup> yielding beliefs about guns that are stubbornly resistant to persuasion based on statistics.<sup>81</sup>

The interlocal distribution of firearm-related norms and attitudes translates into dramatically different levels of support for regulation. Generally, “[o]pposition to gun control decreases as one moves from small towns and rural areas to large metropolitan centers,”<sup>82</sup> with cities displaying the greatest appetite for “stringent gun regulations.”<sup>83</sup> In one

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<sup>71</sup> Blocher, *supra* note 20, at 91.

<sup>72</sup> *Id.* at 91–92.

<sup>73</sup> Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3, 4 (2003); cf. Deborah Azrael, Philip J. Cook & Matthew Miller, *State and Local Prevalence of Firearms Ownership Measurement, Structure, and Trends*, 20 J. QUANTITATIVE CRIMINOLOGY 43, 52 (2004) (“[T]he determinants of gun prevalence have more to do with tradition, culture and childhood experience than with concern about crime or other relatively volatile matters.”).

<sup>74</sup> Kahan, *supra* note 73, at 4.

<sup>75</sup> Kahan & Braman, *supra* note 56, at 1300.

<sup>76</sup> Blocher, *supra* note 20, at 93.

<sup>77</sup> See PARKER ET AL., *supra* note 52, at 31–32.

<sup>78</sup> Blocher, *supra* note 20, at 103.

<sup>79</sup> Kahan & Braman, *supra* note 56, at 1301; see also Kahan, *supra* note 73, at 4–5 (explaining that urban residents often perceive guns as threats to “positive values, including . . . nonaggression, racial and gender equality, and social solidarity”).

<sup>80</sup> Kahan, *supra* note 73, at 4; see also Blocher, *supra* note 20, at 106.

<sup>81</sup> See Kahan, *supra* note 73, at 8 (concluding that “what one believes” about guns “will be cognitively derivative of one’s cultural world views,” which undermines the notion that “empirical data will buy us peace in the American gun debate”).

<sup>82</sup> Robin M. Wolpert & James G. Gimpel, *Self-Interest, Symbolic Politics, and Public Attitudes Toward Gun Control*, 20 POL. BEHAV. 241, 245 (1998).

<sup>83</sup> Blocher, *supra* note 20, at 102.

illustration of this trend, a recent survey found that fifty-six percent of urban dwellers “favored stricter gun control,” while only thirty-four percent of rural respondents did so.<sup>84</sup> Indeed, residents of rural areas “tend to be more supportive of proposals to *loosen* gun restrictions,” such as those that call for relaxing limits on concealed carry.<sup>85</sup>

To some extent, these patterns reflect the geography of partisan identity: Democrats, who are far more likely than Republicans to embrace firearm regulation,<sup>86</sup> tend to cluster in urban areas.<sup>87</sup> Moreover, the spatial concentration of support for gun restrictions is evident in both the variety and volume of urban firearm laws. “[C]ities have traditionally enacted the country’s strictest gun control measures, including handgun bans, safe storage requirements, [and] limits on public carrying”<sup>88</sup>—and urban policies still account for the vast majority of permissible local gun restrictions. These existing rules likely “underrepresent[,] perhaps significantly[,] . . . the breadth and scope of laws that cities *would* pass” if more states left them with the authority to do so.<sup>89</sup>

The upshot is that local attitudes toward firearm regulation vary tremendously within the borders of individual states, and such views are often rooted in values, norms, and cultural understandings impervious to empirics.<sup>90</sup> These stark and stubborn differences frustrate state-level efforts to forge compromises over gun policy, resulting in stalled reform initiatives and bruising political fights that leave “large numbers . . . on the losing side aggrieved.”<sup>91</sup> But the significant variation in firearm-related preferences is neither an inevitable nor an insurmountable barrier to change; in fact, the geographic clustering of those viewpoints presents an “opportunity” to reap the benefits of local autonomy.<sup>92</sup> With greater authority over gun regulation, officials in communities with strong support for stricter laws could forego cumbersome battles in state legislatures and respond to that demand locally. Meanwhile, rural localities would be free to pursue agendas that “maintain their strong gun culture[s]” to the extent permitted under state

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<sup>84</sup> *Id.* at 97–98.

<sup>85</sup> PARKER ET AL., *supra* note 52, at 66 (emphasis added).

<sup>86</sup> *See id.* at 64–65 (reporting sharp partisan differences in attitudes toward various gun policy proposals).

<sup>87</sup> *See* sources cited *infra* notes 121–22 and accompanying text.

<sup>88</sup> Blocher, *supra* note 20, at 87.

<sup>89</sup> *Id.* at 100.

<sup>90</sup> *Cf. id.* at 106 (“[T]he underlying conflict [in firearm politics] is largely about values, and there is no way to resolve such a conflict by appealing to empirics.”).

<sup>91</sup> Briffault, *The New Preemption*, *supra* note 9, at 2027.

<sup>92</sup> Blocher, *supra* note 20, at 86.

and federal law.<sup>93</sup> The bottom line: Enhanced local autonomy permits geographic variation in gun laws, thereby facilitating the accommodation of conflicting preferences within a single state. In a policy domain where compromise and consensus are often in short supply, greater local control over firearm regulation would open up important avenues for change.

## 2. Policy Virtues: Tailoring Policies to Meet Distinct Local Needs

Echoing some of the classic justifications for federalism, scholars have offered yet another salient argument in favor of local autonomy: the devolution of authority to smaller government units yields more effective and creative policymaking.<sup>94</sup> Localities often exhibit a “knack for ‘practical’ problem-solving,”<sup>95</sup> which stems from their capacity to “provide a level of regulation or . . . service more finely tailored to a particular [community’s] needs.”<sup>96</sup> Consequently, empowering those governments not only “allow[s] localities to [maximize] their own policy goals,”<sup>97</sup> but also “permits the testing of varying approaches . . . and the development of real-world evidence” on their efficacy.<sup>98</sup> Put differently, local autonomy facilitates “innovation that would never occur if all policymaking took place . . . on the state and federal levels.”<sup>99</sup>

Such arguments prove especially compelling when applied to questions about guns, which cause roughly 39,000 deaths and 70,000 nonfatal injuries in the United States every year.<sup>100</sup> The causes, risks,

<sup>93</sup> *Id.* at 104.

<sup>94</sup> See, e.g., Briffault, *Contemporary Federalism*, *supra* note 42, at 1315–16; cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[A] single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>95</sup> Diller, *Reorienting Home Rule: Part 1*, *supra* note 51, at 289.

<sup>96</sup> Diller, *Intrastate Preemption*, *supra* note 26, at 1129.

<sup>97</sup> Scharff, *supra* note 17, at 1491; cf. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–20 (1956) (providing a classic—albeit widely critiqued—economic model of localism as an engine of efficient policymaking).

<sup>98</sup> Briffault, *The New Preemption*, *supra* note 9, at 2027.

<sup>99</sup> Diller, *Intrastate Preemption*, *supra* note 26, at 1128.

<sup>100</sup> Kenneth D. Kochanek et al., *Deaths: Final Data for 2017*, NAT’L VITAL STATS. REPS., June 24, 2019, at 12 (reporting over 39,000 firearm fatalities nationwide in 2017); *Firearm Violence Prevention*, CDC (May 4, 2021), <https://www.cdc.gov/violenceprevention/firearms/fastfact.html> [<https://perma.cc/388L-VL78>] (reporting over 39,000 firearm-related deaths in the United States in 2019); Katherine A. Fowler et al., *Firearm Injuries in the United States*, 79 PREVENTIVE MED. 5, 9 (2015) (calculating that an average of 67,000 individuals in the United States endure a nonfatal firearm injury each year).

and burdens of these gun-related harms are not evenly distributed, and different communities experience discrete sets of challenges arising from firearm use.<sup>101</sup> This variation creates conditions ripe for localized action and experimentation on a range of pressing gun issues.

The distinctions between urban, rural, and suburban areas are once again useful for illustrating this point, given the substantial differences “across the urban-rural continuum” in firearm injury and mortality.<sup>102</sup> Urban areas have consistently shouldered the heaviest burdens of gun-related crime and interpersonal firearm violence.<sup>103</sup> Throughout the 1990s, the proportion of all deaths attributable to shootings was nearly two times greater in urban counties than in rural ones,<sup>104</sup> and the overall firearm homicide rate for the nation’s fifty largest metropolitan areas still exceeds the countrywide average.<sup>105</sup> City residents also experience far higher rates of nonfatal injury due to interpersonal gun violence: “[F]irearm assaults” are “[t]he leading cause of hospitalization” for adolescents in urban communities, “occurring at a rate . . . 7.8-fold higher . . . than that . . . in rural areas.”<sup>106</sup> The burdens of both fatal and nonfatal shootings do vary considerably between metropolitan areas,<sup>107</sup> but that pattern only bolsters the case for interventions tailored to specific local conditions. Plus, cities large and

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<sup>101</sup> See, e.g., Bindu Kalesan & Sandro Galea, *Patterns of Gun Deaths Across US Counties 1999–2013*, 27 ANNALS EPIDEMIOLOGY 302, 304 (2017) (documenting “dramatically different levels of gun violence across counties” in the United States based on “aggregate county-specific gun deaths”); Andrew Van Dam, *The Surprising Way Gun Violence Is Dividing America*, WASH. POST (May 31, 2018, 12:00 PM), <https://www.washingtonpost.com/news/wonk/wp/2018/05/31/the-surprising-way-gun-violence-is-dividing-america> [<https://perma.cc/4UWL-63HU>].

<sup>102</sup> Garen J. Wintemute, *The Epidemiology of Firearm Violence in the Twenty-First Century United States*, 36 ANN. REV. PUB. HEALTH 5, 13 (2015); see also Michael L. Nance et al., *The Rural-Urban Continuum: Variability in Statewide Serious Firearm Injuries in Children and Adolescents*, 156 ARCHIVES PEDIATRICS & ADOLESCENT MED. 781, 782–83 (2002).

<sup>103</sup> See Blocher, *supra* note 20, at 99–101.

<sup>104</sup> Charles C. Branas et al., *Urban-Rural Shifts in Intentional Firearm Death: Different Causes, Same Results*, 94 AM. J. PUB. HEALTH 1750, 1752 (2004) (finding that “most urban counties experienced 1.90 . . . times the firearm homicide rate of the most rural counties” throughout the 1990s); see also Michael L. Nance et al., *Variation in Pediatric and Adolescent Firearm Mortality Rates in Rural and Urban US Counties*, 125 PEDIATRICS 1112, 1117 (2010) (concluding that “urban counties experienced disproportionately high rates of firearm homicide” among youth populations).

<sup>105</sup> Scott R. Kegler et al., *Firearm Homicides and Suicides in Major Metropolitan Areas—United States, 2012–2013 and 2015–2016*, 67 MORBIDITY & MORTALITY WKLY. REP. 1233, 1233–34 (2018).

<sup>106</sup> Bradley R. Herrin et al., *Rural Versus Urban Hospitalizations for Firearm Injuries in Children and Adolescents*, PEDIATRICS, Aug. 2018, at 1, 4; see also Nance et al., *supra* note 102, at 782.

<sup>107</sup> For instance, rates of firearm homicide per 100,000 individuals vary widely between large cities, from a rate of only 1.1 in Providence, Rhode Island, to a rate of 16.6 in New Orleans, Louisiana. See Kegler et al., *supra* note 105, at 1233.

small have reported recent upticks in gun crime,<sup>108</sup> a troubling trend that reinforces the need for local action on the issue.

Though interpersonal gun violence predominantly affects urban areas, rural and suburban localities are not without their own gun-related challenges.<sup>109</sup> Perhaps the most powerful example is the alarming rise in firearm suicide, which now accounts for over sixty percent of intentional gun fatalities nationwide.<sup>110</sup> Cities and small towns alike have witnessed staggering increases in suicide deaths,<sup>111</sup> but rural communities disproportionately bear the brunt of this phenomenon.<sup>112</sup> Firearm suicide rates among rural youth are roughly two times greater than those for children and adolescents in urban areas,<sup>113</sup> and that gap appears to be “widening.”<sup>114</sup> Significant disparities are also evident in the incidence of firearm accidents: rural counties consistently report the highest rates of hospitalization and mortality due to unintentional gun injuries.<sup>115</sup> These less visible forms of gun-related harm are often overlooked in public disputes over firearm

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<sup>108</sup> See *id.* (reporting that eighty-six percent of large metropolitan areas experienced an increase in rates of firearm homicide between 2012 and 2016); see also Ashley Southall & Neil MacFarquhar, *Gun Violence Spikes in N.Y.C., Intensifying Debate over Policing*, N.Y. TIMES (Dec. 29, 2020), <https://www.nytimes.com/2020/06/23/nyregion/nyc-shootings-surge.html> [<https://perma.cc/42UT-JHCA>] (noting that “[s]hootings are on the rise in . . . big cities across the country” and that New York City’s gun homicide rates in June 2020 were at their highest point since 1996).

<sup>109</sup> Cf. Branas et al., *supra* note 104, at 1754 (stressing the importance of “demonstrating to both sides of [the gun policy] debate that firearm death is a serious public health problem affecting both urban and rural America”).

<sup>110</sup> See Kochanek et al., *supra* note 100, at 13 (reporting that suicides accounted for just over sixty percent of the 39,773 firearm deaths in 2017); see also Fowler et al., *supra* note 100, at 6 (concluding that the “annual rate of firearm suicide was about twice as high as the annual rate of firearm homicide” between 2010 and 2012).

<sup>111</sup> See, e.g., Lauren M. Rossen et al., *County-Level Trends in Suicide Rates in the U.S., 2005–2015*, 55 AM. J. PREVENTIVE MED. 72, 74 (2018) (documenting an increase in suicide rates of at least ten percent across ninety-nine percent of U.S. counties between 2005 and 2015).

<sup>112</sup> See, e.g., Branas et al., *supra* note 104, at 1750; Herrin et al., *supra* note 106, at 5 (noting the “disproportionately higher rate of increase [in suicides] among rural communities”).

<sup>113</sup> See, e.g., Nance et al., *supra* note 104, at 1115–16 (finding that the rate of firearm suicide was 2.01 times higher among children and adolescents in rural counties compared with those in urban counties).

<sup>114</sup> Cynthia A. Fontanella et al., *Widening Rural-Urban Disparities in Youth Suicides, United States, 1996–2010*, 169 JAMA PEDIATRICS 466, 470 (2015); see also Rossen et al., *supra* note 111, at 76–77 (observing that “more rural counties exhibited larger increases” in firearm suicides than did urban counties between 2005 and 2015).

<sup>115</sup> See, e.g., Herrin et al., *supra* note 106, at 5; Nance et al., *supra* note 104, at 1117.

policy,<sup>116</sup> an omission that underscores the importance of allowing localities to tackle distinct problems affecting their constituencies.

The conclusion to be drawn from these geographic patterns is that local governments are situated to play a vital role in efforts to combat various problems arising from gun use. Public health experts have repeatedly called on localities to “tailor . . . [gun-harm] prevention activities” to their “distinctive profiles of firearm injury and death,”<sup>117</sup> and these localized approaches could yield “incremental policy victories that have proven elusive” at higher tiers of government.<sup>118</sup> In sum, many firearm challenges invite the sort of innovation and customization so often valued among proponents of localism. With broader authority over gun regulation, local governments can go beyond one-size-fits-all policies at the state and federal levels to address specific gun-related harms within their own communities.

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The discussion above makes clear that local governments can and should be at the forefront of efforts to craft more effective firearm laws. The normative justifications for localism apply with particular force in this context: greater local autonomy would facilitate the accommodation of conflicting views on guns and enable officials to target distinct firearm-related problems. Again, that is not to say that all gun policy should be handled locally; certain substantive issues are more amenable to uniform solutions administered at the state or federal level. But the bottom line is that local lawmaking—in addition to, not in lieu of, ongoing state and federal efforts—represents a vital pathway for progress toward a more comprehensive gun regulatory scheme.

Opportunities to pursue local measures, however, will remain severely constrained without efforts to confront one of the “biggest legal obstacles” for localities: state preemption laws that curtail or prohibit local action on guns.<sup>119</sup> The following Part examines this underexplored barrier to firearm policymaking, and in doing so, provides a closer look at a particularly potent strain of state-local preemption.

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<sup>116</sup> Cf. Branas et al., *supra* note 104, at 1750 (“[B]ecause rural health issues are often not on equal footing with those in urban areas, and because suicide is not a crime, attention to firearm suicide . . . [has been] limited . . .”).

<sup>117</sup> Nance et al., *supra* note 104, at 1117.

<sup>118</sup> Blocher, *supra* note 20, at 135.

<sup>119</sup> *Id.* at 133.

## II. UNDERSTANDING THE OBSTACLE: STATUTORY PREEMPTION OF LOCAL FIREARM REGULATIONS

Traditional preemption principles have long been essential in defining and cabining local power, but recent decades have witnessed the proliferation of particularly aggressive state-level restrictions on local lawmaking. This Part provides a comprehensive overview of the history, substance, and implications of that phenomenon in the specific context of firearm policy. Section II.A begins with the past, tracing the evolution of statutory firearm preemption from its roots in the early 1980s to the present. That historical account reveals two central trends: all but a handful of states have adopted measures that expressly displace local gun policy to some degree, and a subset of those states now threaten to impose punitive sanctions on localities for preemption violations. Drawing on these patterns, Section II.B provides a detailed framework for organizing and categorizing state firearm preemption laws. Section II.C then evaluates the practical implications of these statutes using anecdotal evidence from several states. That assessment leaves little room to doubt the efficacy of state firearm preemption measures in constraining, unraveling, and deterring local gun regulation.

### A. *The History and Politics of State Firearm Preemption*

The rise of expansive state preemption is largely—though not entirely—a story of escalating partisan tensions and state-level backlash against progressive urban agendas. As several scholars have explained elsewhere, the current landscape of state-local preemption reflects underlying shifts in the nation’s political geography that have unfolded over multiple decades.<sup>120</sup> Democrats have flocked to metropolitan areas,<sup>121</sup> resulting in a heavy concentration of support for progressive

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<sup>120</sup> See, e.g., Schragger, *supra* note 14, at 1167, 1169–84 (arguing that the “recent spate of preemptive state legislation” is linked to the “widening political gap between American cities and other parts of the country”); Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 *FORDHAM URB. L.J.* 133, 134, 148–50 (2017) (“[R]ecent preemption efforts . . . are the result of a profound political realignment within many states that is reverberating throughout our democratic system . . .”); Phillips, *supra* note 10, at 2236–37.

<sup>121</sup> See, e.g., Gregory J. Martin & Steven W. Webster, *Does Residential Sorting Explain Geographic Polarization?*, 8 *POL. SCI. RSCH. & METHODS* 215, 229–30 (2018) (“The American electorate is geographically divided. . . Democrats [are] clustered in urban cores and Republicans [are] spread out across suburban and rural areas.”); Wendy K. Tam Cho, James G. Gimpel & Iris S. Hui, *Voter Migration and the Geographic Sorting of the American Electorate*, 103

regulations in urban centers.<sup>122</sup> This clustering of Democratic voters in a small subset of electoral districts also paved the way for Republican dominance of state legislatures, a trend that has allowed conservative lawmakers to quash the regulatory efforts of left-leaning local leaders.<sup>123</sup> Granted, preemption measures are not confined to states with Republican legislative majorities, and these laws frequently constrain the authority of rural and urban communities alike.<sup>124</sup> But on the whole, most “new preemption . . . proposals” have been enacted under “Republican dominated state governments,” often to “embrace conservative economic and social causes” or “respond to . . . relatively progressive local regulations.”<sup>125</sup> This phenomenon will likely persist if current political divides remain stable; Republicans held majorities in thirty state legislatures as of early 2022, while Democrats maintained control of many urban governments.<sup>126</sup>

The contemporary landscape of firearm preemption generally mirrors these political dynamics. Republican legislatures have been responsible for the vast majority of aggressive firearm preemption laws, several of which were adopted in direct response to local gun proposals.<sup>127</sup> This conservative resistance has sharply curtailed the ability of Democratic local officials to act on strong support for more stringent gun laws within their borders.<sup>128</sup> The narrative of partisan hostility, however, risks glossing over some of the distinct social and political forces at play in the evolution of state firearm preemption. This Section accordingly presents a more detailed account of that history.

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ANNALS ASS'N AM. GEOGRAPHERS 856, 856 (2013) (noting that patterns in spatial polarization are “self-perpetuating and intensifying”).

<sup>122</sup> See Scharff, *supra* note 17, at 1482–83 (explaining that “cities with clear Democratic majorities” provide the “bulk of support” for labor standards, election reform, LGBTQ+ protections, environmental policies, and other progressive laws).

<sup>123</sup> Stahl, *supra* note 120, at 134 (describing the “vertical relationship between cities and states” as an “outlet for . . . partisan conflict” between “overwhelmingly Democratic” cities and “overwhelmingly Republican” state legislatures “dominated by representatives of rural areas”); see BRIFFAULT ET AL., *supra* note 44, at 5–8.

<sup>124</sup> See Briffault, *The New Preemption*, *supra* note 9, at 1997.

<sup>125</sup> *Id.* at 1997–98; see also Scharff, *supra* note 17, at 1483 (“[L]iberal policymaking by cities . . . has invited pushback from Republican-controlled state legislatures.”).

<sup>126</sup> *State Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 1, 2022), <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [<https://perma.cc/9PAZ-2627>]; Stahl, *supra* note 120, at 134.

<sup>127</sup> See Phillips, *supra* note 10, at 2255; Scharff, *supra* note 17, at 1509 (describing the adoption of Arizona’s punitive preemption measure as a response to new firearm regulations in Tucson).

<sup>128</sup> See Monica Davey & Adeel Hassan, *When Cities Try to Limit Guns, State Laws Bar the Way*, N.Y. TIMES (Aug. 15, 2019), <https://nyti.ms/2KyiV2k> [<https://perma.cc/4TJH-KVWM>].

## 1. The Origins of Firearm Preemption

The stage was set for the rise of state firearm preemption in the early 1970s, when a “nascent gun control movement” began pursuing a bold reform strategy centered primarily on “prohibit[ing], directly or indirectly, private citizens from possessing or using handguns.”<sup>129</sup> As Professor Kristin Goss explains, these organizations were committed to championing a “centralized approach to gun policy,”<sup>130</sup> and they therefore focused their efforts almost exclusively on “elite politics at the national level.”<sup>131</sup>

While these organizations were “struggling unsuccessfully to make progress in Congress,”<sup>132</sup> a handful of localities were pursuing their own ambitious firearm-related agendas. In 1981, the small Chicago suburb of Morton Grove enacted an ordinance prohibiting the private possession of pistols.<sup>133</sup> While supporters of gun regulation cheered the move, the national organizations spearheading the push for firearm reform “did not seriously attempt to create momentum” out of such local efforts.<sup>134</sup> Meanwhile, opponents of stringent firearm laws perceived municipal handgun bans as a “grave political threat”<sup>135</sup>—especially after the Morton Grove ordinance withstood a Second Amendment challenge.<sup>136</sup> From the perspective of the National Rifle Association (NRA) and similar groups, the risk that the “Morton Grove precedent would have a domino effect . . . was one that the gun lobby was not willing” to take.<sup>137</sup>

Determined to prevent the spread of similar handgun bans, the NRA embarked on a nationwide campaign for strict limitations on local authority over firearm policy.<sup>138</sup> Throughout the 1980s, the organization pressed state legislatures to adopt preemption statutes that

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<sup>129</sup> Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 *FORDHAM L. REV.* 681, 690–91 (2004).

<sup>130</sup> *Id.* at 703.

<sup>131</sup> *Id.* at 696.

<sup>132</sup> *Id.* at 703.

<sup>133</sup> See Linda Greenhouse, *Court Lets Stand Gun Ban in Illinois*, *N.Y. TIMES* (Oct. 4, 1983), <https://www.nytimes.com/1983/10/04/us/court-lets-stand-gun-ban-in-illinois.html> [<https://perma.cc/FY6Q-S3VD>]; see also Blocher, *supra* note 20, at 132–33.

<sup>134</sup> Goss, *supra* note 129, at 704.

<sup>135</sup> *Id.*

<sup>136</sup> See *Quilici v. Village of Morton Grove*, 695 F.2d 261, 263–64, 269–71 (7th Cir. 1982).

<sup>137</sup> Goss, *supra* note 129, at 705; see also Joe Palazzolo, Ashby Jones & Patrick O’Connor, *City Gun Laws Hit Roadblock*, *WALL ST. J.* (Feb. 5, 2013, 7:07 PM), <https://www.wsj.com/articles/SB10001424127887324761004578286072929691906> [<https://perma.cc/U5D6-C6JA>] (“Morton Grove’s ban . . . was viewed as the beginning of a nationwide trend.”).

<sup>138</sup> Blocher, *supra* note 20, at 133; Palazzolo et al., *supra* note 137.

expressly curtailed the ability of local governments to pursue gun regulations.<sup>139</sup> The NRA and its counterparts insisted that such measures were necessary to prevent a “hodgepodge” of confusing firearm restrictions and stave off a “snowball effect” toward sweeping bans on gun possession.<sup>140</sup> These arguments, though likely overblown, were highly effective at a time when “local ordinances were passing” swiftly “while scores of national bills [were] not.”<sup>141</sup> The NRA’s campaign also benefited from a symbiotic relationship with various pro-business organizations—in particular, the American Legislative Exchange Council (ALEC)—whose missions centered on coordinating “efforts between state legislative branches and private industries” through the provision of “model legislation . . . and lobbying services.”<sup>142</sup> Together, these groups persuaded state officeholders to place firearm preemption bills at the top of their agendas.

This concerted push for the adoption of express preemption laws was “incredibly successful”<sup>143</sup>: in the two-and-a-half decades after Morton Grove enacted its controversial handgun ban, the number of states explicitly limiting or barring local gun regulations had climbed from seven to more than forty.<sup>144</sup> Though critics were quick to point out that the NRA’s fierce preemption campaign was fundamentally inconsistent with its previous endorsements of local autonomy,<sup>145</sup> few could deny the effectiveness of its chosen tactics. With a strategy targeting state legislatures, the NRA and similar groups managed to “reduc[e] the stringency, scope, and variety of local gun regulations”<sup>146</sup> without “fighting ordinance battles one-by-one.”<sup>147</sup> Moreover, by the

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<sup>139</sup> Goss, *supra* note 129, at 705; Palazzolo et al., *supra* note 137.

<sup>140</sup> Goss, *supra* note 129, at 705.

<sup>141</sup> *Id.*; cf. MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN’T END THE BATTLE OVER GUNS* 111–12 (2007) (describing the effectiveness of the “slippery slope” arguments often deployed in opposition to gun regulations).

<sup>142</sup> Schragger, *supra* note 14, at 1170. ALEC has played a central role in the push for state-level preemption across a wide range of policy areas. See Phillips, *supra* note 10, at 2227, 2240–41; see also Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES (Apr. 21, 2012), <https://nyti.ms/2kd6wFZ> [<https://perma.cc/Z7FK-RZYE>].

<sup>143</sup> Blocher, *supra* note 20, at 133; see Schragger, *supra* note 14, at 1170.

<sup>144</sup> Palazzolo et al., *supra* note 137 (noting that seven states had statutes expressly restricting local firearm regulation in the late 1970s, a number that grew to forty-five by 2005); Briffault, *The New Preemption*, *supra* note 9, at 1999.

<sup>145</sup> See Blocher, *supra* note 20, at 133. This abrupt pivot in the NRA’s stance aligns with a broader pattern of conservative organizations abandoning their previous support for local autonomy as part of the backlash against increasingly progressive local policies. See Phillips, *supra* note 10, at 2227.

<sup>146</sup> Blocher, *supra* note 20, at 133.

<sup>147</sup> Goss, *supra* note 129, at 705 (describing the NRA’s focus on state law as an “efficient strategy”).

time reformers decided to shift their focus toward “more amenable[] local venues,” firearm-related interest groups had already “used federalism—and legislative dominance—to deprive [them] of those opportunities.”<sup>148</sup>

## 2. Recent Shifts and the Rise of Punitive Preemption

In 2010, the Supreme Court issued a landmark opinion invalidating the exact sort of municipal handgun bans that the preemption movement initially aimed to prevent.<sup>149</sup> But the firearm preemption campaign only intensified—Republicans had managed to recapture a majority of state legislative seats in the midterm elections,<sup>150</sup> providing conservative organizations with a clear opening to push their agendas even further. These groups continued to enjoy extraordinary success: in the 2011–2012 legislative session alone, lawmakers in nine states introduced preemption bills mirroring an ALEC template titled the “Consistency of Firearm Regulation Act.”<sup>151</sup> During a time of increasing polarization in debates over gun policy,<sup>152</sup> aggressive state preemption took hold as a national norm.

The past ten years have also witnessed a more alarming development: The emergence of state laws penalizing local governments or officials for firearm policies that violate express preemption statutes. The Oklahoma legislature pioneered the first of

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<sup>148</sup> *Id.* at 706.

<sup>149</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 750, 791 (2010) (incorporating the Second Amendment against the states and invalidating Chicago’s municipal handgun ban as a violation of the individual right to self-defense within the home); see also Blocher, *supra* note 20, at 134–35 (“*Heller* and *McDonald* constitutionally prohibit the kinds of handgun bans and other especially stringent gun control that proponents of preemption laws sought to prevent at the local level.”).

<sup>150</sup> See Press Release, Nat’l Conf. of State Legislatures, Republicans Exceed Expectations in 2010 State Legislative Elections (Nov. 3, 2010), <https://www.ncsl.org/press-room/republicans-exceed-expectations-in-2010.aspx> [<https://perma.cc/5DXY-WJYX>].

<sup>151</sup> See Molly Jackman, *ALEC’s Influence over Lawmaking in State Legislatures*, BROOKINGS INST. (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures> [<https://perma.cc/5ENJ-6YCG>]. The legislators who offer these proposals do not necessarily receive the language from ALEC itself, but instead might model their approaches off of other states, resulting in a rippling effect of similar preemptive legislation. See *id.*

<sup>152</sup> Nate Cohn & Margot Sanger-Katz, *On Guns, Public Opinion and Public Policy Often Diverge*, N.Y. TIMES: THE UPSHOT (Aug. 10, 2019), <https://nyti.ms/2ZYNpAM> [<https://perma.cc/M3K2-TEV3>] (highlighting data from 2000 and 2018 to illustrate that “attitudes about guns have become more polarized in recent years”).

these extreme measures in 2003,<sup>153</sup> but the partisan shifts of 2010 marked the real turning point in this phenomenon. With Republicans firmly in control of legislative majorities, several states enacted punitive preemption measures in relatively quick succession: Florida's legislature authorized various penalties for "knowing and willful violations" of its firearm preemption law in 2011,<sup>154</sup> and the following year, Kentucky embraced criminal liability for local officials who endorsed prohibited gun regulations.<sup>155</sup> Mississippi passed its own punitive legislation mirroring Florida's statute in 2014,<sup>156</sup> and Arizona's Republican lawmakers raised the stakes two years later with a series of severe fiscal sanctions for localities.<sup>157</sup> These measures may represent only the beginning of a broader pattern, as legislators in other states continue to consider their own punitive preemption proposals for local firearm laws.<sup>158</sup>

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Though the rise of aggressive firearm preemption is largely a product of partisan maneuvering and interest-group pressure, the implications of this phenomenon "transcend the politics of the particular issue[] at stake."<sup>159</sup> As a result of this intensive preemption campaign, communities nationwide—urban and rural, progressive and conservative, large and small—have been thwarted in their attempts to implement local solutions to numerous gun-related problems. The following Sections turn to the current firearm preemption landscape, first categorizing the relevant state laws into a framework and then surveying concrete examples of their effects on local governments.

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<sup>153</sup> BRIFFAULT ET AL., *supra* note 44, at 9 (citing OKLA. STAT. tit. 21, § 1289.24(D) (2017) (authorizing the imposition of civil liability on local officials who vote in favor of prohibited gun regulations)).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 10.

<sup>156</sup> *Id.* at 9.

<sup>157</sup> *Id.* at 10.

<sup>158</sup> See, e.g., Leg. 68, 105th Leg., 1st Sess. § 5(2)(a) (Neb. 2017) (proposing an amendment to Nebraska's firearm preemption statute that would authorize private lawsuits against local governments for damages); S. 531, 2019 Gen. Assemb., Reg. Sess. § 306(a)–(b) (Pa. 2019) (laying out a similar addition to Pennsylvania's broad firearm preemption law).

<sup>159</sup> Briffault, *The New Preemption*, *supra* note 9, at 1998.

## B. *Toward a Firearm Preemption Framework*

The history outlined above serves as a reminder that trends in state preemption are “volatile” and constantly evolving.<sup>160</sup> Moreover, existing firearm preemption laws “vary impressively and are rife with exceptions and dizzying cross-references”<sup>161</sup>—a reality that complicates efforts to navigate such restrictions. To achieve some clarity, the following discussion canvasses the range of firearm preemption measures and offers a framework for classifying those laws. This Section does not aim to provide an exhaustive catalog, as the precise mechanics of firearm preemption vary from state to state. The taxonomy below is instead designed to highlight key features of state firearm preemption statutes, with the goal of supplying a general guide for audiences making sense of these barriers to gun policy.

As the preceding Section makes clear, the current assortment of firearm preemption laws reflects two significant patterns: First, most states have embraced express preemption statutes that restrict local gun regulation in some capacity. Second, several legislatures have supplemented these laws with punitive preemption provisions that impose consequences on localities or officials for violations. The framework presented here is structured around these statutory approaches to curtailing local gun policy, though with the understanding that implied preemption remains a crucial background consideration in many states as well.<sup>162</sup>

### 1. No Statutory Firearm Preemption

In Connecticut, Hawaii, Massachusetts, New Jersey, and New York, state legislators have refrained from explicitly restricting local

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<sup>160</sup> Schragger, *supra* note 14, at 1169.

<sup>161</sup> Joseph Tartakovsky, *Firearm Preemption Laws and What They Mean for Cities*, MUN. LAW., Sept.–Oct. 2013, at 7.

<sup>162</sup> As noted earlier, courts in the vast majority of states rely on some variation of an “[i]mplied preemption” inquiry to determine whether a state statute implicitly “displace[s] . . . an otherwise valid local law . . . in the absence of an express state prohibition.” BRIFFAULT & REYNOLDS, *supra* note 11, at 466; *see supra* notes 9–11 and accompanying text. The precise tests differ from state to state, but the crux of the analysis is usually a focus on whether the legislature intended to displace the local law at issue. Thus, even in states that afford some degree of local autonomy over gun regulation, localities may still find themselves in court defending their policies against implied preemption challenges. If a court applying its state-specific doctrine concludes that the legislature implicitly supplanted a local law, that regulation is rendered void and unenforceable. *See generally* Diller, *Intrastate Preemption*, *supra* note 26, at 1140–57 (providing a detailed overview on the development and application of implied preemption doctrine).

capacity to regulate firearms or ammunition.<sup>163</sup> Localities in these states consequently enjoy considerable flexibility to act on guns, subject to any constraints that exist under each jurisdiction's implied-preemption jurisprudence.<sup>164</sup> Given that courts vary significantly in their implied-preemption analyses, assessing the viability of a particular firearm regulation requires careful consideration of the relevant state case law.<sup>165</sup> But as a general matter, state-local conflicts over gun policy are adjudicated on a case-by-case basis, and localities remain free to test the scope of their authority across a range of firearm-related issues.<sup>166</sup>

## 2. A Spectrum of Express State Preemption Statutes

The remaining forty-five states have adopted express firearm preemption provisions that explicitly limit or block local firearm measures to some degree. These statutes range from laws that prohibit only specific types of firearm regulation to those that preempt gun-related lawmaking entirely.<sup>167</sup> The question of whether a specific local law is expressly preempted turns on a close assessment of state statutory language and any corresponding judicial interpretations, but some general principles and examples are highlighted below.

### a. Specific Express Preemption

Several state legislatures have prohibited specific types of gun regulation while affording localities considerable leeway to pursue other firearm-related initiatives. In Nebraska, for instance, an express

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<sup>163</sup> Tartakovsky, *supra* note 161, at 7, 30.

<sup>164</sup> See, e.g., *Dwyer v. Farrell*, 475 A.2d 257, 260–61 (Conn. 1984) (acknowledging that Connecticut's localities can regulate in a manner that is "more comprehensive" than state law but invalidating a New Haven handgun-licensing ordinance that "irreconcilably conflict[ed]" with a state gun-permit scheme); *Citizens for a Safer Cmty. v. City of Rochester*, 627 N.Y.S.2d 193, 201 (Sup. Ct. 1994) (explaining that "a local law is not preempted merely because it prohibits conduct permitted by state law" and upholding a local assault-weapons ban).

<sup>165</sup> Compare, e.g., *Overlook Terrace Mgmt. Corp. v. Rent Control Bd.*, 366 A.2d 321, 326 (N.J. 1976) (articulating a five-part test to guide the implied preemption inquiry in New Jersey), with *Connors v. City of Boston*, 714 N.E.2d 335, 337–38 (Mass. 1999) (describing the flexible standard for implied preemption in Massachusetts, where courts consider "whether the local regulation would somehow frustrate the purpose of [a state] statute so as to warrant an inference that the Legislature intended to preempt the subject"). See generally BRIFFAULT & REYNOLDS, *supra* note 11, at 466–68 (describing the variation in analytical approaches to implied preemption among state courts).

<sup>166</sup> Cf. Scharff, *supra* note 17, at 1504 ("Traditional preemption allows local governments to test the boundaries of . . . state-controlled [policy] space and determine their remaining authority."); BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 2 (noting that local governments "may want to test the permissible scope" of their regulatory power).

<sup>167</sup> Tartakovsky, *supra* note 161, at 7.

preemption provision blocks any local action with respect to state-issued concealed-carry permits for handguns.<sup>168</sup> California's legislature similarly opted to preempt specific categories of regulation, expressly barring certain local measures on the sale and possession of imitation firearms,<sup>169</sup> the registration of commercially manufactured guns,<sup>170</sup> and the licensing of handguns for use on private property.<sup>171</sup> State courts have invalidated multiple ordinances under these provisions,<sup>172</sup> but they have otherwise made clear that California law leaves localities with "substantial" latitude to "tailor firearms legislation to the particular needs of their communities."<sup>173</sup>

Colorado recently joined this category as well. In early 2021, the state emerged as the first in the nation to enact a broad repeal of its firearm preemption provisions. The signed bill, which acknowledged that "the regulation of firearms is a matter of state and local concern," empowers local governments to "enact an ordinance, regulation, or other law governing" firearms unless "expressly prohibited pursuant to state law."<sup>174</sup> State legislators did leave behind a statute that prohibits local restrictions on the transport of guns in private vehicles,<sup>175</sup> evincing an intent to avoid burdening residents with inconsistent rules as they travel through the state. In another effort to accommodate concerns regarding nonuniformity, the bill's authors specified that localities cannot impose criminal penalties on those who violate their gun laws unless the individuals in question "knew or reasonably should have known that [their] conduct was prohibited."<sup>176</sup> As in other states with specific preemption provisions, Colorado's revised legislation offers a

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<sup>168</sup> NEB. REV. STAT. § 18-1703 (2021) ("Cities and villages shall not have the power to regulate the ownership, possession, or transportation of a concealed handgun . . . except as expressly provided by state law, and shall not have the power to require registration of a concealed handgun owned, possessed, or transported by a [state] permitholder . . .").

<sup>169</sup> CAL. GOV'T CODE § 53071.5(a) (West 2021) (preempting regulation of "the manufacture, sale, or possession of imitation firearms").

<sup>170</sup> *Id.* § 53071 (barring local laws on the "registration or licensing of commercially manufactured firearms").

<sup>171</sup> CAL. PENAL CODE § 25605 (prohibiting permit or license requirements with respect to the purchase, ownership, possession, or carrying of a handgun in a residence or place of business).

<sup>172</sup> *See, e.g.,* *Fiscal v. City & County of San Francisco*, 70 Cal. Rptr. 3d 324, 334–36 (Ct. App. 2008) (concluding that CAL. GOV'T CODE § 53071 "expressly preempted" an ordinance prohibiting the sale, distribution, transfer, and manufacture of all firearms and ammunition within San Francisco); *Doe v. City & County of San Francisco*, 186 Cal. Rptr. 380, 384–85 (Ct. App. 1982) (invalidating a citywide handgun ban under California's preemption provisions).

<sup>173</sup> *Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420, 425 (Ct. App. 1997).

<sup>174</sup> An Act Concerning Permitting Regulation of Firearms by Local Governing Bodies, S. 21-256, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021).

<sup>175</sup> COLO. REV. STAT. § 18-12-105.6(2) (2021).

<sup>176</sup> COLO. REV. STAT. § 29-11.7-103(1).

glimpse into the role that such statutes might play in finetuning a firearm regulatory regime—one that reduces certain compliance costs for gun owners while leaving localities with substantial flexibility to enact firearm policies that meet local needs.

#### b. Partial Express Preemption

Many states fall somewhere in the middle of the express preemption spectrum, with statutes that displace local authority in multiple firearm policy areas.<sup>177</sup> Typically, these statutes are formatted as general prohibitions on local gun regulation, subject to a set of specific exceptions.<sup>178</sup> For example, the Wisconsin legislature has barred all local lawmaking on the “sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration, or taxation of . . . any firearm,”<sup>179</sup> unless the measure falls within one of several narrow exemptions listed in the statute.<sup>180</sup> South Carolina has taken a similar approach, preempting all local regulations related to the “transfer, ownership, possession, carrying, or transportation of firearms” except for those “temporarily restrict[ing]” open carry during certain events on public property.<sup>181</sup> State law in Texas broadly prohibits localities from adopting rules “relating to” firearms or ammunition, also with limited exceptions.<sup>182</sup> The exact contours of local authority under these “partial” preemption statutes can differ significantly, depending on the number and scope of the exceptions carved out in the relevant state law.<sup>183</sup>

#### c. Maximum Express Preemption

The remaining states have embraced what commentators describe as “absolute” preemption provisions, which facially prohibit all local

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<sup>177</sup> See Tartakovsky, *supra* note 161, at 7 (identifying various states with “partial pre-emption” statutes as of 2013).

<sup>178</sup> See, e.g., ALASKA STAT. § 29.35.145(a)–(b) (2019); DEL. CODE ANN. tit. 22, § 111 (2019); OHIO REV. CODE ANN. § 9.68(A) (West 2021); MD. CODE ANN., CRIM. LAW § 4-209 (West 2019); S.C. CODE ANN. § 23-31-510(1) (2019); WIS. STAT. § 66.0409 (2019).

<sup>179</sup> WIS. STAT. § 66.0409(2).

<sup>180</sup> *Id.* § 66.0409(3)–(4).

<sup>181</sup> S.C. CODE ANN. § 23-31-510(1)–(2); *id.* § 23-31-520 (providing that local governments may “temporarily restrict the otherwise lawful open carrying of a firearm on public property when a governing body issues a permit to allow a public protest, rally, fair, parade, festival, or other organized event”).

<sup>182</sup> TEX. LOC. GOV'T CODE ANN. § 229.001(a)(1)–(3) (2020); *id.* § 229.001(b) (listing exceptions).

<sup>183</sup> Compare OHIO REV. CODE ANN. § 9.68(A)–(D) (barring all local firearm laws but carving out two narrow exceptions for zoning ordinances that address the commercial sale of firearms), with OR. REV. STAT. §§ 166.170–.175 (West 2021) (barring local firearm regulations but carving out a variety of relatively broad exceptions).

firearm laws.<sup>184</sup> Pennsylvania, for instance, enacted a statute providing that “[n]o county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms,”<sup>185</sup> and South Dakota’s localities have been denied the authority to pass any “ordinance that restricts or prohibits, or imposes any tax [or] licensure requirement” on guns.<sup>186</sup>

These provisions, frequently enacted in the name of preserving uniformity or protecting constitutional interests, are blunt instruments that strip away far more local power than is necessary to achieve their supposed aims. Indeed, absolute preemption statutes often preclude local lawmaking in areas where the state itself has not attempted to regulate, a pattern consistent with Briffault’s observation that such statutes are designed not to reconcile competing firearm laws, but to preclude any action on the subject whatsoever.<sup>187</sup> Put differently, many sweeping firearm preemption measures were championed with an eye toward “deregulat[ing] the space” entirely.<sup>188</sup>

### 3. Punitive Preemption Measures

In addition to enacting express restrictions on local firearm measures, several states have recently moved into the “uncharted legal territory” of punitive preemption.<sup>189</sup> Statutes in this category go beyond “merely nullify[ing] inconsistent local rules” to “impose harsh penalties on local officials or governments” responsible for preempted policies.<sup>190</sup> These laws encompass an array of sanctions “as creative as they are severe,”<sup>191</sup> and states differ in both the number of authorized punishments and the circumstances that trigger their application. Some

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<sup>184</sup> Schragger, *supra* note 14, at 1170; Tartakovsky, *supra* note 161, at 7; *see, e.g.*, N.M. CONST. art. II, § 6 (“No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.”); IOWA CODE § 724.28 (2019); UTAH CODE ANN. § 76-10-500(2) (LexisNexis 2019).

<sup>185</sup> 18 PA. CONS. STAT. § 6120(a) (2019).

<sup>186</sup> S.D. CODIFIED LAWS § 7-18A-36 (2019) (for counties); *id.* § 9-19-20 (for municipalities); *id.* § 8-5-13 (for townships).

<sup>187</sup> Briffault, *The New Preemption*, *supra* note 9, at 1997.

<sup>188</sup> Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 594 (2022) (emphasis omitted).

<sup>189</sup> BRIFFAULT ET AL., *supra* note 44, at 1.

<sup>190</sup> Briffault, *The New Preemption*, *supra* note 9, at 1997; *see also* Scharff, *supra* note 17, at 1473, 1495 (explaining that punitive preemption “seeks not just to curtail local government policy authority over a specific subject, but to broadly discourage local governments from exercising policy authority in the first place”).

<sup>191</sup> Rachel Proctor May, *Punitive Preemption and the First Amendment*, 55 SAN DIEGO L. REV. 1, 13 (2018).

legislatures, for instance, have endorsed narrower punitive measures that rely on a single enforcement mechanism or that apply under limited conditions.<sup>192</sup> Others have taken a hybrid approach, outlining a variety of potential penalties for localities with preempted gun laws.<sup>193</sup>

State legislators in Florida, Kentucky, and Arizona—three states with “absolute” prohibitions on local gun policymaking—have adopted the most severe forms of punitive firearm preemption to date. In Florida, section 790.33 of the state code proclaims an intent to “occupy[] the whole field of regulation of firearms” and expressly preempts all inconsistent local “ordinances, rules, [and] regulations.”<sup>194</sup> That same law then lists a series of punitive mechanisms designed to “deter and prevent [its] violation,”<sup>195</sup> including removal from office, hefty fines, civil liability for damages, and attorney’s fees.<sup>196</sup> Kentucky’s section 65.870, which similarly bars local regulation in “any part of the field . . . of firearms,”<sup>197</sup> contains its own distinct consequences for “violation[s] of [the law] or the spirit thereof.”<sup>198</sup> The statute strips local officials of immunity, authorizes private lawsuits against localities, mandates the payment of attorney’s fees, and even threatens criminal

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<sup>192</sup> For instance, several states have enacted a single punitive measure that authorizes private lawsuits for monetary remedies against local governments with prohibited firearm regulations. *See, e.g.*, MISS. CODE ANN. § 45-9-53(5)(c) (2019); OKLA. STAT. tit. 21, § 1289.24(D) (2019); N.C. GEN. STAT. § 14-409.40(h) (2019); VA. CODE ANN. § 15.2-915(C) (2019); OHIO REV. CODE ANN. § 9.68(B) (LexisNexis 2019). Iowa and Minnesota similarly permit private claims against local governments or officials, but only for violations of specific prohibitions on local firearm measures during public emergencies. *See* IOWA CODE § 29C.25 (2019) (barring localities from imposing restrictions or prohibitions on guns during periods of “emergency management,” *id.* § 29C.25(2)(b), and providing that individuals “aggrieved by a violation” of that provision “may seek relief . . . for actual damages . . . against a person who commits . . . such violation,” *id.* § 29C.25(3)(a)); MINN. STAT. § 624.7192 (2019) (forbidding local restrictions on firearms during “a state of emergency,” *id.* § 624.7192(a)–(c), and allowing individuals to pursue claims for damages and attorney’s fees for violations, *id.* § 624.7192(e)); *see also infra* text accompanying notes 204–14.

<sup>193</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3108 (2021); FLA. STAT. ANN. § 790.33 (West 2021); KY. REV. STAT. ANN. § 65.870 (West 2021).

<sup>194</sup> FLA. STAT. ANN. § 790.33(1); *see also id.* § 790.33(2)(a) (“It is the intent of this section . . . to declare all ordinances and regulations null and void which have been enacted by any jurisdictions other than state and federal, which regulate firearms . . . [and] to prohibit the enactment of any future ordinances or regulations relating to firearms . . .”).

<sup>195</sup> *Id.* § 790.33(2)(b).

<sup>196</sup> *Id.* § 790.33(3)(b)–(f); *see also* BRIFFAULT ET AL., *supra* note 44, at 9 (describing Florida’s punitive provisions).

<sup>197</sup> KY. REV. STAT. ANN. § 65.870(1); *see also id.* § 65.870(2) (“Any existing or future ordinance, executive order, administrative regulation, policy, procedure, rule, or any other form of executive or legislative action in violation of this section or the spirit thereof is hereby declared null, void, and unenforceable.”).

<sup>198</sup> *Id.* § 65.870(2)–(3).

penalties.<sup>199</sup> Local governments that attempt to regulate guns in Arizona risk running afoul of section 13-3108, a sweeping firearm preemption law that punishes violations with fines, removal from office, and civil liability.<sup>200</sup> These sanctions are coupled with an additional set of fiscal penalties under Arizona’s infamous Senate Bill 1487 (S.B. 1487),<sup>201</sup> which mandates state-aid cutoffs when localities fail to “cure” preemption defects in any policy area.<sup>202</sup>

To capture both the range and severity of the enforcement mechanisms embedded in punitive preemption laws, this Section breaks the relevant statutes into their component parts and organizes those provisions based on penalty type. The available sanctions for firearm preemption violations can be sorted into two separate buckets: those penalizing local governments and those targeting individual officials. As demonstrated below, states have taken various approaches within each of these two categories.

#### a. Penalizing the Local Government

Many punitive preemption measures impose fiscal sanctions directly on local governments engaged in firearm-related policymaking.<sup>203</sup> The most popular approach within this category has been the authorization of private lawsuits seeking to hold local entities financially accountable for preemption violations, though one state has also taken the extraordinary step of pledging to withhold funds from noncompliant governments. Both penalty types threaten to exact a heavy toll on localities when their gun laws are challenged and invalidated.

##### i. Authorizing Private Lawsuits and Monetary Remedies

To facilitate the enforcement of firearm preemption statutes, multiple states have created private rights of action against local governments with potentially prohibited regulations on the books.<sup>204</sup> These laws typically provide that any “person or . . . organization . . . adversely affected by” a preempted firearm

<sup>199</sup> *Id.* § 65.870(4)–(6).

<sup>200</sup> See ARIZ. REV. STAT. ANN. § 13-3108(A)–(D) (2021) (forbidding all “political subdivision[s]” from enacting any ordinances, rules, or regulations for firearms and ammunition); *id.* § 13-3108(I)–(K) (listing penalties for violations).

<sup>201</sup> See S. 1487, 52d Leg., 2d Reg. Sess. (Ariz. 2016).

<sup>202</sup> See ARIZ. REV. STAT. ANN. § 41-194.01(B)(1)(a).

<sup>203</sup> Briffault, *The New Preemption*, *supra* note 9, at 2004.

<sup>204</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-3108(K); FLA. STAT. ANN. § 790.33(3)(f) (2021); KY. REV. STAT. ANN. § 65.870(4); OHIO REV. CODE ANN. § 9.68(B) (West 2021); OKLA. STAT. tit. 21, § 1289.24(D) (2021); MISS. CODE ANN. § 45-9-53(5)(a) (2021); N.C. GEN. STAT. § 14-409.40(h) (2021); VA. CODE ANN. § 15.2-915(C) (2021).

policy is entitled to file a civil lawsuit against the locality.<sup>205</sup> A handful of states have deviated from this standard script,<sup>206</sup> but the repeated use of nearly identical language suggests that legislatures are borrowing these “citizen suit provision[s]” from one another.<sup>207</sup>

Statutes of this sort not only expand the available avenues for bringing preemption claims, but also significantly raise the stakes of such lawsuits. When a local policy is declared invalid in a traditional preemption dispute, localities usually face “nothing more” than an order deeming the measure unenforceable and the loss of “whatever expenses [were] incurred” during the litigation.<sup>208</sup> But in states where private litigants can file claims under the newer punitive measures, local governments may find themselves on the hook for sums that far exceed the costs of their own legal defense. Some provisions specify that successful plaintiffs may recover attorney’s fees,<sup>209</sup> others provide for actual damages,<sup>210</sup> and several authorize courts to award both.<sup>211</sup> Arizona’s legislature has gone even further with a measure empowering judges to impose a \$50,000 civil penalty on any “political subdivision” that “knowingly and wilfully violate[s]” the state’s firearm preemption statute.<sup>212</sup> These measures significantly increase “the risks of losing a legal

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<sup>205</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-3108(K); FLA. STAT. ANN. § 790.33(3)(f); KY. REV. STAT. ANN. § 65.870(4); see also MISS. CODE ANN. § 45-9-53(5)(a); N.C. GEN. STAT. § 14-409.40(h); OHIO REV. CODE ANN. § 9.68(B).

<sup>206</sup> See, e.g., OKLA. STAT. tit. 21, § 1289.24(D) (“When a person’s rights pursuant to the protection of the preemption provisions . . . have been violated, the person shall have the right to bring a civil action . . .”); VA. CODE ANN. § 15.2-915(C) (authorizing various civil remedies for “any person, group, or entity that prevails in an action challenging . . . an ordinance, resolution, or motion as being in conflict” with the state’s firearm preemption law). Notably, Kentucky’s provision allows private plaintiffs to bring claims against localities that have regulated firearms “in violation of [the preemption] section or the *spirit thereof*.” KY. REV. STAT. ANN. § 65.870(4) (emphasis added). This vague language could easily be construed to cover a whole host of local practices, and it leaves officials with little clarity regarding the types of activity that might expose localities to liability. See May, *supra* note 191, at 13; see also Tartakovsky, *supra* note 161, at 8.

<sup>207</sup> May, *supra* note 191, at 11–13, 21. The “similar wording” of these provisions is “likely attributable” to reliance on model statutory language from ALEC and other conservative organizations. *Id.* at 21 n.134.

<sup>208</sup> *Id.* at 13.

<sup>209</sup> See, e.g., KY. REV. STAT. ANN. § 65.870(4)(a)–(b) (providing that localities may be liable for “[r]easonable attorney’s fees and costs” and “[e]xpert witness fees and expenses”); VA. CODE ANN. § 15.2-915(C).

<sup>210</sup> See, e.g., OKLA. STAT. tit. 21, § 1289.24(D).

<sup>211</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-3108(K) (“If the plaintiff prevails in the action, the court shall award both: (1) [r]easonable attorney fees and costs[, and] (2) [t]he actual damages incurred not to exceed one hundred thousand dollars.”); see also FLA. STAT. ANN. § 790.33(3)(f)(1)–(2) (West 2021); N.C. GEN. STAT. § 14-409.40 (2021); OHIO REV. CODE ANN. § 9.68(B) (West 2021).

<sup>212</sup> ARIZ. REV. STAT. ANN. § 13-3108(I).

battle” over preemption,<sup>213</sup> likely leaving many localities “unwilling even to try to probe the line of what is legally permissible” in the firearm space.<sup>214</sup>

ii. Withholding State Funds

Arizona’s recent preemption legislation, known widely as S.B. 1487, has achieved notoriety for its status as the “most punitive fiscal measure” applied to local governments.<sup>215</sup> The statute threatens localities with serious financial consequences for any violation of state law across a range of policy areas,<sup>216</sup> layering an additional set of possible penalties for gun-related lawmaking onto those already listed in Arizona’s firearm preemption provision.<sup>217</sup>

Under S.B. 1487, any Arizona legislator may request that the State Attorney General conduct an inquiry into whether a particular local policy has been preempted.<sup>218</sup> Localities are given “thirty days to resolve [any] violation” uncovered in the investigation.<sup>219</sup> If a preempted law remains in place after that period has elapsed, Arizona’s Treasurer must “withhold and redistribute” the local government’s share of state aid until the violation is addressed.<sup>220</sup> To place the severity of this provision in perspective, these “state-shared” funds account for “about a quarter” of Tucson’s general revenues.<sup>221</sup>

Even the mere possibility of a violation raises serious fiscal risk. Upon concluding that a local regulation “[m]ay violate a provision of state law,” Arizona’s Attorney General must “file a special action” with the state supreme court for resolution of the issue.<sup>222</sup> The local government is then required to “post a bond equal to the amount of state shared revenues” received from the state “in the preceding six months.”<sup>223</sup> The Tucson example from above once again displays the risk: this

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<sup>213</sup> Scharff, *supra* note 17, at 1504.

<sup>214</sup> BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 12.

<sup>215</sup> Briffault, *The New Preemption*, *supra* note 9, at 2005; see S. 1487, 52d Leg., 2d Reg. Sess. (Ariz. 2016). For a description of S.B. 1487 that is far more thorough than the summary offered here, see Scharff, *supra* note 17, at 1495–98.

<sup>216</sup> ARIZ. REV. STAT. ANN. § 41-194.01(A).

<sup>217</sup> See *id.* § 13-3108.

<sup>218</sup> *Id.* § 41-194.01(A).

<sup>219</sup> *Id.* § 41-194.01(B)(1).

<sup>220</sup> *Id.* § 41-194.01(B)(1)(a). The shared funds at issue are revenues that the Arizona government collects from state taxes and then earmarks for the support of local governments. Scharff, *supra* note 17, at 1496.

<sup>221</sup> Scharff, *supra* note 17, at 1496 (citing Complaint for Declaratory, Injunctive, and Special Action Relief at 5, *City of Tucson v. State*, No. C20165733 (Ariz. Super. Ct. Dec. 12, 2016)).

<sup>222</sup> ARIZ. REV. STAT. ANN. § 41-194.01(B)(2) (emphasis added).

<sup>223</sup> *Id.*

potential bond payment would “exceed[] [the city’s] reserve fund by about \$5 million.”<sup>224</sup>

Within and beyond the firearms space, Arizona’s S.B. 1487 presents a severe financial threat for localities statewide. The statute effectively “short circuits the traditional legal process for . . . preemption challenges,” endowing the Attorney General with “extraordinary powers” to identify and punish violations of state law.<sup>225</sup> Moreover, the state funds at stake are “crucial to local fiscal health.”<sup>226</sup> Litigating potential violations requires posting a bond that may be “virtually impossible” for localities to pay, and “no local government is likely to . . . withstand the coercive force of a complete cut-off” from shared state aid.<sup>227</sup> As a supplement to Arizona’s separate punitive firearm preemption law, S.B. 1487 provides “an effective means of bludgeoning a recalcitrant locality into submission.”<sup>228</sup>

#### b. Punishing Local Officials

In addition to, or in place of, penalizing local governments, some states “reinforce firearms preemption by threatening local officials” with sanctions.<sup>229</sup> The current roster of state-imposed consequences for local leaders includes civil liability, substantial fines, removal from office, and criminal punishment.<sup>230</sup> These penalties are explored further below.

#### i. Financial Liability

The threat of individual monetary accountability has emerged as the most common tactic for targeting local officials who attempt to regulate guns. In several states, government employees are included on the list of defendants exposed to potential liability when private parties allege preemption violations.<sup>231</sup> Officials in Oklahoma may be held

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<sup>224</sup> Scharff, *supra* note 17, at 1496–97.

<sup>225</sup> *Id.* at 1495–96. Moreover, the statute “provides no judicial review of the attorney general’s conclusion that the locality has violated state law.” *Id.* at 1496.

<sup>226</sup> Briffault, *The New Preemption*, *supra* note 9, at 2006.

<sup>227</sup> BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 6.

<sup>228</sup> Briffault, *The New Preemption*, *supra* note 9, at 2006; *see also* Scharff, *supra* note 17, at 1497 (“With so much revenue at stake, local governments will be tempted to back away from innovations that are within their authority.”).

<sup>229</sup> Briffault, *The New Preemption*, *supra* note 9, at 2002–03.

<sup>230</sup> *See id.*

<sup>231</sup> *See, e.g.*, FLA. STAT. ANN. § 790.33(3)(a) (West 2021); KY. REV. STAT. ANN. § 65.870(4) (West 2021); OKLA. STAT. tit. 21, § 1289.24(D) (2021); *see also* IOWA CODE § 29C.25 (2021) (authorizing private lawsuits for firearm preemption violations during states of public emergency); MINN. STAT. § 624.7192 (2021) (same).

“jointly and severally [liable]” for their role in firearm policymaking,<sup>232</sup> and local leaders who enact preempted gun laws in Kentucky are stripped of their state-conferred immunity.<sup>233</sup> As a result, officials in both states could be forced to pay steep prices for winding up on the losing side of gun preemption disputes.<sup>234</sup>

Two additional states go so far as to impose weighty fines on local lawmakers involved in adopting or enforcing their own firearm laws. Florida’s preemption provision not only subjects officials to civil liability,<sup>235</sup> but also mandates that courts “assess a civil fine” of up to \$5,000 for “knowing and willful” violations of the statute.<sup>236</sup> The Mississippi legislature borrowed from this template to enact a similar measure,<sup>237</sup> which authorizes a \$1,000 civil penalty for “[a]ny elected county or municipal official under whose jurisdiction [a] violation occurred.”<sup>238</sup> Both states also bar local governments from using public funds to cover or reimburse the defense costs of officials found liable under each preemption law.<sup>239</sup>

## ii. Removal from Office

Legislators in two states have added removal from office to the medley of available penalties for local leaders. In Arizona, any individual who has “knowingly and wilfully violated” the state’s firearm preemption law may be subject to “termination from employment.”<sup>240</sup> Florida’s legislature adopted a comparable provision empowering the Governor to remove officials for “knowing and willful violation[s]” of its restriction on local firearm policies.<sup>241</sup> The validity of the Florida provision is currently uncertain,<sup>242</sup> but both measures signal a

<sup>232</sup> OKLA. STAT. tit. 21, § 1289.24(D).

<sup>233</sup> KY. REV. STAT. ANN. § 65.870(4). The firearm preemption law specifically “exempt[s] [local officials] from any immunity provided in Section 231 of the Constitution of Kentucky,” *id.*, which empowers the state legislature to determine who may be subject to suit in the state’s courts, *see* KY. CONST. § 231.

<sup>234</sup> *See* KY. REV. STAT. ANN. § 65.870(4) (opening up the possibility that local officials will be responsible for attorney’s fees and costs); OKLA. STAT. tit. 21, § 1289.24(D) (authorizing an award of “monetary damages”).

<sup>235</sup> FLA. STAT. ANN. § 790.33(3)(a).

<sup>236</sup> *Id.* § 790.33(3)(c).

<sup>237</sup> *See* BRIFFAULT ET AL., *supra* note 44, at 9–10.

<sup>238</sup> MISS. CODE ANN. § 45-9-53(5)(c) (2021).

<sup>239</sup> *See* FLA. STAT. ANN. § 790.33(3)(d) (“[P]ublic funds may not be used to defend or reimburse the unlawful conduct of any person found to have knowingly and willfully violated this section.”); MISS. CODE ANN. § 45-9-53(5)(c) (similar).

<sup>240</sup> ARIZ. REV. STAT. ANN. § 13-3108(J) (2021).

<sup>241</sup> FLA. STAT. ANN. § 790.33(3)(e).

<sup>242</sup> *See infra* text accompanying notes 306–07, 382–90 (discussing relevant developments in recent Florida case law).

willingness on the part of state legislators to deter gun regulation through direct intrusion into local power structures.<sup>243</sup>

### iii. Criminal Liability

Kentucky has separated itself from the rest of the punitive preemption pack with a measure that outlines criminal penalties for enacting prohibited gun laws.<sup>244</sup> The statute specifically provides that any “public servant” implicated in a preemption violation is criminally liable for official misconduct,<sup>245</sup> a misdemeanor carrying a one-year maximum prison sentence.<sup>246</sup> This Kentucky provision may represent a “fearsome new template” for punitive preemption,<sup>247</sup> though no states have followed suit as of yet.

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The framework above lends some clarity and coherence to the complex landscape of state firearm preemption statutes. With this roadmap in hand, activists, officials, and scholars can develop a deeper understanding of discrete state preemption laws, their implications for the state-local relationship, and their consequences for gun policy. Those consequences take center stage in the following Part, which investigates the practical effects of firearm preemption on local efforts to address gun-related harms.

## III. PREEMPTION IN PRACTICE: DERAILING AND DETERRING LOCAL FIREARM POLICY

Commentators have offered a range of predictions regarding the costs of recent trends in state preemption. Some warn that broad express preemption measures—now common across various policy

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<sup>243</sup> See Phillips, *supra* note 10, at 2251–52 (describing removal provisions as examples of punitive measures “designed to structurally alter the power of cities” and highlighting Florida’s statute).

<sup>244</sup> BRIFFAULT, *Punitive Preemption*, *supra* note 17, at 3 (observing that among the “[s]everal states [that] have adopted laws penalizing local officials” for preempted firearm regulations, “Kentucky appears to have gone the furthest”).

<sup>245</sup> KY. REV. STAT. ANN. § 65.870(6) (West 2021) (“A violation of [the preemption provision] by a public servant shall be a violation of either KRS 522.020 or 522.030, depending on the circumstances of the violation.”). The two criminal provisions referenced in the statute correspond, respectively, to “official misconduct in the first degree,” *id.* § 522.020(1), and “official misconduct in the second degree,” *id.* § 522.030(1).

<sup>246</sup> See *id.* § 532.090.

<sup>247</sup> Tartakovsky, *supra* note 161, at 8.

areas—diminish “responsiveness . . . to citizen engagement,” undermine “attentiveness to distinctly local preferences,” and reduce regulatory “innovations . . . address[ing] local problems.”<sup>248</sup> Several scholars have added that punitive preemption likely compounds these consequences, as “few actions can have a greater chilling effect on local self-government than threatening local officials with [sanctions] . . . for supporting certain local measures.”<sup>249</sup>

Drawing on concrete examples from various states, this Part demonstrates the accuracy of these predictions with respect to firearm policy. Jurisdictions with expansive express preemption statutes have tied the hands of community leaders eager to address local firearm-related issues and preferences. Punitive preemption laws exert additional pressure on many local governments, effectively forcing them to back down from certain gun policies or else risk severe sanctions. In several cases, the possibility of punishment has even discouraged attempts to open debate on firearm issues at the outset. These consequences have converged to fuel a substantial reduction in the breadth, diversity, and effectiveness of local firearm laws nationwide.

#### A. *Express Firearm Preemption in Practice*

Explicit restrictions on local gun policy differ from state to state in their scope and severity, but their collective role in narrowing the range of regulatory opportunities for firearms is readily apparent. In particular, broad express preemption measures—that is, those purporting to prohibit all or nearly all local firearm regulation—regularly push localities to abandon or curtail policy efforts that target gun-related concerns.

For a compelling example of broad express preemption and its consequences, consider Pennsylvania. The state’s two largest cities, Pittsburgh and Philadelphia, have long grappled with rates of firearm-related crime and mortality that exceed statewide averages.<sup>250</sup> Democratic leaders in both cities have consistently acknowledged the

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<sup>248</sup> Briffault, *The New Preemption*, *supra* note 9, at 2019; *see also* Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 *PUBLIUS* 403, 418–20 (2017).

<sup>249</sup> Briffault, *The New Preemption*, *supra* note 9, at 2022; *see also* Scharff, *supra* note 17, at 1494.

<sup>250</sup> Philadelphia County and Allegheny County (where Pittsburgh is located) have firearm mortality rates of 17.9 deaths and 13.4 deaths per every 100,000 people, respectively, while the statewide rate is around 11.4 deaths per every 100,000 individuals. *See* EVERYTOWN FOR GUN SAFETY, *GUN VIOLENCE IN PENNSYLVANIA 1* (2019) [<https://perma.cc/DW7E-ANQ8>].

need to address local gun violence,<sup>251</sup> but the state's expansive preemption statute has thwarted their repeated attempts to enact more comprehensive firearm laws.

A string of cases dating back to the late 1990s is illustrative. Both Philadelphia and Pittsburgh suffered a major defeat under the preemption statute in 1996, when the Pennsylvania Supreme Court invalidated a set of ordinances prohibiting certain assault weapons within municipal limits.<sup>252</sup> A lower court later relied on that decision to strike down seven Philadelphia measures designed to reduce gun-related crime.<sup>253</sup> The judges did express sympathy for the city's efforts to address "terrible problems [of] gun violence," but those "practical considerations" could not justify contravening the state legislature's "clear" intent to "assume[] sole regulatory power" over firearms.<sup>254</sup> Philadelphia officials were dealt another blow the following year with an opinion that nullified new restrictions on assault rifles and straw purchases.<sup>255</sup> Once again, the court explained, the state's broad preemption law foreclosed "the City's latest attempt" to curtail the "tragic proliferation of gun crimes" within city limits.<sup>256</sup>

More recent events have thrust the ramifications of Pennsylvania's sweeping preemption measure into the national spotlight. Following a shootout that left six Philadelphia police officers wounded, Mayor Jim Kenney publicly implored state legislators to either "choose . . . to help" or "get out of the way—and allow cities . . . that struggle with gun violence to enact [their] own solutions."<sup>257</sup> Around the same time, Pittsburgh Mayor Bill Peduto was litigating the validity of three new firearm regulations adopted after a mass shooting in a local

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<sup>251</sup> See, e.g., Chris Palmer, *Mayor Kenney Unveils Initiatives to Address Gun Violence*, PHILA. INQUIRER (Jan. 17, 2019), <https://www.inquirer.com/news/philadelphia-anti-violence-report-mayor-jim-kenney-homicides-shootings-20190117.html> [<https://perma.cc/CJ58-B8DP>]; Press Release, City of Pittsburgh, Leaders Forward Package of Common Sense Gun Safety Measures (Dec. 14, 2018), <https://pittsburghpa.gov/press-releases/press-releases.html?id=2517> [<https://perma.cc/J7YW-K9R7>].

<sup>252</sup> *Ortiz v. Commonwealth*, 681 A.2d 152, 155 (Pa. 1996) (concluding that the municipal bans were "infirm" because the cities had attempted to "regulate [a policy area] which the General Assembly has said they may not regulate").

<sup>253</sup> *Clarke v. House of Representatives*, 957 A.2d 361, 363–65 (Pa. Commw. Ct. 2008); see *id.* at 362 (describing the seven ordinances, which included new gun-licensing measures, limitations on handgun purchases, reporting requirements for ammunition sellers, and the authorization of firearm confiscation from high-risk individuals).

<sup>254</sup> *Id.* at 364–65.

<sup>255</sup> *Nat'l Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78, 79–80, 83 (Pa. Commw. Ct. 2009).

<sup>256</sup> *Id.* at 80.

<sup>257</sup> Davey & Hassan, *supra* note 128.

synagogue.<sup>258</sup> The measures would have revived the city's assault-weapons ban, barred military-style accessories, and empowered "courts to temporarily prohibit" high-risk individuals from possessing firearms.<sup>259</sup> But a state court swiftly voided these ordinances,<sup>260</sup> reminding officials in Pittsburgh and elsewhere that the legislature has "preempt[ed] any local regulation pertaining to . . . firearms. . . . across the state of Pennsylvania."<sup>261</sup>

Leaders in Philadelphia and Pittsburgh are representative of the many local officials—often, though not entirely, in urban areas—whose attempts to meet local demand for gun regulation have been derailed under a broad preemption statute.<sup>262</sup> As these examples illustrate, expansive firearm preemption is fundamentally at odds with the long-standing notion that localities are "both democratically elected governments and service providers that regularly tackle the street-level problems."<sup>263</sup> In Pennsylvania and beyond, state legislators have seriously limited the range of options available to officials for crafting public-safety agendas that reflect local needs.

### B. *Punitive Preemption in Practice*

While punitive preemption is a relatively recent phenomenon, its consequences for firearm policymaking are already becoming clear. Across the states with punitive preemption laws, legislators and private plaintiffs alike have successfully deployed these measures to secure the removal of existing gun regulations and derail the implementation of new ones. Localities that initially resist this pressure often acquiesce once confronted with the risk of burdensome litigation. Moreover, in

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<sup>258</sup> See Mihir Zaveri, *Judge Strikes Down Gun Laws Enacted in Wake of Pittsburgh Synagogue Massacre*, N.Y. TIMES (Oct. 30, 2019), <https://nyti.ms/3Z9Mrz> [<https://perma.cc/GW25-6R99>].

<sup>259</sup> Press Release, City of Pittsburgh, *supra* note 251; see also PITTSBURGH, PA., ORDINANCES 2018-1218 to -1220 (2018).

<sup>260</sup> *Firearm Owners Against Crime v. City of Pittsburgh*, No. GD 19-005330, slip op. at 6 (Pa. Ct. Com. Pl. Oct. 29, 2019); see also Jonathan D. Silver, *Judge Strikes Down Pittsburgh Gun-Control Ordinances*, PITTSBURGH POST-GAZETTE (Oct. 29, 2019, 6:42 PM), <https://www.post-gazette.com/news/crime-courts/2019/10/29/pittsburgh-gun-ordinances-judge-struck-down/stories/201910290149> [<https://perma.cc/3BCX-W4YJ>].

<sup>261</sup> *Firearm Owners Against Crime*, slip op. at 5.

<sup>262</sup> Cf. *City of Missoula v. Fox*, 450 P.3d 898, 900–01, 903–04 (Mont. 2019) (invoking Montana's broad express preemption provision to invalidate a Missoula ordinance that mandated instant background checks for firearm purchases or transfers within the city); *Chan v. City of Seattle*, 265 P.3d 169, 176 (Wash. Ct. App. 2011) (concluding that a Seattle law limiting the possession of firearms in certain public parks was void under the state's express preemption statute).

<sup>263</sup> Briffault, *The New Preemption*, *supra* note 9, at 2020.

several instances, the looming prospect of state-imposed sanctions has been sufficiently distressing to stifle public discussion on gun-related problems and discourage local governments from probing the contours of their authority. These patterns amount to an assault on local lawmaking that restricts the “capacity of local communities to govern themselves.”<sup>264</sup>

### 1. Mississippi

A closer look at Mississippi illuminates the potent effects of punitive measures that authorize private actions against local governments with preempted firearm policies. In 2014, the state empowered private litigants to challenge local gun regulations and seek various civil remedies.<sup>265</sup> The statute requires that prospective plaintiffs first submit the supposed violation to the State Attorney General, who informs localities of their thirty-day window to “cure” the issue before facing litigation.<sup>266</sup>

Almost immediately, gun-rights interest groups inundated the Attorney General’s Office with preemption allegations.<sup>267</sup> One particularly ambitious firearms instructor filed thirty-four separate complaints, prompting all but three of the targeted localities to alter or repeal their regulations within the thirty-day grace period.<sup>268</sup> The remaining holdouts capitulated once they were hauled into court.<sup>269</sup> More recently, at the behest of a different gun-rights advocate, the Attorney General notified the Republican mayor of a Jackson suburb that its ordinance barring concealed weapons on public property violated the state preemption law.<sup>270</sup> Within just two months, the

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<sup>264</sup> BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 11.

<sup>265</sup> See MISS. CODE ANN. § 45-9-53(5) (2021).

<sup>266</sup> See *id.* § 45-9-53(5)(b).

<sup>267</sup> See Jimmie E. Gates, *AG’s Office Says Madison’s Ordinance May Violate State’s Enhanced Gun Carry Permit Law*, MISS. CLARION LEDGER (Nov. 21, 2019, 4:00 AM), <https://www.clarionledger.com/story/news/politics/2019/11/21/man-files-ags-complaint-saying-city-madison-violating-gun-laws/4206145002> [<https://perma.cc/TRK9-56YK>].

<sup>268</sup> See *id.*

<sup>269</sup> *Id.* (explaining that the gun-rights advocate “file[d] civil suits against the cities of Hattiesburg and Forrest as well as Jones County” and noting that “all three settled the suits and admitted guilt in an agreed order in circuit court”).

<sup>270</sup> See Madison, Miss., Ordinance Prohibiting Possession of Firearms on Designated City Property, and Setting Forth Conditions of Said Prohibition (Sept. 3, 2013), <http://www.madisonthecity.com/sites/default/files/MadisonFirearmsOrdinanceSigned.pdf> [<https://perma.cc/C745-K5S9>]; see also Gates, *supra* note 267 (summarizing a letter sent to the mayor of Madison, Mississippi, to provide notice regarding the locality’s violation of the state’s preemption provision).

Madison Board of Aldermen gutted the seven-year-old rule and approved a new version.<sup>271</sup> The swiftness with which localities have succumbed to these warnings underscores the coercive nature of statutes that cast local gun regulation as a basis for civil liability.

## 2. Kentucky

A similar statewide campaign to disassemble local firearm policy has unfolded in Kentucky. Shortly after the state's punitive preemption measure took effect in 2013, the Kentucky Concealed Carry Coalition—a gun-rights organization commonly known as KC3—unleashed a wave of lawsuits against localities with “what its members saw as offending ordinances and rules.”<sup>272</sup> In that first year alone, all but one of the fourteen targeted local governments “rescind[ed] the [challenged] regulation . . . before going to court.”<sup>273</sup> The organization now boasts that it has forced “dozens of local governments . . . to change their ordinances,” and it touts its “18–0 record in court actions” against localities that “refused” to do so.<sup>274</sup> The overwhelming success of this crusade is a direct product of Kentucky's preemption statute: by “strip[ping] government officials of immunity” and “allow[ing] those filing suit to recoup attorney's expenses,” the law “makes it possible, and worthwhile, for [KC3] to take [its] cases to court.”<sup>275</sup>

Recent KC3 victories reveal that the mere threat of punitive preemption is a powerful tool in the organization's deregulatory campaign. In 2015, the Louisville Arena Public Authority swiftly repealed a stadium's “total ban on firearms” after KC3 warned that the regulation “constituted a violation of state law.”<sup>276</sup> The following year, a single “request” from KC3 prompted Danville to retract a 1983

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<sup>271</sup> See Minutes of the First Regular Monthly Meeting of the Mayor and Board of Aldermen of the City of Madison, Mississippi 2 (Dec. 3, 2019), <http://www.madisonthecity.com/sites/default/files/Minutes%2C%2012-3-19.pdf> [<https://perma.cc/H8TZ-P8RD>] (loosening the restriction limiting possession of firearms on designated city property).

<sup>272</sup> Kelly McKinney, *Gun Rights Group Sues Richmond over Pawn Shop Ordinance*, RICHMOND REG. (Mar. 15, 2018), [https://www.richmondregister.com/news/gun-rights-group-sues-richmond-over-pawn-shop-ordinance/article\\_ece569e0-28a3-11e8-b978-4f77326f57bc.html](https://www.richmondregister.com/news/gun-rights-group-sues-richmond-over-pawn-shop-ordinance/article_ece569e0-28a3-11e8-b978-4f77326f57bc.html) [<https://perma.cc/2HSL-E3W9>].

<sup>273</sup> *Id.*

<sup>274</sup> KY. CONCEALED CARRY COAL., <https://kc3.com> [<https://perma.cc/9UEP-HNUW>]; see also McKinney, *supra* note 272 (noting that KC3 has been the “force behind changes in regulations in more than a dozen [Kentucky] localities”).

<sup>275</sup> McKinney, *supra* note 272.

<sup>276</sup> Sheldon S. Shafer, *Yum! Center Eases Total Firearms Ban*, LOUISVILLE COURIER J. (Nov. 10, 2015, 12:25 PM), <https://www.courier-journal.com/story/news/local/2015/11/09/yum-center-adopts-limited-firearms-ban/75455704> [<https://perma.cc/JQH4-N8FW>].

ordinance prohibiting firearms in public cemeteries.<sup>277</sup> Hoping to evade further scrutiny, the city's commissioners also voted unanimously to strike a separate ten-year-old rule requiring firearms-safety training for citation officers.<sup>278</sup> Both decisions reflected the perceived risks of defying the state: as one Danville official explained, local leaders "don't know if [they] have a choice" when confronted with the prospect of punitive preemption.<sup>279</sup>

Some localities have resisted these initial threats only to find themselves roped into private lawsuits authorized under the preemption statute. After KC3 successfully pressured leaders in the small city of Richmond to remove signs barring guns at public parks and pools,<sup>280</sup> the group set its sights on a pawnshop ordinance that subjected firearms to various record-keeping requirements.<sup>281</sup> Richmond officials rebuffed KC3's initial request to revise the ordinance, prompting the organization to announce that the municipality would "bear the expense" of litigation.<sup>282</sup> The group's own vice president quickly staged a failed gun sale in a Richmond pawnshop, a move that gave KC3 standing to sue the locality under Kentucky's preemption law.<sup>283</sup> Seven months after the lawsuit was filed, Richmond's commissioners unanimously agreed to remove firearms from the regulation's text.<sup>284</sup>

A similar series of events in Hillview, Kentucky, underscores the potential financial implications of these state-authorized lawsuits. In 2013, KC3 challenged a Hillview ordinance from 1996 that restricted

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<sup>277</sup> *Danville Lifts Prohibition on Firearms in Cemeteries*, *ADVOC.-MESSENGER* (Dec. 13, 2016, 4:15 PM), <https://www.amnews.com/2016/12/13/danville-lifts-prohibition-on-firearms-in-cemeteries> [<https://perma.cc/KCB8-TMLR>].

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> McKinney, *supra* note 272 (explaining that Richmond's city attorney immediately advised local officials to remove the signs after KC3 "point[ed] out to city officials that the prohibition[s] violate[d] . . . state law").

<sup>281</sup> *Id.* The ordinance, adopted in 2012, required pawn shops accepting secondhand goods to obtain "a photograph of the person selling or pawning an item, a copy of the customer's ID, and a photo of the item itself," along with "serial numbers, model numbers and identifying marks" on any firearms. *Id.*

<sup>282</sup> *Id.* (quoting KC3 Vice President Stephen McBride).

<sup>283</sup> *Id.*; see KY. REV. STAT. ANN. § 65.870(4) (West 2021) (authorizing parties "adversely affected by" local gun laws to file suit).

<sup>284</sup> See Richmond, Ky., Ordinance No. 18-19 (Aug. 28, 2018), <https://www.richmond.ky.us/DocumentCenter/View/444/18-19-Ordinance-Pawnshop-Firearms-Amendment-PDF> [<https://perma.cc/YJD6-7LQT>]. The lawsuit was initially filed in Madison County Circuit Court on February 27, 2018. See McKinney, *supra* note 272.

concealed carry in city-owned buildings.<sup>285</sup> The trial court invalidated the ordinance, but issued an order denying KC3's request for \$8,472.50 in attorney's fees, triggering an appeal from the organization.<sup>286</sup> That order was reversed in the Kentucky Court of Appeals, which concluded that the state's preemption statute "mandated" an award of "reasonable attorney's fees" to the "prevailing party."<sup>287</sup> Hillview's city council subsequently settled the dispute with a pledge to pay \$9,250 in attorney's fees, an amount higher than the sum that KC3 had demanded in its initial motion.<sup>288</sup>

Just as in Mississippi, the threat of punitive preemption has exerted tremendous pressure on Kentucky localities seeking to implement or enforce their own firearm policies. With the specter of civil and criminal sanctions looming in the background, many local governments have surrendered as soon as their gun regulations were targeted—and in at least one case, resistance came with a price of thousands of dollars in attorney's fees and costs.

### 3. Florida

Recent clashes over local firearm policies in Florida provide yet another powerful illustration of punitive preemption in action. State firearm organizations, using the same tactics as those in Mississippi and Kentucky, have invoked the private right of action in Florida's preemption statute to push local governments into costly legal battles.<sup>289</sup> In one notable example, two gun-rights groups sought to hold Tallahassee and its officials liable for failing to repeal old prohibitions on discharging weapons in certain areas.<sup>290</sup> The city had already ceased

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<sup>285</sup> Ky. *Concealed Carry Coal., Inc. v. City of Hillview*, No. 2015-CA-000304, 2017 WL 3833253, at \*1 (Ky. Ct. App. Sept. 1, 2017) (quoting HILLVIEW, KY., ORDINANCES §§ 130.15–.19 (1996)).

<sup>286</sup> *Id.* at \*2.

<sup>287</sup> *Id.* at \*5–6.

<sup>288</sup> Thomas Barr, *Hillview Settles Old Lawsuit on Weapons Ordinance*, PIONEER NEWS (Nov. 22, 2017, 4:01 AM), <https://www.pioneernews.net/content/hillview-settles-old-lawsuit-weapons-ordinance> [<https://perma.cc/RN7K-Q7LY>].

<sup>289</sup> See, e.g., *Litigation*, FLA. CARRY, <https://www.floridacarry.org/litigation> [<https://perma.cc/BZ37-ZPRG>] (listing nine separate preemption lawsuits filed against local governments and public universities and noting at least four victories resulting in policy changes or repeal).

<sup>290</sup> See *Fla. Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 455–56 (Fla. Dist. Ct. App. 2017). The first ordinance, enacted in 1957, limited gun use to agricultural areas of five acres or larger, see *id.* at 455–56 (quoting TALLAHASSEE, FLA., CODE § 12-61(a) (2017)), and the second restriction, adopted in 1984, prohibited discharge in municipally owned parks and recreational facilities, see *id.* at 456 (citing TALLAHASSEE, FLA., CODE § 13-34(b)(5)).

enforcement of the ordinances to avoid any state-imposed penalties,<sup>291</sup> but the litigants insisted that keeping the measures on the books constituted the “promulgation” of firearm policies in violation of the preemption law.<sup>292</sup> A state court rejected this argument in *Florida Carry, Inc. v. City of Tallahassee*,<sup>293</sup> an outcome that shielded the Tallahassee officials from sanctions and provided at least some clarity on the conduct proscribed under the statute.<sup>294</sup> But the judge declined to address the validity of Florida’s penalty provisions,<sup>295</sup> leaving in place a set of consequences with significant “chilling potential” for local lawmakers.<sup>296</sup> Moreover, Tallahassee’s hard-fought victory drained over two years’ worth of litigation costs from city coffers.<sup>297</sup>

Other examples from Florida confirm the prediction that punitive preemption would dissuade localities from testing the viability of new gun laws. In the months before Florida enacted its punitive preemption legislation, Palm Beach County’s Commissioners were developing a proposal to prohibit gun magazines holding more than ten rounds of ammunition.<sup>298</sup> But the adoption of the harsh preemption statute “stopped [the initiative] in [its] tracks”: county leaders “dropped the plan entirely” when they realized that the state’s removal provision put their “jobs . . . at stake.”<sup>299</sup> This story tracks the events that played out in Coral Gables, where local leaders who had eagerly endorsed a citywide assault-weapons ban “backed down” from the plan after evaluating the litigation risk.<sup>300</sup>

Two-hundred and sixty miles away in St. Petersburg, the state’s punitive preemption statute derailed local efforts to open public

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<sup>291</sup> *See id.* at 456.

<sup>292</sup> Complaint for Declaratory Judgment and Injunctive Relief, *Fla. Carry, Inc. v. City of Tallahassee*, 2015 WL 13612020 (Fla. Cir. Ct. Nov. 3, 2015) (No. 2014-CA-001168).

<sup>293</sup> 212 So. 3d 452.

<sup>294</sup> *See id.* at 462 (concluding that “the re-publication of the ordinances and their existence in the City’s Code” did not qualify as an act of “promulgation” for which a locality could be held liable).

<sup>295</sup> *Id.* at 466 (explaining that the court lacked an appropriate “case or controversy” to assess the legality of Florida’s punitive measures because “no penalties [were] imposed” in the dispute at hand).

<sup>296</sup> BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 4.

<sup>297</sup> *See* Julie Montanaro & Mariel Carbone, *Appellate Court Rejects Lawsuit Filed Against City of Tallahassee*, WCTV (Feb. 3, 2017, 4:47 PM), <https://www.wctv.tv/content/news/Tallahassee-leaders-in-court-over-gun-suit--410281715.html> [<https://perma.cc/QQ42-GD3U>] (noting that the court’s ostensibly favorable ruling for Tallahassee officials “ignore[d] two years of litigation by special interests intended to bully local governments” (quoting Tallahassee Mayor Andrew Gillum)).

<sup>298</sup> Palazzolo et al., *supra* note 137.

<sup>299</sup> *Id.* (quoting Palm Beach County Commissioner Burt Aaronson).

<sup>300</sup> Hanks, *supra* note 2.

dialogue on firearm issues altogether. Shortly after a mass shooting at an Orlando nightclub claimed forty-nine lives, a St. Petersburg councilwoman requested that local leaders “symbolically support” a nonbinding resolution calling for a special legislative session on gun violence.<sup>301</sup> She later “pull[ed] the discussion” from the locality’s agenda on the advice of the City Attorney, who cautioned that even this expressive gesture might trigger severe penalties.<sup>302</sup> Only after the Florida Attorney General offered reassurance did the councilwoman feel comfortable raising the issue; until then, she explained, she had feared the repercussions of pursuing “a deeper conversation about sensible regulations.”<sup>303</sup> Around the same time, the threat of private lawsuits pushed the Sarasota City Commission to abandon a resolution urging the state legislature to consider tighter assault-rifle regulations.<sup>304</sup> Though the proposal enjoyed “unanimous personal support,” local officials were unwilling to take the risk that simply “open[ing] dialogue” and “communicat[ing] . . . public safety concerns” would invite expensive litigation.<sup>305</sup>

The validity of Florida’s punitive preemption statute was recently tested. Back in 2019, a county circuit court invalidated several of the penalties targeting local officials after more than thirty localities banded together to challenge the measures.<sup>306</sup> Much of that victory, however, was fleeting: when the government contested the decision, a state appeals court concluded that the statutory provisions subjecting local officials to private lawsuits and hefty fines were both “valid and enforceable.”<sup>307</sup>

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<sup>301</sup> *Wheeler-Bowman Urges St. Pete Council to Speak Against Gun Violence*, TAMPA BAY REP. (Feb. 14, 2017), <http://www.tbreporter.com/local-news/pinellas/st-petersburg/wheeler-bowman-urges-st-pete-council-speak-gun-violence> [https://perma.cc/4RV8-DZ42].

<sup>302</sup> John Romano, *Should We Really Diminish the First Amendment to Stifle Talk of the Second Amendment?*, TAMPA BAY TIMES (July 20, 2016), [https://www.tampabay.com/news/localgovernment/romano-should-we-really-diminish-the-first-amendment-to-stifle-talk-of-the/2286182](https://www.tampabay.com/news/localgovernment/romano-should-we-really-diminish-the-first-amendment-to-stifle-talk-of-the/) [https://perma.cc/H5VS-PP5W].

<sup>303</sup> *Id.* (quoting St. Petersburg Councilwoman Lisa Wheeler-Bowman).

<sup>304</sup> Zach Murdock, *City Balks at Resolution Calling for Stricter Gun Controls*, SARASOTA HERALD-TRIB. (June 20, 2016, 3:06 PM), <https://www.heraldtribune.com/news/20160620/city-balks-at-resolution-calling-for-stricter-gun-controls> [https://perma.cc/MV3Y-A3GU]; see also Romano, *supra* note 302.

<sup>305</sup> Murdock, *supra* note 304 (first quoting Sarasota Mayor Willie Shaw; and then quoting City Manager Tom Barwin).

<sup>306</sup> See *City of Weston v. DeSantis*, No. 2018-CA-0699, 2019 Fla. Cir. LEXIS 11621, at \*3 (Fla. Cir. Ct. July 29, 2019); see also Jim Saunders, *Judge Won’t Dismiss Lawsuits Brought by Cities Against State Restrictions on Gun Laws*, MIA. HERALD (Oct. 23, 2018, 5:03 PM), <https://www.miamiherald.com/news/state/florida/article220506375.html> [https://perma.cc/YRY7-XD79].

<sup>307</sup> *State v. City of Weston*, 316 So. 3d 398, 402–08 (Fla. Dist. Ct. App. 2021).

#### 4. Arizona

The effects of punitive preemption in Arizona are most evident in the state's constant tug-of-war with Tucson over gun policy. In the decade preceding the enactment of Arizona's harshest measures, Tucson's leaders repeatedly pushed to "tighten local restrictions on . . . firearms, only to see state officials exercise their sweeping authority . . . to invalidate [those] efforts."<sup>308</sup>

After a 2011 mass shooting in Tucson left seventeen injured and six dead,<sup>309</sup> city officials once again pressed forward with a set of more stringent gun regulations.<sup>310</sup> This effort culminated in the adoption of a new gun-theft reporting requirement and an ordinance authorizing breathalyzer exams for suspects of certain firearm-related crimes.<sup>311</sup> In 2013, the Tucson City Council drew the ire of Arizona legislators when it ignored an Attorney General opinion deeming both laws preempted,<sup>312</sup> and it further goaded the state with a resolution proposing background checks for guns sold on city property.<sup>313</sup> Viewing this defiance as a sign that existing preemption measures did not go far enough,<sup>314</sup> state lawmakers began searching for a more effective means of pressuring the city to stand down.

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<sup>308</sup> Palazzolo et al., *supra* note 137.

<sup>309</sup> Marc Lacey & David M. Herszenhorn, *In Attack's Wake, Political Repercussions*, N.Y. TIMES (Jan. 8, 2011), <https://www.nytimes.com/2011/01/09/us/politics/09giffords.html> [<https://perma.cc/X6V4-6TQW>].

<sup>310</sup> Palazzolo et al., *supra* note 137.

<sup>311</sup> Tucson, Ariz., Ordinance No. 11080 (May 29, 2013) (authorizing law enforcement officers who have "probable cause to believe that a person . . . discharged a firearm" with "criminal negligence" to administer a breathalyzer exam); TUCSON, ARIZ., CODE § 11-56 (2021) (requiring that gun owners "report the theft or loss of [their] firearm to the Tucson police department within [two days]" to avoid a "civil sanction of one hundred dollars").

<sup>312</sup> See Preemption of Tucson Ordinances, Ariz. Att'y Gen. No. I13-010, at 4-7 (Sept. 25, 2013); see also Howard Fischer, *Ducey Gets Bill Penalizing Cities for Countering State Policies*, ARIZ. DAILY SUN (Mar. 16, 2016), [https://azdailysun.com/news/local/ducey-gets-bill-penalizing-cities-for-countering-state-policies/article\\_b8c19c2c-66ba-5219-ac5e-4b64ea9bb7d8.html](https://azdailysun.com/news/local/ducey-gets-bill-penalizing-cities-for-countering-state-policies/article_b8c19c2c-66ba-5219-ac5e-4b64ea9bb7d8.html) [<https://perma.cc/E4VN-B3WW>].

<sup>313</sup> See Jim Nintzel, *Tucson City Council Wants Background Checks, but Gun Show Will Probably Go on Elsewhere*, TUCSON WKLY. (Feb. 6, 2013, 4:30 PM), <https://www.tucsonweekly.com/TheRange/archives/2013/02/06/tucson-city-council-advances-plan-for-background-checks-but-gun-show-will-probably-go-on-elsewhere> [<https://perma.cc/NG3U-HTS5>].

<sup>314</sup> See, e.g., Palazzolo et al., *supra* note 137 (quoting an Arizona State Rifle and Pistol Association member who explained that "[e]very time the city . . . does this, we go back to our friends in the legislature and put [Tucson] in a smaller box").

The result was Arizona's S.B. 1487,<sup>315</sup> which was used almost immediately to target firearm regulations in Tucson. Pursuant to the statute, Arizona State Representative Mark Finchem requested an investigation into a local provision authorizing the police department to destroy forfeited or seized firearms that "failed to serve a law enforcement purpose."<sup>316</sup> Upon completing his investigation, State Attorney General Mark Brnovich notified the city's leadership that the measure was likely incompatible with the state's preemption statutes and other relevant laws governing confiscated weapons.<sup>317</sup> Tucson officials failed to revise the policy within thirty days, prompting Brnovich to file a special action requesting that the state supreme court address the matter.<sup>318</sup>

The outcomes of this litigation illustrate the stakes of punitive firearm preemption in Arizona. Tucson officials boldly decided to challenge not only the Attorney General's findings but also the constitutionality of S.B. 1487, transforming the case into the first test of the law's legitimacy.<sup>319</sup> Ultimately, the city "lost on both counts."<sup>320</sup> The court first rejected Tucson's argument that the disposal of city-held weapons was a matter of purely "municipal concern,"<sup>321</sup> finding instead that the state's interests in the uninterrupted exercise of its police power

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<sup>315</sup> See Scharff, *supra* note 17, at 1509 (characterizing Tucson's firearm laws as an "impetus" for S.B. 1487); see also *Arizona Supreme Court Rebuffs Tucson's Illegal Destruction of Firearms*, NAT'L RIFLE ASS'N INST. LEGIS. ACTION (Aug. 17, 2017), [<https://perma.cc/QZ6B-7DZ9>] (describing S.B. 1487 as a response to Tucson's resistance).

<sup>316</sup> Scharff, *supra* note 17, at 1509–10. The ordinance, passed in 2005, governed the "[d]isposition of unclaimed and forfeited firearms by the [Tucson] police department." TUCSON, ARIZ., CODE § 2-142 (2016). Under the policy, officers were required to "dispose[] of unclaimed, lost and confiscated firearms either through sale at auction, by keeping them for law enforcement purposes, or destruction." Letter from Mike Rankin, City Att'y, City of Tucson, to Beau W. Roysden, Assistant Att'y Gen., Off. of the Ariz. Att'y Gen. 2 (Oct. 27, 2016) [hereinafter Tucson City Attorney Letter], <https://media.azpm.org/master/document/2016/12/6/pdf/tucson-gun-response-letter.pdf> [<https://perma.cc/G9X4-DZQY>]. When the ordinance was in effect, most of the collected firearms were designated for destruction; in 2013, for example, the police department destroyed 1,849 of the 1,926 confiscated weapons. *Id.* at 2–4.

<sup>317</sup> See OFF. OF THE ARIZ. ATT'Y GEN., INVESTIGATIVE REPORT, No. 16-002, CITY OF TUCSON ORDINANCE REQUIRING DESTRUCTION OF FIREARMS BY TUCSON POLICE DEPARTMENT 1 (2016) (concluding that Tucson's ordinance "may violate" state law); see also Scharff, *supra* note 17, at 1509 (citing ARIZ. REV. STAT. ANN. §§ 12-941 to -945, 13-3105(A), 13-3108(F) (2019)).

<sup>318</sup> Howard Fischer, *Brnovich Sues Tucson over Firearms Destruction*, ARIZ. DAILY SUN (Dec. 6, 2016), [https://azdailysun.com/news/local/brnovich-sues-tucson-over-firearms-destruction/article\\_9250eca9-432a-50d3-873c-49de1c3fc519.html](https://azdailysun.com/news/local/brnovich-sues-tucson-over-firearms-destruction/article_9250eca9-432a-50d3-873c-49de1c3fc519.html) [<https://perma.cc/3H5Y-NP4C>]; see ARIZ. REV. STAT. ANN. § 41-194.01(B)(2) (2021).

<sup>319</sup> See Scharff, *supra* note 17, at 1508–16 (discussing the origins and implications of the case).

<sup>320</sup> BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 6.

<sup>321</sup> See *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 675–76 (Ariz. 2017).

justified displacing a local regulation “inconsistent” with Arizona law.<sup>322</sup> The opinion went on to affirm the general validity of S.B. 1487 against Tucson’s separation-of-powers challenge, all while sidestepping questions about the severe fiscal penalties outlined for preemption violations.<sup>323</sup>

When the decision was released, Tucson lawmakers were faced with two options: either repeal the invalidated policy, or defy the court order and risk sacrificing roughly \$115 million in state shared funds.<sup>324</sup> Local leaders quickly realized that they never had a choice, as Tucson could not afford to lose over one-fourth of its general revenues for asserting its home rule authority.<sup>325</sup> The city council accordingly rescinded the firearm-destruction rule,<sup>326</sup> ending a practice that had long been understood to serve a vital public-safety function.<sup>327</sup>

The effects of the opinion reverberate far beyond the Tucson city limits. Arizona’s highest court embraced an extraordinarily narrow view of home rule power under the state constitution, signaling the probable futility of local attempts to pursue a whole host of firearm-related initiatives.<sup>328</sup> Further, the rejection of Tucson’s challenges to S.B. 1487—coupled with the court’s refusal to address the validity of the statute’s sanctions—leaves localities with exposure to enormous

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<sup>322</sup> *Id.* at 679.

<sup>323</sup> *Id.* at 668. The court specifically declined to address the validity of the bond requirement, though it did refrain from compelling Tucson to post the mandated payment and opined that the “purpose, practical application, and ramifications” of the provision were “unclear.” *Id.* at 672.

<sup>324</sup> Steve Kozachik, Opinion, *Ruling on Tucson Gun Policy Undermines Cities’ Local Sovereignty*, TUCSON SENTINEL (Aug. 22, 2017, 9:28 AM), [https://www.tucsonsentinel.com/opinion/report/082217\\_koz\\_guns\\_op/kozachik-ruling-tucson-gun-policy-undermines-cities-local-sovereignty](https://www.tucsonsentinel.com/opinion/report/082217_koz_guns_op/kozachik-ruling-tucson-gun-policy-undermines-cities-local-sovereignty) [<https://perma.cc/7789-RRLU>].

<sup>325</sup> Scharff, *supra* note 17, at 1496; see *Tucson City Council to Repeal Controversial Gun Ordinance*, KOLD NEWS 13 (Sept. 7, 2017, 11:35 AM), <https://www.kold.com/story/36306405/tucson-city-council-to-repeal-controversial-gun-ordinance> (last visited Feb. 24, 2022) (quoting Mayor Jonathan Rothschild, who explained that Tucson “had to protect [its] . . . revenues”).

<sup>326</sup> Press Release, City of Tucson, *City Council Rescinds Gun Destruction Policy* (Sept. 7, 2017), <https://www.tucsonaz.gov/newsnet/city-council-rescinds-gun-destruction-policy> [<https://perma.cc/2NET-PTX5>].

<sup>327</sup> See Tucson City Attorney Letter, *supra* note 316, at 8 (“The destruction of City-acquired firearms that were used in crimes . . . prevents the reintroduction of [those] weapons into the community . . .”); see also B. Poole, *AZ Supreme Court Orders Tucson to Stop Destroying Guns*, TUCSON SENTINEL (Aug. 19, 2017, 12:58 PM), [https://www.tucsonsentinel.com/local/report/081917\\_tucson\\_guns/az-supreme-court-orders-tucson-stop-destroying-guns](https://www.tucsonsentinel.com/local/report/081917_tucson_guns/az-supreme-court-orders-tucson-stop-destroying-guns) [<https://perma.cc/WF2D-75X3>] (noting that after Tucson repealed its ordinance and began reselling seized firearms, “[m]any of the confiscated weapons . . . [were] used to commit criminal acts” (quoting Tucson Mayor Jonathan Rothschild)).

<sup>328</sup> See *Brnovich*, 399 P.3d at 673–75 (reasoning that while Arizona’s “home rule charter provision” was designed to “render the cities . . . as nearly independent of state legislation as was possible,” firearm-related issues touching on the “state’s police power” do not qualify as matters of local concern); see also Scharff, *supra* note 17, at 1515.

financial costs in the event that they do exceed their circumscribed authority.<sup>329</sup> Summarizing the effects of these threatened fiscal losses, one Tucson official explained that local governments statewide have “seen [their] ability to establish local laws that reflect the values of [their] community placed at risk.”<sup>330</sup>

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The incidents described here represent a mere fraction of the episodes in which the prospect of statutory preemption pressured localities into dismantling or dropping various gun policies. Pennsylvania’s story showcases the consequences of expansive express preemption statutes, which incapacitate local governments seeking to address many gun-related issues. The evidence out of Mississippi, Kentucky, Florida, and Arizona confirms that punitive preemption measures do, in fact, intimidate local governments into submission and chill substantive debate. At bottom, firearm preemption laws severely constrain local action on guns, thereby choking off promising opportunities for comprehensive regulation. Absent a concerted effort to chip away at firearm preemption, these windows for progress will remain unavailable.

#### IV. ADDRESSING THE OBSTACLE: AVENUES FOR ROLLING BACK STATE FIREARM PREEMPTION

Equipped with a better understanding of the mechanics and implications of state firearm preemption statutes, advocates and local leaders can take up the task of rolling back these barriers to local firearm policy. This Part canvasses the available strategies for change and highlights key considerations for those interested in charting the path forward. The discussion begins with a focus on the role of litigation, which has emerged as the primary strategy for breaking down state preemption measures both within and beyond the firearms context. After exploring the array of suggested arguments against preemption laws, Section IV.A concludes that opening up opportunities for local gun regulation nationwide will require integrating legal battles into a far broader political push against preemption. Section IV.B accordingly

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<sup>329</sup> See Kozachik, *supra* note 324 (“The court did not address [the] loss of state shared revenues. [Tucson] argued that it’s punitive and confiscatory. By leaving it unaddressed—by ignoring it and punting—the court let it stand.”).

<sup>330</sup> *Id.*

issues a call to action. The discussion there moves past litigation and highlights additional tactics for altering the firearm preemption landscape, which may prove useful in reshaping state-local dynamics across other substantive policy domains as well.

A. *Taking Firearm Preemption to Court: The Limits of Litigation*

Thus far, most efforts to counteract firearm preemption have been directed at state courthouses. Multiple scholars have suggested legal theories for challenging aggressive state-local preemption generally, and localities have tested a selection of these arguments in lawsuits against their respective states. Rather than diving into the merits of each strategy—a vital project already underway elsewhere<sup>331</sup>—this Section draws on the available scholarship and state case law to evaluate the potential impact of litigation in dismantling firearm preemption statutes.

The discussion below should be approached with two underlying themes in mind. First, as a background rule, “[e]xisting legal doctrines provide local governments with few protections against state preemption”: federal law “treats state-local relations as almost entirely a matter for the states,”<sup>332</sup> and state legislatures enjoy broad power to define the bounds of local authority.<sup>333</sup> Second, given the significant state-by-state variation in the structure and regulation of local governments, the viability of many legal challenges will ultimately turn on the intricacies and idiosyncrasies of state law. To determine whether specific state-law claims hold promise, prospective litigants must carefully consider the applicable constitutional provisions, statutory language, and judicial precedent within their own jurisdiction.

As these principles indicate, local litigants seeking judicial invalidation of state firearm preemption laws will generally find that the odds are stacked against them. The nature of the state-local relationship places states at a significant advantage in their defense of express preemption statutes, even when those measures impose expansive restrictions on entire spheres of substantive policymaking. Localities

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<sup>331</sup> See, e.g., Briffault, *The New Preemption*, *supra* note 9, at 2008–25; May, *supra* note 191, at 22–54 (exploring First Amendment arguments against punitive preemption); Scharff, *supra* note 17, at 1507–17 (surveying a range of suggested strategies for challenging punitive preemption measures as well as relevant case law); BRIFFAULT ET AL., *supra* note 44, at 10–17 (summarizing potential state and federal constitutional arguments against broad preemption laws).

<sup>332</sup> Briffault, *The New Preemption*, *supra* note 9, at 2008.

<sup>333</sup> See *id.* (“State constitutions, despite the widespread adoption of home rule provisions governing at least some localities, typically allow their state governments to curtail the regulatory authority of their local governments.”).

might have slightly better luck against certain punitive preemption measures, but early efforts to attack such laws have yielded mixed results. Collectively, these conclusions point to a single lesson: in the fight against state firearm preemption, the utility of litigation will be limited at best.

This assessment should not be taken to imply that resisting state preemption in court is utterly futile. Local governments may secure important victories under the right circumstances, and litigation often calls attention to pressing public issues regardless of the judicial outcome. But ultimately, legal challenges will be insufficient on their own to unravel sweeping state limitations on gun regulation. Litigation must instead be viewed as a single component within a broader campaign to scale back these barriers to local firearm policy.

### 1. Challenging Express Preemption

Critics of broad express preemption statutes have primarily considered challenging these laws under federal and state constitutional principles. Their analyses—coupled with relevant examples from the case law—do point to several provisions in state constitutions that could offer hope for litigants. But beyond these limited lines of attack, explicit restrictions on local gun regulations will be exceedingly difficult to nullify in court.

#### a. The U.S. Constitution

Federal constitutional law offers few, if any, meaningful avenues for contesting the validity of express firearm preemption. This observation reflects the weak status of local governments in the federal system: The Constitution neither recognizes the existence of localities nor safeguards an individual right to self-governance,<sup>334</sup> and local entities as such cannot claim constitutional protection from state conduct.<sup>335</sup> Local governments are instead treated as “political subdivisions” or “convenient agencies” of the states,<sup>336</sup> “no more protected from . . . regulation or displacement than the state’s department of motor vehicles.”<sup>337</sup> Consequently, the Constitution affords little security against state laws that bar localities from enacting

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<sup>334</sup> *Hunter v. City of Pittsburgh*, 207 U.S. 161, 176–79 (1907).

<sup>335</sup> *Williams v. Mayor and City Council of Balt.*, 289 U.S. 36, 40 (1933).

<sup>336</sup> *Hunter*, 207 U.S. at 178.

<sup>337</sup> Briffault, *The New Preemption*, *supra* note 9, at 2008.

gun policies. Such preemption typically falls within the state's vast "discretion" to dictate the "powers conferred" on localities.<sup>338</sup>

Of course, state authority in this domain is not entirely exempt from federal constitutional limits. Where state action with respect to local governments indirectly burdens individual rights, residents may be positioned to allege constitutional violations.<sup>339</sup> These challenges would most likely arise under the Fourteenth Amendment,<sup>340</sup> which could render certain types of state preemption measures—for instance, those curtailing local antidiscrimination laws—vulnerable to attack on due process or equal protection grounds.<sup>341</sup> Firearm preemption statutes, however, are doubtful candidates for a Fourteenth Amendment challenge, as they typically "lack [the] substantive constitutional implications" or the legislative intentions that such claims require.<sup>342</sup> Accordingly, local governments hoping to overcome express restrictions on gun policy must look beyond federal constitutional principles.

#### b. State Constitutions

The primary grounds on which localities have attempted to challenge preemption statutes "derive primarily from state constitutional law."<sup>343</sup> These claims generally fall into one of two categories: "substantive" arguments alleging home rule violations, or "procedural" challenges targeting the legislative process for a particular preemption measure. State constitutional provisions do offer slightly more favorable pathways for attacking firearm preemption, but their utility will vary across jurisdictions and the outcomes will ultimately be mixed.

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<sup>338</sup> *Hunter*, 207 U.S. at 178.

<sup>339</sup> *See, e.g., Romer v. Evans*, 517 U.S. 620, 631–36 (1996) (finding an equal protection violation where a state constitutional amendment barred localities from prohibiting discrimination on the basis of sexual orientation); *Gomillion v. Lightfoot*, 364 U.S. 339, 342–48 (1960) (concluding that the Alabama legislature encroached on constitutionally protected rights when it modified the boundaries of a locality to exclude nearly all Black residents).

<sup>340</sup> *See, e.g., Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 476, 487 (1982); *Romer*, 517 U.S. at 631–36; *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring) (arguing that the redrawing of local borders to exclude Black residents gave rise to a claim under the Equal Protection Clause); *see also* Briffault, *The New Preemption*, *supra* note 9, at 2008 n.92.

<sup>341</sup> BRIFFAULT ET AL., *supra* note 44, at 15–16 (arguing that "heightened scrutiny" may be warranted where a state preemption statute "intentionally discriminate[s] against a protected class," "impinge[s] on a fundamental right," or is "driven by animus . . . towards an unpopular group").

<sup>342</sup> *See* Briffault, *The New Preemption*, *supra* note 9, at 2008 (explaining why certain preemption measures, "such as those dealing with environmental or public health regulation," are not susceptible to invalidation on Fourteenth Amendment grounds).

<sup>343</sup> BRIFFAULT ET AL., *supra* note 44, at 12.

Some localities might invoke state home rule provisions to target firearm preemption statutes as intrusions on local autonomy. As a reminder, “home rule” refers to an independent grant of “substantive lawmaking authority” beyond that “provided [under] the traditional . . . regime,” in which local powers were confined solely to those conferred via specific state authorization.<sup>344</sup> These home rule grants typically come in two forms: “initiative” endows localities with the power to enact policies without prior state permission,<sup>345</sup> while “immunity” protects certain spheres of local authority from intervention.<sup>346</sup> A handful of states have embraced “imperio” home rule, a model that combines limited initiative powers with grants of immunity restricting interference in “local affairs.”<sup>347</sup> The more common approach, known as “legislative home rule,” bestows broad initiative authority but leaves all local lawmaking susceptible to state override.<sup>348</sup>

This basic framework is useful in drawing conclusions about the prospects for home rule challenges against express firearm preemption laws. In states that confer only initiative power, such claims are probably futile. Most “legislative home rule” provisions explicitly authorize localities to act so long as their policies are not “in conflict with state law,”<sup>349</sup> a condition that leaves states with wide latitude to supplant local regulation. Under this framework, firearm preemption laws likely constitute clear expressions of legislative intent to withhold local control over certain spheres of gun policy. Any local measure purporting to regulate one of those subjects would consequently fall beyond the bounds of local authority,<sup>350</sup> stripping the locality of its ability to prevail on a home rule claim.

At least in theory, local governments with “imperio” home rule stand a slightly better chance against firearm preemption measures. These statutes, a locality would argue, impermissibly intrude on “local

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<sup>344</sup> Diller, *Intrastate Preemption*, *supra* note 26, at 1124.

<sup>345</sup> See BRIFFAULT & REYNOLDS, *supra* note 11, at 346 (defining the “initiative” power as the “local government’s ability to initiate legislation and regulation in the absence of express state legislative authorization”).

<sup>346</sup> Diller, *Reorienting Home Rule: Part 2*, *supra* note 30, at 1049 (describing “immunity” provisions as those that “carve out a sphere of ‘local’ issues in which the actions of the local government are . . . protected from state legislative override”).

<sup>347</sup> BRIFFAULT & REYNOLDS, *supra* note 11, at 347–48.

<sup>348</sup> *Id.* at 348–49.

<sup>349</sup> Diller, *Intrastate Preemption*, *supra* note 26, at 1126.

<sup>350</sup> *Id.* (explaining that under a “legislative home rule” model, any “ordinance conflicting with state law” is automatically “ultra vires . . . because it lies outside the grant of authority to the city”).

affairs” in violation of state-conferred immunity.<sup>351</sup> Under the typical immunity analysis, a local policy prevails over a conflicting state law only where the latter interferes with purely “local” or “municipal” matters.<sup>352</sup> If, however, the inconsistent rules touch on subjects of “mixed” or “statewide” concern, state law supersedes the local regulation at issue.<sup>353</sup> The problem is that state courts tend to “interpret[] ‘local’ quite narrowly, thereby severely limiting [localities’] policymaking authority.”<sup>354</sup> States need only persuade the court that firearm policy implicates statewide interests—in, for example, public safety or uniformity—to justify displacing local gun measures.

Several opinions underscore the difficulty of securing immunity-based victories over firearm preemption. In *Ortiz v. Commonwealth*,<sup>355</sup> for instance, Pittsburgh and Philadelphia insisted that their respective assault-weapon bans could not be preempted because Pennsylvania’s express restriction on gun policy abridged constitutional home rule.<sup>356</sup> The Pennsylvania Supreme Court rejected that argument as “frivolous,” proclaiming instead that firearm regulation is a “substantive matter[] of statewide concern” best handled in “the General Assembly, not city councils.”<sup>357</sup> A home rule argument similarly failed in *City of Cleveland v. State*,<sup>358</sup> where the Ohio Supreme Court concluded that the state’s express firearm preemption statute was a permissible “general law” promoting an interest in “uniform” regulation.<sup>359</sup> Both *Ortiz* and *City of Cleveland* readily endorsed the assertion that firearms implicate questions of statewide concern, effectively foreclosing home rule attacks on the states’ expansive preemption laws.<sup>360</sup>

As with nearly all matters of state law, the nature of home rule power differs substantially across jurisdictions. Localities, therefore, must evaluate both the relevant constitutional or statutory text and any

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<sup>351</sup> See BRIFFAULT & REYNOLDS, *supra* note 11, at 346.

<sup>352</sup> See *id.* at 347.

<sup>353</sup> Diller, *Intrastate Preemption*, *supra* note 26, at 1127.

<sup>354</sup> *Id.* at 1125; see also Briffault, *The New Preemption*, *supra* note 9, at 2012.

<sup>355</sup> 681 A.2d 152 (Pa. 1996).

<sup>356</sup> *Id.* at 155–56; see PA. CONST. art. IX, § 2 (granting municipalities with a “home rule charter” the ability to “exercise any power . . . not denied . . . by the General Assembly at any time”).

<sup>357</sup> *Ortiz*, 681 A.2d at 156.

<sup>358</sup> 942 N.E.2d 370 (Ohio 2010).

<sup>359</sup> *Id.* at 378.

<sup>360</sup> See, e.g., *Ohioans for Concealed Carry, Inc. v. City of Cleveland*, 90 N.E.3d 80, 88 (Ohio Ct. App. 2017) (citing *City of Cleveland* for the proposition that a “municipality can no longer legislate in the field” of gun policy because Ohio’s legislature “expressed the intent to require uniform statewide firearm regulation”); *Clarke v. House of Representatives*, 957 A.2d 361, 364–65 (Pa. Commw. Ct. 2008) (applying the “broad and unqualified language” of *Ortiz* to void seven Philadelphia gun laws).

subsequent interpretations to assess the feasibility of home rule challenges. But as the decisions cited above indicate, courts often refrain from “vindicating local authority” and instead “limit[] the scope” of home rule to narrowly defined spheres.<sup>361</sup> Thus, while home rule claims might occasionally prove worthwhile,<sup>362</sup> the prospects for defeating firearm preemption on these grounds are seriously limited.

Beyond home rule grants, many state constitutions include “procedural” provisions that outline restrictions for the legislative process. Though such rules are aimed primarily at preventing shoddy lawmaking, they might supply a basis for voiding preemptive laws that fail to meet applicable drafting requirements.<sup>363</sup> Roughly thirty-seven states, for example, constitutionally require that legislatures avoid “special” measures singling out specific localities and instead enact “general” or “uniform” laws.<sup>364</sup> This sort of “special legislation” clause could be relevant if a firearm preemption statute were to restrict local power selectively,<sup>365</sup> but courts frequently “tolerate[] circumvention” so long as the law at issue does not “expressly identify” individual local governments.<sup>366</sup> In practice, then, “special legislation” challenges would have little bite against broadly written firearm preemption laws.

Another potentially relevant “procedural” requirement embedded in most state constitutions is the “single subject” clause, which “restrict[s] the subject matter of [a state legislative] enactment . . . to one general topic.”<sup>367</sup> Under such rules, a statute “address[ing] preemption of a local ordinance and an entirely unrelated issue” might be “constitutionally vulnerable.”<sup>368</sup> This argument was raised successfully in *Leach v. Commonwealth*,<sup>369</sup> where three Pennsylvania municipalities asserted that legislation incorporating a private right of action into the state’s firearm preemption statute violated a constitutional “single subject” provision.<sup>370</sup> The legislature had folded the preemption amendment into a larger bill defining new criminal

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<sup>361</sup> BRIFFAULT ET AL., *supra* note 44, at 11.

<sup>362</sup> *Cf. id.* (reasoning that the “case law [on home rule] is sufficiently mixed” for such challenges to remain “an avenue that local governments . . . [can] continue to pursue”).

<sup>363</sup> See Briffault, *The New Preemption*, *supra* note 9, at 2011.

<sup>364</sup> See Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 725–32 (2012); see also JOHN MARTINEZ, 1 LOCAL GOVERNMENT LAW § 3:23 nn.4–5 (2021) (listing categories of “special” or “local” laws barred by state constitutional provisions).

<sup>365</sup> See BRIFFAULT ET AL., *supra* note 44, at 11–12.

<sup>366</sup> *Id.* at 13.

<sup>367</sup> *Id.* at 14.

<sup>368</sup> *Id.*

<sup>369</sup> 141 A.3d 426 (Pa. 2016).

<sup>370</sup> *Id.* at 429; see PA. CONST. art. III, § 3 (“No bill shall be passed containing more than one subject, which shall be clearly expressed in its title . . .”).

offenses for “theft of secondary metal[s],” leading the Pennsylvania Supreme Court to declare the multisubject enactment “void in its entirety.”<sup>371</sup> Though the case affected just one component of the state’s broader gun-policy restrictions, it did provide a buffer against the hostile firearm preemption litigation that other states have authorized.<sup>372</sup>

These “somewhat obscure procedural requirements” may have “new salience” in the firearm preemption context, as the “haste or lack of transparency” with which such laws are often enacted may render the legislation constitutionally deficient.<sup>373</sup> The problem, however, is that a “determined state legislative majority” can simply reenact the same preemption measure in accordance with all mandated procedures.<sup>374</sup> Pennsylvania’s legislature, for instance, has already responded to the *Leach* opinion with a bill limited solely to authorizing private lawsuits for firearm preemption violations,<sup>375</sup> demonstrating that victories grounded in procedural provisions will frequently be short lived.

## 2. Litigating Punitive Preemption

Advocates and scholars have identified a range of potential arguments to neutralize punitive preemption laws, but many of these legal theories remain untested and others have yielded variable results. Given both the severity of punitive firearm preemption and the troubling possibility of its spread,<sup>376</sup> a brief exploration of the proposed challenges and their prospects for success is warranted.

The same sort of state constitutional arguments outlined above have been considered in the punitive preemption context. In terms of substantive challenges, some have suggested that home rule claims could have slightly more force when directed at statutes that go beyond merely restricting local power to penalizing governments for overstepping their authority.<sup>377</sup> The available case law, however, highlights the difficulty of prevailing on a home rule challenge even when targeting the harshest

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<sup>371</sup> *Leach*, 141 A.3d at 428, 435.

<sup>372</sup> See *supra* notes 204–14 and accompanying text.

<sup>373</sup> BRIFFAULT ET AL., *supra* note 44, at 14.

<sup>374</sup> Briffault, *The New Preemption*, *supra* note 9, at 2011.

<sup>375</sup> S. 531, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019) (proposing a private right of action under which any “person adversely affected by” a local firearm policy “may seek declarative and injunctive relief and . . . actual damages”).

<sup>376</sup> See, e.g., *id.*; *supra* note 158 and accompanying text.

<sup>377</sup> Cf. Briffault, *The New Preemption*, *supra* note 9, at 2018 (“Laws that punish local officials or governments for exercising their home rule powers . . . are fundamentally inconsistent with the idea of home rule.”).

punitive measures. In the *Brnovich* litigation,<sup>378</sup> for instance, Tucson officials insisted that Arizona's decision to authorize "withholding and redistributing revenues generated by [local] taxpayers" reflected a "desire" to "punish Arizona charter cities" for the use of their "constitutional [home rule] authority."<sup>379</sup> The Arizona Supreme Court skirted that assertion, resolving the immediate preemption question in the state's favor and declining to address the law's home rule implications until penalties were actually imposed.<sup>380</sup>

Local governments can also parse state constitutions for procedural provisions that provide a basis for targeting punitive firearm preemption laws. The *Leach* opinion highlighted above, in which Pennsylvania's citizen suit provision was invalidated under a "single subject" clause,<sup>381</sup> illustrates this approach. Another example emerged out of two punitive preemption lawsuits in Florida, where multiple cities have challenged the Governor's statutory authority to remove local officials responsible for gun policies.<sup>382</sup> According to the plaintiffs in both cases, this penalty violated a state constitutional rule that empowers the Governor to *suspend* county officers but requires a majority vote of state senators to "remove . . . the suspended official" permanently.<sup>383</sup> A Florida judge first credited this argument in *Marcus v. Scott*<sup>384</sup> to bar the removal of several Palm Beach County Commissioners who had allegedly committed "knowing and willful violation[s]" of the firearm preemption statute.<sup>385</sup> The *Marcus* court, however, cabined its holding to the County Commissioners' "as-applied challenge,"<sup>386</sup> leaving open the question of whether legislators could authorize the unilateral executive removal of other local officials.<sup>387</sup> Five years later, the state trial court presiding over *City of Weston v. DeSantis*<sup>388</sup> answered that question in the negative. Read broadly, the

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<sup>378</sup> See *supra* notes 309–30 and accompanying text.

<sup>379</sup> Tucson City Attorney Letter, *supra* note 316, at 9.

<sup>380</sup> State *ex rel.* *Brnovich v. City of Tucson*, 399 P.3d 663, 668 (Ariz. 2017) ("[T]he City raises a host of constitutional challenges to S.B. 1487, but we address only those portions of the law that are directly implicated here."); *id.* at 672 ("Whether the bond requirement may, as written, be constitutionally enforced . . . can be addressed in future cases . . .").

<sup>381</sup> *Leach v. Commonwealth*, 141 A.3d 426, 435 (Pa. 2016).

<sup>382</sup> See *Marcus v. Scott*, No. 2012-CA-001260, 2014 WL 3797314 (Fla. Cir. Ct. June 2, 2014); *City of Weston v. DeSantis*, No. 2018-CA-0699, 2019 Fla. Cir. LEXIS 11621 (Fla. Cir. Ct. July 29, 2019).

<sup>383</sup> FLA. CONST. art. IV, § 7 (emphasis added).

<sup>384</sup> 2014 WL 3797314.

<sup>385</sup> *Id.* at \*3–4.

<sup>386</sup> *Id.* at \*3.

<sup>387</sup> See Briffault, *The New Preemption*, *supra* note 9, at 2003.

<sup>388</sup> 2019 Fla. Cir. LEXIS 11621.

court concluded, the relevant constitutional text “impliedly forbids” the Governor from removing any local officeholder without senate approval.<sup>389</sup> The state failed to challenge this specific determination on appeal, and accordingly, the higher court left undisturbed the finding that “authorizing the Governor to remove local officials . . . [was] an unconstitutional expansion of the Governor’s constitutionally enumerated suspension powers.”<sup>390</sup>

Of course, this outcome reveals little about how the Florida appeals court would have ruled on the merits of the removal issue if given the opportunity. Indeed, in both *Leach* and *City of Weston*, the plaintiffs’ victories were contingent on the idiosyncratic circumstances of each case rather than general principles of law. Ultimately, given the extent of state control over local power and the ease with which legislatures can rectify laws to avoid procedural deficiencies, state constitutions furnish litigants with an exceedingly limited toolkit for constraining punitive preemption.

Nevertheless, the penalties imposed for local firearm lawmaking may be vulnerable on grounds beyond those suggested for express preemption alone. Using a rough categorization based on the type of penalty at issue, the next Section considers proposed strategies for taking the sting out of punitive firearm preemption statutes.

#### a. Challenging Measures that Target Local Officials

Opponents of punitive preemption have pinpointed several “substantial legal arguments” against measures that threaten individual officials with sanctions.<sup>391</sup> Many of these proposed challenges are grounded in the First Amendment and its state analogs,<sup>392</sup> a reflection of the underlying premise that local lawmaking necessarily entails various “kinds of speech.”<sup>393</sup> Some have commented that threatening punishment for local policy choices might “amount to an unconstitutional restriction” on the free speech rights of the officeholders themselves,<sup>394</sup> while others contend that these measures

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<sup>389</sup> *Id.* at \*10 (“Giving the governor removal power . . . is a grant of an entirely new power, not an expansion of a previously existing power. ‘Where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner.’” (quoting *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006))).

<sup>390</sup> *State v. City of Weston*, 316 So. 3d 398, 408 (Fla. Ct. App. 2021).

<sup>391</sup> See, e.g., BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 7; Tartakovsky, *supra* note 161, at 8–9 (canvassing potential arguments against punitive firearm preemption measures, with a specific focus on Kentucky’s criminal penalties).

<sup>392</sup> May, *supra* note 191, at 30–31; BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 7–8.

<sup>393</sup> May, *supra* note 191, at 30.

<sup>394</sup> BRIFFAULT ET AL., *supra* note 44, at 17.

indirectly burden “the core political speech of the local electorate” whose chosen representatives are silenced.<sup>395</sup>

The precise contours of these theories have been explored elsewhere,<sup>396</sup> but briefly, the extent to which punitive firearm preemption implicates First Amendment concerns may differ with the characterization of the expressive conduct at issue.<sup>397</sup> For instance, litigants who frame the content of a local legislator’s vote as the targeted “speech” in question will be disappointed to find that existing doctrine provides little clarity on whether that activity is constitutionally protected.<sup>398</sup> As an alternative, one could shift the focus to the “unique form[s] of public debate that precede[] the passage of a [local] law” and argue that punitive preemption impermissibly stifles “political speech” on the subject of gun policy itself.<sup>399</sup> Several episodes described in Section III.B.2 lend anecdotal support to the notion that threatening

<sup>395</sup> May, *supra* note 191, at 31.

<sup>396</sup> For a particularly thorough analysis of potential First Amendment challenges in the punitive preemption context, see May, *supra* note 191, at 30–52. May reasons that existing “First Amendment doctrines” could “support[] an argument that the state’s power to preempt does not extend to prohibiting the passage of the possibly-preempted laws in the first place,” and that prohibitions on viewpoint discrimination could bolster the case against penalizing local officials, given “the normative emphasis the Court has consistently placed on speech in aid of democratic self-government.” *Id.* at 40–41.

<sup>397</sup> See *id.* at 31 (organizing First Amendment arguments against punitive preemption into those addressing “the text” of the law, “the public debate . . . surrounding whether the law should be passed,” and “the officials’ votes” for the law).

<sup>398</sup> See *id.* at 35 (“The question of whether a [local legislator’s] vote can be speech is a complicated one.”). Those who argue that the First Amendment may afford some degree of protection for the content of a local lawmaker’s vote point to the Supreme Court’s decisions in *Spallone v. United States* and *Bond v. Floyd*, where the Justices seemed to recognize a “constitutional interest in protecting the ability of local officials to vote for what they think is in the best interests of their community.” BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 8; see, e.g., *Spallone v. United States*, 493 U.S. 265, 279–80 (1990) (reasoning that a district court “perver[ted] . . . the normal legislative process” when it fined local lawmakers for failing to vote in favor of a judicially mandated remedy); *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (“Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them . . .”). Neither of these opinions, however, directly endorsed the proposition that local lawmakers’ votes fall within the ambit of the First Amendment, see BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 8, and other Supreme Court precedent has suggested that “a legislator does not have a personal free speech right in . . . casting a vote,” May, *supra* note 191, at 36 (citing *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 125–26 (2011)). See BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 7–8, for further discussion of these First Amendment precedents.

<sup>399</sup> May, *supra* note 191, at 34–35 (“[P]unitive preemption burdens public debate by restricting the topics discussed . . .”); see also Tartakovsky, *supra* note 161, at 8–9 (arguing that Kentucky’s criminal penalty for preemption violations “so clearly burden[s] policy discussion” that it effectively operates as a “content-based” restriction on gun-related speech).

local officials does, in fact, chill broader firearm-related discourse,<sup>400</sup> but litigants bringing First Amendment claims on that basis will find themselves in uncharted legal waters.<sup>401</sup> Moreover, several courts have already signaled a general reluctance to endorse speech-based challenges to punitive preemption measures.<sup>402</sup>

Commentators have also argued that imprecise language may render certain penalty provisions for local officials susceptible to “vagueness” claims under the Fourteenth Amendment’s Due Process Clause. Consider, for example, section 65.870 of Kentucky’s state code, which threatens local policymakers with criminal liability for pursuing any “policy” or “action” that “violates” its firearm preemption law or “the spirit thereof.”<sup>403</sup> The statute’s critics contend that this text might be unconstitutionally vague, as officials are left with little clarity regarding the “line at which a suggestion” becomes a “policy” or “action” subject to criminal sanction.<sup>404</sup> This argument, however, has not yet been attempted in the Kentucky courts, and judges elsewhere have indicated that punitive preemption measures with sweeping language could withstand facial vagueness challenges.<sup>405</sup>

Statutory penalties for local officials might also be vulnerable to arguments grounded in legislative immunity, or the long-standing common law principle that elected representatives are shielded from liability for their lawmaking activities.<sup>406</sup> Though this protection has traditionally covered state and federal legislators, scholars have identified various grounds for extending immunity to the local level. For example, forty-three state constitutions contain a privilege for state legislators analogous to the federal guarantee that no congressional

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<sup>400</sup> See *supra* notes 298–305 and accompanying text (highlighting preemption examples in St. Petersburg, Palm Beach County, and Coral Gables).

<sup>401</sup> Cf. May, *supra* note 191, at 30, 52 (conceding that “local lawmaking is not a precise fit” with First Amendment doctrine and noting that “analytic precision is necessary to sustain [a] novel [free speech] argument” against punitive preemption).

<sup>402</sup> See, e.g., Fla. Carry, Inc. v. City of Tallahassee, 212 So. 3d 452, 455–56 (Fla. Dist. Ct. App. 2017) (declining to reach a free speech challenge to Florida’s punitive preemption statute); City of Weston v. DeSantis, No. 2018-CA-0699, 2019 Fla. Cir. LEXIS 11621, at \*11 (Fla. Cir. Ct. July 29, 2019) (reasoning that “penalizing infringement” of Florida’s preemption law did not interfere with the ability of residents to “speak, assemble, or petition and instruct their local officials about firearms and ammunition”).

<sup>403</sup> KY. REV. STAT. ANN. § 65.870(5)–(6) (West 2021).

<sup>404</sup> Tartakovsky, *supra* note 161, at 8–9; see BRIFFAULT ET AL., *supra* note 44, at 17.

<sup>405</sup> Cf. City of Weston, 2019 Fla. Cir. LEXIS 11621, at \*12 (rejecting a due process “vagueness” challenge to Florida’s punitive preemption law because the statute “provides reasonably ascertainable guidelines” for identifying proscribed conduct).

<sup>406</sup> See Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 224–25 (2003).

representative “shall . . . be questioned” for “any Speech or Debate.”<sup>407</sup> Though these clauses “do not explicitly protect local legislators,” several state courts have construed this constitutional immunity to encompass both state and local officials.<sup>408</sup> Other state judges have embraced the U.S. Supreme Court’s reasoning in *Bogan v. Scott-Harris*,<sup>409</sup> concluding that the rationales for common law legislative immunity justify its application to local lawmakers.<sup>410</sup> Finally, “[a] number of states have also extended legislative immunity to local legislators by statute.”<sup>411</sup> Local officials could invoke the relevant source of immunity to ward off state-imposed sanctions, but their prospects for success would turn on the strength and scope of the doctrine in their respective states.

The Florida litigation described above exemplifies the uncertainty inherent in such challenges, particularly in states where the principle of local legislative immunity is weak, ambiguous, or underdeveloped. In *City of Weston*, the plaintiffs asserted that Florida’s provisions authorizing damages and fines for knowing and willful preemption violations improperly abridged the legislative immunity of local officials.<sup>412</sup> Such immunity, the plaintiffs argued, flowed from three sources: state common law, federal precedent, and state constitutional separation-of-powers doctrines.<sup>413</sup> The trial court embraced a blend of the latter two arguments, concluding that the penalty provisions were inconsistent with both the state’s constitutional structure and *Bogan*’s suggestion that the “rationales” for “absolute immunity . . . apply with equal force to local legislators.”<sup>414</sup>

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<sup>407</sup> U.S. CONST. art. I, § 6, cl. 1; see Huefner, *supra* note 406, at 224.

<sup>408</sup> BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 8–9; see, e.g., *id.* at 9 n.28 (collecting cases that have extended legislative immunity to local officials through the construal of state speech and debate clauses); see also Moore v. Call, 749 P.2d 674, 677 (Wash. 1988) (en banc) (interpreting Washington’s speech and debate clause to cover local officials in light of the “necessity for free and vigorous debate . . . [that] is part of the essence of representative self-government”).

<sup>409</sup> 523 U.S. 44, 46, 49 (1998) (concluding that the common law principle of “absolute immunity from civil liability for . . . legislative activities” extended to cover local lawmakers in lawsuits brought under § 1983 because “the rationales for such immunity are fully applicable” at the local level).

<sup>410</sup> See, e.g., Cornett v. Fetzer, 604 S.W.2d 62, 63 (Tenn. Ct. App. 1980) (reasoning that an “absolute privilege” must extend to local officeholders to ensure “independent and forceful debate” and to protect those who “make important social and economic decisions that many times affect our lives to a greater degree than do decisions made by our state legislators”).

<sup>411</sup> BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 9.

<sup>412</sup> *City of Weston v. DeSantis*, No. 2018-CA-0699, 2019 Fla. Cir. LEXIS 11621, at \*2 (Fla. Cir. Ct. July 29, 2019).

<sup>413</sup> *Id.* at \*2–3.

<sup>414</sup> *Id.* at \*4 (quoting *Bogan*, 523 U.S. at 52).

That determination was reversed on appeal. Turning first to the plaintiffs' state-law arguments, the appellate court reasoned that "legislative immunity"—if it extends to local officials at all—"does not shield individuals who knowingly and willfully act contrary to or beyond the limits of state law."<sup>415</sup> Accordingly, local representatives who adopt firearm regulations cannot invoke immunity to avoid statutory penalties, for any such enactment occurs "in violation of state preemption and thus beyond the scope of state-delegated authority."<sup>416</sup> The appeals court also summarily rejected the plaintiffs' federal-law immunity arguments, finding that the "citations to federal cases . . . do not apply."<sup>417</sup> As a result, the provisions subjecting local officials to fines and civil liability remain enforceable,<sup>418</sup> and Florida has recovered its status as a particularly hostile environment for firearm regulation. Reversal in the Florida Supreme Court, which recently agreed to review the case,<sup>419</sup> is exceedingly unlikely.

Given the variation in legislative immunity principles from state to state, local plaintiffs bringing similar claims might fare better in jurisdictions where the doctrine is more robust. But *City of Weston* stands out as the most prominent test of immunity-based challenges to date, and the failure of those arguments on appeal—along with the possibility that courts in other states will find the appellate opinion persuasive—marks a serious blow for localities seeking strategies to invalidate punitive preemption measures.

#### b. Challenging Measures that Penalize Local Governments

Nullifying state provisions that penalize local governments for preemption violations will be an even more difficult task. Some scholars and jurists have posited that free-speech principles might be implicated when sanctions imposed on localities stifle public debate,<sup>420</sup> but local governments will likely find that invoking the First Amendment—whether "for themselves or as associations of their residents"<sup>421</sup>—is an unattractive litigation strategy. The Supreme Court has already rejected the notion that municipal corporations can bring First Amendment

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<sup>415</sup> *State v. City of Weston*, 316 So. 3d 398, 404 (Fla. Ct. App. 2021).

<sup>416</sup> *Id.* at 407.

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> See Order at 1, *Fried v. State*, No. SC21-917 (Fla. Sept. 9, 2021), [https://edca.1dca.org/DCADocs/2019/2819/192819\\_1498\\_09092021\\_112031\\_i.pdf](https://edca.1dca.org/DCADocs/2019/2819/192819_1498_09092021_112031_i.pdf) [<https://perma.cc/2DF8-DMQM>].

<sup>420</sup> *Creek v. Village of Westhaven*, 80 F.3d 186, 192–93 (7th Cir. 1996) ("There is at least an argument that the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern . . .").

<sup>421</sup> BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 10.

claims on their own behalf,<sup>422</sup> and arguments relying on an association theory remain virtually untested.<sup>423</sup>

State separation-of-powers doctrines have also been cited as potential grounds for challenging the enforcement mechanisms in several punitive firearm preemption laws. Professor Erin Scharff, for instance, argues that these statutes occasionally direct the branches of state government to encroach on one another's powers.<sup>424</sup> Tucson officials raised this exact sort of argument in *Brnovich*, where they contended that Arizona's protocols for addressing preemption violations contravened constitutional separation-of-powers principles.<sup>425</sup> The city specifically alleged that S.B. 1487, which authorizes the Attorney General to investigate preemption questions, undermined the judicial role in determining "whether a municipal law violates state law."<sup>426</sup> Moreover, in Tucson's view, the directive that the Attorney General file a "special action" for judicial resolution of inconclusive preemption inquiries arrogated the executive branch's "inherent constitutional power[] . . . to decide what cases to bring."<sup>427</sup>

Arizona's highest court was ultimately unpersuaded.<sup>428</sup> Relying on a narrow construal of the procedural mandates in S.B. 1487, the opinion concluded that the legislation created a framework for "incentiviz[ing] political subdivisions to comply with state law" without "usurp[ing] executive or judicial authority."<sup>429</sup> This rejection of Tucson's separation-of-powers arguments, Scharff explains, may "bode[] poorly for the success of such challenges elsewhere."<sup>430</sup> The decision highlights the uncertainty in relying on state separation-of-powers principles that are "much less developed than [their] federal counterpart[s]," and it suggests that localities "may not be best positioned to contest" the relationships between state-level branches of government.<sup>431</sup>

The First Amendment and separation-of-powers arguments outlined above are perhaps the most frequently discussed theories for

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<sup>422</sup> See *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362–64 (2009).

<sup>423</sup> Cf. BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 10 ("[A]ny argument based on local government speech or association rights must await future development.").

<sup>424</sup> Scharff, *supra* note 17, at 1511–12.

<sup>425</sup> See *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 668 (Ariz. 2017) (challenging S.B. 1487's enforcement mechanisms as a violation of the state separation-of-powers doctrine embedded in ARIZ. CONST. art. III, § 1).

<sup>426</sup> Tucson City Attorney Letter, *supra* note 316, at 11.

<sup>427</sup> *Id.*

<sup>428</sup> *Brnovich*, 399 P.3d at 667–69.

<sup>429</sup> *Id.* at 668.

<sup>430</sup> Scharff, *supra* note 17, at 1513.

<sup>431</sup> *Id.* at 1516.

challenging penalties aimed at localities,<sup>432</sup> but a closer look at these arguments makes clear that the “case for protecting local governments from punitive financial penalties” is a “difficult” one to build.<sup>433</sup> This concession ultimately reaffirms the notion that litigation, on its own, will be an insufficient tool for eliminating the civil, criminal, and financial sanctions that many localities and their officials face when gun regulations are deemed preempted.

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The discussion above reveals several important conclusions for the fight against firearm preemption that are worth summarizing here. First, broad express preemption statutes—even those purporting to occupy whole fields of gun regulation—will be extremely difficult to nullify. State constitutional law does offer more hope than do federal principles, but the strength of such claims will likely turn on nuanced state-by-state variations in the language and interpretation of the relevant provisions. Second, in the punitive preemption context, claims targeting measures that penalize local officials may hold more promise than do those aimed at sanctions for local governments. But the arguments against penalties for individual officials remain underdeveloped, and the outcomes have been mixed in the small sample of cases that have tested some of these claims.

Again, the conclusion to be drawn here is not that advocates and officials should eschew litigation entirely in their efforts to open up space for local firearm lawmaking. The outcomes in *Leach* and *Marcus* indicate that lawsuits can yield occasional successes under the right circumstances, particularly where a specific state’s precedents, constitutional text, or statutes are favorable to a locality’s position. Additionally, even when local plaintiffs fall short on the merits, litigation often serves as a valuable tool for generating public awareness. The *City of Weston* lawsuit in Florida has certainly done so,<sup>434</sup> and Pittsburgh’s refusal to back down in a recent legal skirmish over several

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<sup>432</sup> Scholars have considered several additional arguments that were not included in this brief overview. See, e.g., BRIFFAULT, PUNITIVE PREEMPTION, *supra* note 17, at 10–11 (exploring the prospects for a coercion-based challenge to S.B. 1487 and other measures that penalize local governments).

<sup>433</sup> Briffault, *The New Preemption*, *supra* note 9, at 2016.

<sup>434</sup> See Doug Hanks, *Judge Strikes Down Penalties for Local Governments that Pass Gun-Control Laws*, TAMPA BAY TIMES (July 27, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/07/28/judge-strikes-down-penalties-for-local-governments-that-pass-gun-control-laws> [https://perma.cc/DG24-SA3T].

gun proposals produced a similar effect.<sup>435</sup> Such lawsuits put state governments on the defensive, forcing them to justify expansive firearm preemption laws while under popular scrutiny.

Risky litigation, however, is simply not an option for many local governments. Lawsuits are a resource-intensive endeavor, and the potential costs of a protracted legal fight may be too high a price to pay for pursuing challenges with uncertain prospects. Many localities would resolve this cost-benefit assessment against litigation, and those that do choose to press their legal claims will inevitably encounter mixed outcomes. The takeaway, then, is that litigation must be treated as just one of many tactics for pushing back against severe state restrictions on gun policy. Strategic politics were largely responsible for the rise of aggressive state firearm preemption, and strategic politics will be indispensable in reversing that trend.

### B. *A Call to Action: Anti-Preemption Politics*

Shortly after the Parkland shooting described at the outset of this Article, city officials in Boulder, Colorado, passed a local ordinance prohibiting assault weapons and high-capacity magazines within city limits.<sup>436</sup> Gun owners in the area promptly sued the municipality, and in March 2021, a state court invoked Colorado's sweeping firearm preemption law to void the citywide ban.<sup>437</sup> State Democrats, who controlled the Colorado legislature, immediately initiated discussions on potential revisions to the preemption statute.<sup>438</sup> Those talks accelerated when, just days after Boulder's ordinance was struck down, a shooter used an assault rifle to kill ten individuals in one of the city's supermarkets.<sup>439</sup>

It is impossible to determine whether the invalidated regulation would have prevented the attack, but this series of events prompted public outrage and drew national attention to the state's preemption

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<sup>435</sup> Zaveri, *supra* note 258 (describing Pittsburgh Mayor Bill Peduto's plan to appeal the invalidation of three municipal gun control measures in the hopes of "chang[ing] the temperature" in the state capital).

<sup>436</sup> Patrick J. Lyons, *A Judge Recently Blocked Boulder from Enforcing Its Assault-Weapon Ban*, N.Y. TIMES (Mar. 22, 2021), <https://www.nytimes.com/2021/03/22/us/boulder-colorado-gun-laws.html> [<https://perma.cc/4UKF-PN7L>].

<sup>437</sup> *Id.*

<sup>438</sup> Alex Burness, *After Boulder Shooting, Colorado Lawmakers Thinking About Putting Gun Laws Back in Cities' Hands*, DENVER POST (Mar. 23, 2021, 3:32 PM), <https://www.denverpost.com/2021/03/23/boulder-shooting-fenberg-legislature-king-soopers> [<https://perma.cc/D8T6-HGJY>].

<sup>439</sup> *Id.*

law. As noted above, the Colorado legislature ultimately responded with a broad repeal of its expansive preemption statute, preserving only a few narrow prohibitions on local lawmaking that alleviate certain compliance-related burdens for gun owners.<sup>440</sup> The result is a regulatory framework that empowers local governments to craft solutions for their distinct firearm-related needs, while leaving the state legislature free to supplant local law in policy areas where centralized regulation would be more effective. Meanwhile, in Colorado locales where firearm restrictions remain unpopular, local officials need not enact any gun laws of their own.

The Colorado story suggests that shifting a substantial degree of firearm regulatory power back to local governments will require looking beyond the courthouse walls and treating aggressive state preemption as a leading political issue. Activists and officials must set their sights on pressuring state legislators to reconsider, revise, and repeal expansive preemption laws, a goal that will require cultivating broader popular support and taking advantage of democratic processes. Generating the necessary political momentum will, of course, be an extraordinarily difficult task, but proponents of local gun policy do have an array of tools at their disposal for launching a sustained offensive against state firearm preemption.

A critical prerequisite in the fight against firearm preemption is an informed public. With a deeper understanding of “legislative trends and the negative implications of [preemption] laws,”<sup>441</sup> citizens can more effectively identify “aggressive preemptive tactics” and articulate demands for change.<sup>442</sup> The developments in Colorado certainly generated a degree of national awareness concerning state-level preemption, and activists there cited the March 2021 shooting to describe the stakes of the proposed repeal in terms that would resonate with the public.<sup>443</sup> But activists and policymakers need not wait for a similar mass tragedy to strike before educating constituents about the costs of expansive firearm preemption in their home states.

Moreover, when residents are made familiar with the consequences of firearm preemption, larger majorities might reject state efforts to strip localities of their authority over guns. Recent

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<sup>440</sup> See *supra* notes 174–76 and accompanying text.

<sup>441</sup> Phillips, *supra* note 10, at 2262.

<sup>442</sup> *Id.* at 2229.

<sup>443</sup> See, e.g., *Tell Lawmakers: Pass Gun Reform!*, COLO. CEASEFIRE (May 10, 2021), <https://www.coloradoceasefire.org/2021/05/10/tell-lawmakers-pass-gun-reform> [<https://perma.cc/PP6E-K74Z>] (“[T]hese laws would make it harder for violent offenders to gain access to guns . . . . With the King Soopers shooting, Coloradans were reminded that nowhere is safe from gun violence . . .”).

examples lend some support to this proposition. A survey in Nebraska, for instance, revealed that sixty-two percent of Nebraskans—including “the majority of gun owners and poll respondents from both major parties”—would oppose a proposed bill updating the firearm preemption statute to include a citizen suit provision.<sup>444</sup> Other anecdotal examples have emerged in Pennsylvania, where several organizations are disseminating information about the costs of firearm preemption to mobilize the state’s electorate against a punitive statutory amendment.<sup>445</sup> Similar efforts to direct public attention toward firearm preemption will be essential in creating sufficient pressure for change at the state level.

Cultivating a political appetite for the relaxation of firearm preemption laws will also require shifting dominant public narratives around the issue. Specifically, activists and local officials must work to counteract the “pro-preemption” message embedded in the “rhetoric of . . . conservative legislators and organizations,”<sup>446</sup> who insist that restrictive state laws “prevent . . . an incomprehensible patchwork of local ordinances” and protect the “Second Amendment rights” of “unsuspecting gun owners.”<sup>447</sup> The National League of Cities has already offered some suggestions for “reshaping” the typical preemption story, noting that municipalities can “take an active role” in pushing the public conversation “away from ‘cities are out of control’ [toward] ‘cities help the state.’”<sup>448</sup> In the firearm context, that dialogue-shifting effort could center on some of the political and regulatory benefits of local policymaking outlined in Part I: states that permit localities to pursue their own gun-related agendas will foster innovation, defuse polarization, and encourage responsiveness to community-specific preferences and problems.

Beyond working to alter public messaging around firearm preemption, local governments—particularly large cities—can thrust demands for change into the spotlight through overt acts of local resistance. This strategy would capitalize on what Professor Paul Diller describes as cities’ capacity to “serve as a ‘destabilizing’ force in state

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<sup>444</sup> Press Release, Everytown for Gun Safety, New Poll: 62 Percent of Nebraskans Oppose Stripping Cities of the Ability to Pass Common-Sense Public Safety Laws (Mar. 15, 2017), <https://everytown.org/press/new-poll-62-percent-of-nebraskans-oppose-stripping-cities-of-the-ability-to-pass-common-sense-public-safety-laws> [<https://perma.cc/9EQR-AVD2>].

<sup>445</sup> See, e.g., *Preemption: Special/Standing Expanded Preemption or the Sue Our Cities Bill*, CEASEFIREPA [<https://perma.cc/K6P3-LHBS>]; *Tell Your PA Senator: Oppose SB 531!*, EVERYTOWN FOR GUN SAFETY, [https://act.everytown.org/sign/PA\\_Senators\\_Oppose\\_SB531](https://act.everytown.org/sign/PA_Senators_Oppose_SB531) [<https://perma.cc/HGM5-S2V6>].

<sup>446</sup> DUPUIS ET AL., *supra* note 15, at 24; Phillips, *supra* note 10, at 2262.

<sup>447</sup> *Strong Firearms Preemption Laws Are More Important than Ever*, *supra* note 48.

<sup>448</sup> DUPUIS ET AL., *supra* note 15, at 24.

and national policy debates, disrupting the state legislative and congressional stasis on policy matters of significance.”<sup>449</sup> If large municipalities take high-profile steps to “put [the] issue” of firearm preemption “on the nation’s policy agenda,” then “state legislatures may feel more compelled to address it.”<sup>450</sup>

Certain forms of resistance can be pursued on an individual city-by-city basis. For instance, in states where municipal officials do not run the risk of triggering punitive sanctions, local leaders can enact prohibited gun regulations that signal their strong opposition to firearm preemption. These unenforceable policies are best understood as “‘protest’ laws,” or measures that are “passed without a good-faith belief in their viability, purely for the political or expressive value of doing so.”<sup>451</sup> The Pittsburgh ordinances described earlier in this Article offer a compelling illustration: Though city officials anticipated that a renewed assault-rifle ban would embroil the city in a “long legal fight,” they insisted that adopting the measure would call attention to the consequences of Pennsylvania’s sweeping preemption law.<sup>452</sup> Given the national media’s interest in following the Pittsburgh story, that calculation appears to have been correct.<sup>453</sup>

Pittsburgh’s leaders, however, also recognize the value of strength in numbers, and they have called for the very sort of municipal coalition-building that will be vital in orchestrating collective resistance to state firearm preemption. Mayor Bill Peduto has issued several public statements urging “cities around the country” to express “support [for] Pittsburgh’s measures” with the goal of “creat[ing] nationwide momentum [for] . . . critically needed gun changes.”<sup>454</sup> Pittsburgh officials have also contacted sixty other mayors to collaborate on the introduction of similar local legislation elsewhere.<sup>455</sup> Former Tallahassee Mayor Andrew Gillum initiated a similar project, launching a campaign that united local leaders across multiple states to raise

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<sup>449</sup> Diller, *Intrastate Preemption*, *supra* note 26, at 1129.

<sup>450</sup> *Id.*

<sup>451</sup> May, *supra* note 191, at 23–24; *see also* Stahl, *supra* note 120, at 150.

<sup>452</sup> *See* Zaveri, *supra* note 258.

<sup>453</sup> *See, e.g., id.*; Jeffery Martin, *Pittsburgh Gun Control Ordinances Overturned by Judge, Ruled “Unenforceable,”* NEWSWEEK (Oct. 29, 2019, 9:26 PM), <https://www.newsweek.com/pittsburgh-gun-control-ordinances-overturned-judge-ruled-unenforceable-1468578> [<https://perma.cc/JYE5-Z2ZN>].

<sup>454</sup> Press Release, City of Pittsburgh, *supra* note 251.

<sup>455</sup> Ashley Murray, *Mayor Peduto Wants Mayors Across the Nation to Join Local Gun Legislation Fight*, PITTSBURGH POST-GAZETTE (Dec. 5, 2018, 7:35 PM), <https://www.post-gazette.com/news/politics-local/2018/12/05/Mayor-bill-Peduto-pittsburgh-urging-mayors-local-gun-legislation-fight/stories/201812050188> [<https://perma.cc/DB4L-9ZWL>].

awareness about state preemption issues.<sup>456</sup> These efforts suggest that many city leaders already possess the political will to champion or join an organized push against firearm preemption, and sustained coordination among those officials would ensure that their demands are not easily ignored.

Of course, public awareness and local resistance will not automatically translate into concrete gains against state firearm preemption. To secure the expansion of local authority over gun regulation, organizers must channel increased political momentum into processes through which state law can be modified. For example, voters, localities, and advocacy groups can urge legislators to introduce or enact broad repeal bills like the one in Colorado.<sup>457</sup> Firearm interest groups are working overtime to stymie debate on such legislation,<sup>458</sup> but their efforts could be rebuffed with a critical mass of public support in favor of repeal measures. Voters and local officials can also call for statutory amendments carving out reasonable exceptions to expansive preemption laws, an approach that might be more viable where state legislative majorities are hostile to the notion of repeal.

As an alternative, activists in states where ballot initiatives are permitted can employ that mechanism to place the rollback of state firearm preemption measures squarely before the electorate.<sup>459</sup> Increased participation in other forms of direct democracy may also give voters greater influence over the scope of preemption laws. Finally, those committed to an “ambitious[]” agenda for the long-term expansion of local power can “keep[] an eye on the potential for . . . state constitutional change,” which would entrench and reinforce statewide commitments to “local innovation” in gun policy and beyond.<sup>460</sup>

Again, the fight to scale back state firearm preemption laws will undoubtedly be an “uphill battle.”<sup>461</sup> But as Pittsburgh’s Mayor recently argued in his appeal for mobilization around the issue, “it’s a battle that

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<sup>456</sup> See *About the Campaign*, CAMPAIGN TO DEF. LOC. SOLS. [<https://perma.cc/2H77-ADBS>] (outlining the coalition’s mission and its outreach efforts in forty-three states).

<sup>457</sup> In a small handful of states, legislators have already attempted to propose such bills. See, e.g., H.R. 1374, 66th Leg., 2019 Reg. Sess. §§ 1–4 (Wash. 2019).

<sup>458</sup> See, e.g., *Washington: Upcoming Hearings on Gun Bills This Week*, NAT’L RIFLE ASS’N INST. LEGIS. ACTION (Jan. 19, 2020), <https://www.nrila.org/articles/20200119/washington-upcoming-hearings-on-gun-bills-this-week> [<https://perma.cc/Q83M-P35W>] (mobilizing NRA against a bill that would “abolish Washington’s decades old state preemption statute”).

<sup>459</sup> BRIFFAULT ET AL., *supra* note 44, at 18.

<sup>460</sup> *Id.*

<sup>461</sup> See Zaveri, *supra* note 258.

has to happen, and it has to start somewhere.”<sup>462</sup> The strategies outlined above should prove useful in heeding his call.

#### CONCLUSION

Officials in Pittsburgh, Coral Gables, Hillview, Tucson, and the other localities mentioned in this Article represent just a handful of the local leaders eager to address firearm preferences and concerns within their own communities. Many of these policymakers rightly acknowledge that local governments—whether rural or urban, large or small, predominantly Democrat or mostly Republican—are uniquely situated to effectuate changes in gun policy. When empowered to pursue gun regulations beyond those enshrined in state and federal law, localities can accommodate diverse views, target the most salient local problems, and develop fine-grained and creative solutions. Localities hold substantial promise as critical sites for progress on a range of gun issues, especially in an era of intensifying partisan polarization and persistent gun-related public health challenges.

In the vast majority of states, however, extensive statutory restrictions on local gun laws severely curtail the available opportunities to fulfill that promise. Firearm preemption statutes have dramatically reduced the variety and scope of local gun regulations nationwide, and several states are currently debating proposals to increase the severity of these laws.<sup>463</sup> A small number of localities and activists have sounded the alarm on this state of affairs, but significant changes in the firearm preemption landscape will remain out of reach absent broader political mobilization around the issue.

This Article should serve as a starting point for audiences interested in the work of scaling back state firearm preemption laws. Furnished with a thorough understanding of these statutes and their implications, organizers and officials can better navigate preemption provisions within their respective states and identify pressure points for change. To be sure, chipping away at firearm preemption statutes will be a tremendously difficult task. But those committed to the pursuit of comprehensive gun regulation should nevertheless prioritize the anti-

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<sup>462</sup> *Id.*

<sup>463</sup> See, e.g., sources cited *supra* note 158 (documenting such efforts in Nebraska and Pennsylvania); see also Alan Ashworth, *Gun Lawsuit Pits Five Summit County Cities, Other Communities Against State*, AKRON BEACON J. (Dec. 6, 2019, 5:33 PM), [<https://perma.cc/D642-FNRU>] (describing recent litigation in which Ohio municipalities challenged an amendment authorizing a private right of action for firearm preemption violations).

preemption project, for doing so will be indispensable in realizing the immense potential of local firearm policymaking.