

Tracking State Preemption 2019: The Pre-Pandemic Landscape

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Introduction

Preemption is a legal doctrine that allows a higher level of government to limit, or prevent, the regulatory authority of a lower level of government.¹ As a legislative tool, preemption is neither inherently good nor bad, but the misuse and abuse of preemption can be especially harmful when it limits the ability of localities to respond to the needs of their residents.

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The National League of Cities (NLC), in partnership with the Policy Surveillance Program (PSP) of Temple University’s Center for Public Health Law Research (CPHLR) tracks and analyzes preemption of local policies, particularly those that impact the conditions in which people live, learn, work and play, like housing and tax policy.² These “social determinants of health” affect a wide range of health and quality-of-life outcomes as well as the ability of local governments to function effectively to meet the needs of their local communities.³

FIND THE DATA ONLINE

The data explored in this brief, including updated 2020 data, is freely available online at: lawatlas.org/datasets/preemption-project

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Specifically, this project examines express state-level preemption, which occurs when a state law explicitly limits or restricts the lawmaking authority of local governments through legislation. Using the policy surveillance process of legal epidemiology, the project team created a legal dataset capturing laws in twelve legal domains across all 50 U.S. states as of August 1, 2019. This brief summarizes the dataset that can be accessed at [LawAtlas.org](https://www.lawatlas.org).^{4, 5, 6}

In 2011, the Institute of Medicine suggested that when it comes to public health policies, governments should set minimum standards (also known as floor preemption), and avoid restrictive maximum standards (also known as ceiling preemption) that do not advance health and equity.⁷ For example, ceiling preemption occurs as states ban cities from passing

minimum wage ordinances that would implement a higher rate than the statewide rate.⁸ Now more than ever, local governments need the authority to pass protective laws that address economic inequities through income security policies.

The past year and half have underscored the critical nature of local leadership and policy in advancing public health, as well as the complex challenges facing communities when local authority is stripped.⁹ This brief is part of a broader series and details the pre-pandemic preemption landscape. Subsequent analysis will highlight preemption trends throughout the pandemic and what is on the horizon as local governments seek to rebuild and strengthen their communities.



WHAT YOU NEED TO KNOW ABOUT PREEMPTION

What is Preemption?

Preemption occurs when a higher level of government supersedes the authority of lower levels.¹⁰ For example, a state can preempt cities by saying localities cannot set their own minimum wage and must adhere to the state's minimum wage.

TYPES OF PREEMPTION

Express Preemption

Express Preemption occurs when the state law explicitly limits or restricts the lawmaking authority of local governments through legislation.

Why Preemption Matters

As a legislative tool, preemption is neither inherently good nor bad. But the misuse and abuse of preemption can be harmful, especially when it limits the ability of cities to respond to the needs of their residents.

Implied Preemption

Implied Preemption occurs when a state authority invalidates a lower level authority even though explicit preemptory language does not exist in legislation. Implied preemption is most often clarified through litigation (i.e., case law) and Attorney General Opinions.

FORMS OF PREEMPTION

Vacuum Preemption

This is when a state prohibits cities from doing something without setting any standards of its own. For example, Wisconsin does not allow municipalities to enact paid leave law, but it did not create its own policy either, thus leaving a policy vacuum.¹¹

Ceiling Preemption

When a state prohibits cities from doing anything different from what state law already mandates. For example, tax and expenditure limits (TELs) set a ceiling on tax rates or levies.

Floor Preemption

This is when a state sets a minimum standard and allows cities to enact laws with requirements above that minimum standard. For example, a state could set a minimum wage of \$12 an hour, but allow localities to set a higher minimum wage of \$15 if it is an expensive city to live in.

Punitive Preemption

This is when a higher level of government threatens to punish a lower level of government. For example, in Arizona the state threatens to withhold shared revenue from cities that have ordinances found to be in conflict with state law.¹²

Nullification Preemption

When a state retroactively nullifies something that a city has already passed. Some instances include the state of North Carolina preempting Charlotte's LGBTQ+ friendly ordinance, as well as the state of Texas preempting a ballot referendum in Denton from banning fracking.¹³

The Legal Domains

Preemption pervades many areas of legal regulation, from firearm purchase and possession, to government taxing and spending, to housing access. Although a comprehensive start, this list is certainly not exhaustive. Below are the legal domains currently included in the LawAtlas dataset:¹⁴



Ban the Box laws can delay background checks and require employers to remove conviction and arrest history inquiries from job applications. Ban the Box preemption policies prevent localities from implementing this fair chance employment initiative.



Firearms regulation is multifaceted – carrying, permitting, and transferring are just a few areas regulated by state law. Some states preempt localities from regulating firearms altogether, while others preempt specific areas of local firearm regulation (e.g., concealed carry). This project specifically tracked 15 facets of state firearm preemption: firearm possession; purchasing; carrying; concealed carry; transfer; registration requirements; sale; licensing; ammunition; ownership; transportation; assault weapons; creation of a firearm registry; manufacture; and buyback programs.



Inclusionary Zoning laws aim to create affordable housing by encouraging or requiring developers to set aside a percentage of housing units to be sold or rented below-market value. Some states preempt localities from passing mandatory inclusionary zoning ordinances for residential units.



Rent Control laws impose price ceilings on rent, or aim for rent-stabilization over time. State rent control preemption laws prevent rent control policies in local communities.



Municipal Broadband refers to broadband internet access services provided by public entities such as local governments. Some states prohibit municipal broadband networks from operating in communities. Other states do not prohibit municipal broadband operations outright, but make municipal broadband extremely difficult to achieve due to bureaucratic barriers.



Paid Leave Paid family and medical leave laws allow qualified workers to continue to earn a portion of their pay while they take time away from work in certain circumstances. Paid leave preemption laws restrict local governments from requiring employers to provide paid family and/or paid sick leave.



Tax and Expenditure Limits (TEs) are self-imposed restrictions that state governments create by capping or limiting taxing and spending. These limits can extend to local governments, restricting growth of local revenues and spending. There are six common TELs:

- ◆ Full Disclosure Tax Requirements oblige local governments to disclose certain tax changes and hold public hearings on such changes. Such requirements may be considered a type of tax-and-expenditure limitation.
- ◆ General Revenue Limits create legal limits on annual increases in total revenues from all sources in a jurisdiction.
- ◆ General Expenditure Limits create legal limits on annual increases in a jurisdiction's total expenditures.
- ◆ Property Tax Rate Limits create legal limits on property tax rates so that they are either frozen or tied to an index or formula.
- ◆ Tax Assessment Limits create legal limits on annual increases in assessed values that either freezes such values or ties increases to an index or formula. Some states freeze or limit a property's assessed value until it is sold, to then assess the new market value. This is known as an acquisition value-based assessment system.
- ◆ Tax Levy Limits create legal limits on the amount of revenue raised by the property tax or on the rate of growth in property tax revenues.

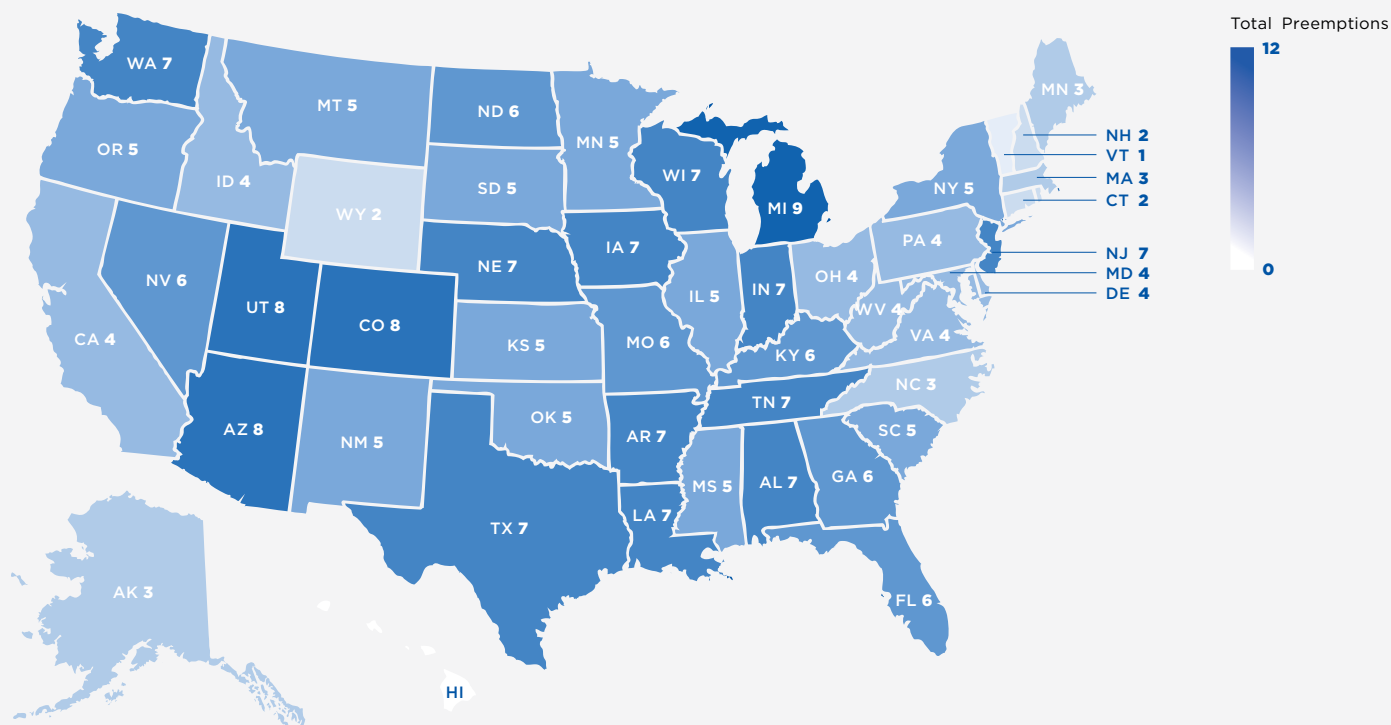
Although these domains are just a sample of the preemptory issues that plague local leaders every day, each demonstrates, not only the limits placed on the local decision-making of mayors and councilmembers—but also what options are denied to residents. Today, more than ever, these restrictions are causing excess harm to local communities that are already struggling to combat COVID-19. For example, states are continuing to restrict municipal broadband at a time when large swaths of the workforce need steady internet to work remotely or access telemedicine providers. States also continue to ban local authority to regulate paid sick leave, which could ultimately reduce the level of spread and exposure of COVID-19 and protect a worker's job when they or someone in their family becomes ill.¹⁵

Key Findings

States are increasingly passing laws that directly limit or restrict local authority. Of the 50 U.S. states examined, 49 have express preemption in at least one of the twelve legal domains. All key findings discussed herein use data as of August 1, 2019.

TOTAL NUMBER OF LEGAL DOMAINS EXPRESSLEY PREEMPTED, BY STATE

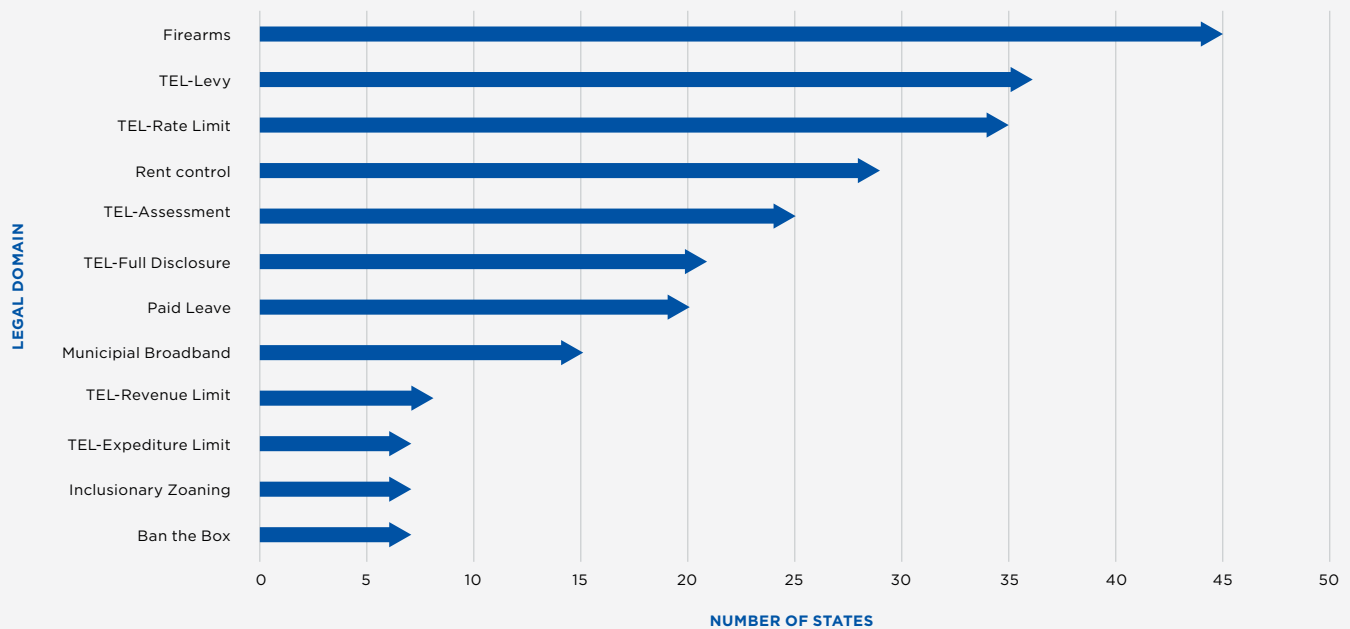
Note: Data as of August 1, 2019. Total express preemption by state, as tracked out of the 12 policy areas in this dataset.



In fact, as of August 1, 2019, there were more than 250 instances of express preemption found across all domains.¹⁶ The most heavily regulated domain was firearms (45 states). Three domains with the least amount of regulation include Ban the Box, inclusionary zoning and general expenditure limits (7 states each).

TOTAL NUMBER OF LEGAL DOMAINS EXPRESSLEY PREEMPTED, BY STATE

Note: Data as of August 1, 2019. Total express preemption by state, as tracked out of the 12 policy areas in this dataset



Ban the Box

Seven states (IA, IN, MI, MS, NJ, TN, and UT) expressly preempt local governments from creating Ban the Box ordinances. Five of the seven states have passed their own statewide Ban the Box law, thus local governments cannot include questions that ask about criminal histories on their employment applications.¹⁷ For instance, New Jersey has a statewide Ban the Box law that blocks employers from asking about an applicant's criminal record in both the private and public sector.

Iowa and Mississippi expressly preempt localities from passing Ban the Box ordinances without a statewide policy in place. This leaves a policy vacuum and allows public and private employers to choose whether to include questions about an applicant's record. Iowa's preemption statute is being litigated in court by the Association of Business and Industry against the city of Waterloo, as the city pushes to enact a fair-chance initiative for both public and private applications.¹⁸



Firearms

Forty-five states prohibit local governments from passing an ordinance related to certain aspects of firearms regulation. The six most common areas of firearm regulation that are explicitly preempted include possession (39 states), transfer (38 states), sale (32 states), ammunition (34 states), ownership (36 states), and transportation (37 states). Twenty states impose penalties on local government for regulating firearms in spite of the state preemption statute. The most common penalty, civil liability, is present in 18 states. This represents punitive preemption—measures targeted at local elected officials to deter action and deny them the full weight of their offices as representatives of their communities.

The five states that do not explicitly preempt firearms regulations include Hawaii, New York, Massachusetts, Connecticut, and New Jersey.



Inclusionary Zoning & Rent Control

Six states (AZ, IN, KS, TN, TX, WI) expressly preempt localities from being able to implement mandatory inclusionary zoning for residential units. Four states (AZ, KS, TN, TX) that preempt mandatory inclusionary zoning do permit voluntary inclusionary zoning, either through incentives such as density bonuses or other voluntary programs. Today, more than 800 localities have some type of inclusionary zoning policy, and most having been adopted after January 1, 2000.¹⁹ These cities include mandatory programs such as in Davis, CA, which requires between 25% and 35% of new rentals to be affordable; or voluntary programs such as in Austin, TX, that offers waivers.²⁰ Twenty-nine states expressly preempt local governments from passing rent control ordinances. Of the 29, 14 states have carved out exceptions. All 14 states allow cities to pursue voluntary agreements with local government, while two states (MN and FL) allow voter referenda to implement the policy.



Municipal Broadband

Fifteen states explicitly preempt municipal broadband networks, which leaves cities without the opportunity to connect their residents. Of these 15 states, all but Nevada provide legal exceptions. Of the 14 states that provide legal exceptions, 10 have more than one requirement that the community must meet in order to qualify for the broadband exception. Exceptions are typically large hurdles for communities, usually demanding a combination of requirements (e.g., must pay taxes as if they were a private entity, must be provided within a restricted geographic area, must deploy a feasibility study). The single most common requirement is that the private sector must be unwilling to deploy services (CO, MI, MT, PA, WA, and WI).



This project tracks the preemption of paid leave as it relates to paid family and paid medical leave, although paid leave in general can refer to various forms of paid time off. Twenty states preempt localities from being able to enact their own mandatory paid sick leave ordinances. Fifteen of those states also preempt localities from implementing mandatory paid family medical leave.

PAID SICK LEAVE POLICY VACUUM

Legend:

- State has a statewide paid sick leave law
- States where there is a policy vacuum for paid sick leave

States with a statewide paid sick leave law (Dark Blue): OR, MI, IA, AR, LA, FL, GA, SC, NJ, MD, DE.

States with a policy vacuum for paid sick leave (Light Blue): WI, IL, IN, OH, KS, OK, TN, MS, AL.

States with no specific policy indicated (Gray): WA, MT, ND, MN, SD, WY, NE, CO, UT, NV, ID, CA, AZ, NM, TX, AK, HI, VT, NH, ME, NY, PA, WV, VA, NC, KY, MO, MA, CT, RI, DE.

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Tax and Expenditure Limits

Tax and Expenditure Limits (TELs) are self-imposed restrictions that state governments create by capping or limiting taxing and spending. State TELs can affect the revenue streams and spending of cities.²⁶ Most often, TEL preemption will affect sources of revenue, such as property taxes. TELs can be classified as “binding” and “non-binding” depending on the mixture of TELs in a given state. Cities that face a property tax cap could raise the assessment value, unless the state has also preempted that.²⁷ Typically, these limits are state-imposed or voter-imposed. The six TEL legal domains listed below represent the breadth and depth of TELs, affecting rates, methods (full disclosure requirements), how much is collected, and how much is spent:

- ◆ Full disclosure requirements (21 states)
- ◆ General revenue limits (8 states)
- ◆ General expenditure limits (7 states)
- ◆ Property tax rate limits (35 states)
- ◆ Tax assessment limits (25 states)
- ◆ Tax levy limits (36 states)

Across 48 states with TELs, there are more than 130 TELs affecting city finances. Hawaii and Vermont are the only two states without TELs. The most common TELs are tax levy limits (36 states) and property tax rate limits (35 states). No state has all six TELs in place.

More common than other types of preemption, TELs can be found in state statutes and constitutions. The key distinction between the source of authority relates to how the preemption can be altered; either through state constitutional amendment or through a legislative amendment, repeal, or the enactment of a new statute.

Conclusions

Understanding the depth and breadth of preemption in the United States is an ever-evolving challenge. Express preemption – found when state law explicitly limits or restricts the lawmaking authority of local governments – is one small frame of the full picture. Even with that, over 250 instances of express preemption were found across 12 legal domains in the United States as of August 1, 2019.

Within each legal domain, there exists barriers to limit the scope of local decision-making. Whether it is access to affordable housing, or the capping of tax rates found in tax and expenditure limits—municipalities are facing constraints in responding to the needs of their communities due, in part, to state preemption.

Cities, towns and villages have options. Policies such as paid leave, inclusionary zoning, and Ban the Box, can provide greater access to healthcare, housing, and job opportunities—all aspects of the social determinants of health. These data provide researchers with the ability to evaluate the impact of these laws on population health and local leaders with the capacity to determine where barriers exist and which may be surmountable. To restore a proper state-local balance of authority, it will take the collective action of local leaders, policymakers, and researchers to reveal then contest the misuse and abuse of preemption.

To explore the data, please visit:

lawatlas.org/datasets/preemption-project

Check out these additional resources:

[Local Solutions
Support Center](#)

[Restoring City Rights in an Era of Preemption](#)

[Principles of Home Rule for the 21st Century](#)

[ChangeLab Solutions](#)

[Partnership for
Working Families](#)

[Economic Policy Institute](#)

Endnotes

- ¹ ChangeLab Solutions. Fundamentals of Preemption. Rep. June 2019 ed. ChangeLab Solutions, 2019. 1-6. Print.
- ² Centers for Disease Control. "Social Determinants of Health." 19 Aug. 2020. Web. 03 Nov. 2020.
- ³ Pomeranz, J. L., Zellers, L., Bare, M., Sullivan, P. A., & Pertschuk, M. (2019). State Preemption: Threat to Democracy, Essential Regulation, and Public Health. American Journal of Public Health, 109(2), 251-252. <https://doi.org/10.2105/ajph.2018.304861>
- ⁴ Burris S, Hitchcock L, Ibrahim J, Penn M, & Ramanathan T. Policy surveillance: a vital public health practice comes of age. J Health Politics Pol Law. 2016;(41)(6):1151-1173.
- ⁵ Ramanathan T, Hulkower R, Holbrook J, Penn M. Legal epidemiology: the science of law. J Law Med Ethics. 2017;(45)(suppl):69-72
- ⁶ "State Preemption Laws." LawAtlas. Web. 04 Dec. 2020. <https://dev.lawatlas.org/datasets/preemption-project>
- ⁷ Pomeranz, J. L., Zellers, L., Bare, M., Sullivan, P. A., & Pertschuk, M. (2019). State Preemption: Threat to Democracy, Essential Regulation, and Public Health. American Journal of Public Health, 109(2), 251-252. <https://doi.org/10.2105/ajph.2018.304861>
- ⁸ Pomeranz, J. L., Zellers, L., Bare, M., Sullivan, P. A., & Pertschuk, M. (2019). State Preemption: Threat to Democracy, Essential Regulation, and Public Health. American Journal of Public Health, 109(2), 251-252. <https://doi.org/10.2105/ajph.2018.304861>; Carr, D., Adler, S., Winig, B. D., & Montez, J. K. (2020). Equity First: Conceptualizing a Normative Framework to Assess the Role of Preemption in Public Health. The Milbank Quarterly, 98(1), 131-149. <https://doi.org/10.1111/1468-0009.12444>
- ⁹ National League of Cities. "The COVID-19 Recession." 2020. Web. 2020. https://www.nlc.org/wp-content/uploads/2020/12/NLC_Survey_November_2020_One_Pager.pdf
- ¹⁰ ChangeLab Solutions. June 2019 ed., ChangeLab Solutions, 2019, pp. 1-6, Fundamentals of Preemption.
- ¹¹ Temple University Center for Public Health Law Research. "Preemption, Paid Leave, and the Health of America." Bill of Health, 19 Mar. 2020, blog.petrieflom.law.harvard.edu/2020/03/16/preemption-paid-leave-and-the-health-of-america/
- ¹² Joffe-Block, Jude. "Arizona Law Targets City Governments By Cutting Off Funds." NPR, NPR, 19 Dec. 2016, www.npr.org/2016/12/19/506199963/arizona-law-targets-city-governments-by-cutting-off-funds
- ¹³ Gordon, Michael, et al. "Understanding HB2: North Carolina's Newest Law Solidifies State's Role in Defining Discrimination." Charlotte Observer, Charlotte Observer, 26 Mar. 2016, www.charlotteobserver.com/news/politics-government/article68401147.html
- ¹⁴ Carr, Derek, Sabrina Adler, Benjamin D. Winig, and Jennifer Karas Montez. "Equity First: Conceptualizing a Normative Framework to Assess the Role of Preemption in Public Health." The Milbank Quarterly 98 (2020). Print.
- ¹⁵ <https://www.nber.org/papers/w26832>
- ¹⁶ "State Preemption Laws." LawAtlas. Web. 04 Dec. 2020. <<https://dev.lawatlas.org/datasets/preemption-project>>.

- ¹⁷ Avery, Beth, and Han Lu. "Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies." National Employment Law Project. 2020. Web. 02 Oct. 2020.
- ¹⁸ Jett, Tyler. "Iowa's First 'ban the Box' Ordinance Survives Its First Legal Challenge." Des Moines Register. Des Moines Register, 07 Apr. 2020. Web. 02 Oct. 2020.
- ¹⁹ McFarland, Christiana K., Kyle Funk, Domenick Lasorsa, and Brenna Rivett. Local Tools to Address Housing Affordability: A State-by-State Analysis. Rep. Washington, DC: National League of Cities, 2019. Print.
- ²⁰ Ibid.
- ²¹ BroadbandNow. "BroadbandNow." BroadbandNow. 02 Oct. 2020. Web. 02 Oct. 2020.
- ²² Wagner, Spencer. "What a Broadband Preemption Victory in Arkansas Means For Rural Cities." CitiesSpeak. 31 July 2020. Web. 02 Oct. 2020.
- ²³ Crabtree, Mark A. "Oregon Passes Paid Family and Medical Leave Law." Jackson Lewis. 12 July 2019. Web. 02 Oct. 2020.
- ²⁴ A Better Balance. *Overview of Paid Sick Time Laws in the United States: Oregon*. 16 July 2020, www.abetterbalance.org/paid-sick-time-laws/oregon/
- ²⁵ "Preemption, Paid Leave, and the Health of America." Bill of Health. 19 Mar. 2020. Web. 02 Oct. 2020.
- ²⁶ McFarland, Christy, and Spencer Wagner. "Local Budget Pressures Are Real. So Why Don't Cities Just Raise Taxes?" *National League of Cities*. 23 Oct. 2020. Web. 04 Dec. 2020. <<https://www.nlc.org/article/2020/06/01/local-budget-priorities-are-real-so-why-dont-cities-just-raise-taxes/>>.
- ²⁷ Pagano, Michael A., and Christopher W. Hoene. City Budgets in an Era of Increased Uncertainty. Rep. Washington, DC: Brookings Institute, 2018. Print.