

# THE POWER OF STATE PREEMPTION: PREVENTING PROGRESS AND THREATENING EQUALITY

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Author



Partners

## This report was authored by:

### Movement Advancement Project

The Movement Advancement Project (MAP) is an independent think tank that provides rigorous research, insight, and analysis that help speed equality for LGBT people. MAP works collaboratively with LGBT organizations, advocates, and funders, providing information, analysis, and resources that help coordinate and strengthen efforts for maximum impact. MAP's policy research informs the public and policymakers about the legal and policy needs of LGBT people and their families.

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**The Local Solutions Support Center (LSSC)** is a coordinating hub that provides local governments, elected officials, and advocates with the strategies, tools, and assistance needed to defend local democracy and discourage the use of preemption that limits the ability of cities to protect people's civil rights, solve problems, and improve lives. The LSSC also supports grassroots organizing, research and communications, and education and outreach efforts aimed at raising awareness of preemption laws and their consequences for local communities. For more information, visit [www.leap-preemption.org](http://www.leap-preemption.org).

## TABLE OF CONTENTS

<b>INTRODUCTION .....</b>	<b>1</b>
<b>WHAT IS STATE PREEMPTION AND WHERE IS IT HAPPENING? .....</b>	<b>2</b>
<b>STATE PREEMPTION OF LOCAL ORDINANCES IS A THREAT TO LGBT EQUALITY .....</b>	<b>3</b>
Hindering Local Nondiscrimination Ordinances and Restricting Restroom Access .....	4
Preventing Cities from Banning Harmful Conversion Therapy.....	5
<b>OTHER EFFORTS TO PREEMPT LOCAL PROGRESS HURT MANY COMMUNITIES .....</b>	<b>7</b>
Limiting Cities' Abilities to Increase the Minimum Wage .....	7
Preventing Cities from Extending Paid Sick and Safe Days.....	8
Restricting Cities' Efforts to Assist Unauthorized Immigrants.....	9
<b>RECOMMENDATIONS.....</b>	<b>10</b>
<b>CONCLUSION .....</b>	<b>11</b>
<b>ENDNOTES .....</b>	<b>12</b>



## INTRODUCTION

Around the country, cities and counties are taking steps to promote progress on a range of issues, including the minimum wage, paid leave, and nondiscrimination protections for LGBT people. Increasingly, state legislatures are attempting to limit these efforts through “preemption,” or state laws that block or prevent local governments from passing their own laws on certain issues, often overturning local laws already on the books. Although the reasoning behind current state preemption efforts can vary, the impact remains the same across the board: tying the hands of local lawmakers and preventing them from providing the laws and protections they know are needed in their communities.<sup>1</sup>

Historically, preemption has been a federal tool to create a minimum level of protections, or a floor under which states, cities, or counties could not fall.<sup>2</sup> For example, the federal Civil Rights Act of 1964 set a minimum standard of civil rights protections; it allowed states and cities to choose to increase protections, but not to fall below those provided and required by federal law. States have also used preemption in similar ways in the past, setting a minimum standard for cities, counties, and localities.

By contrast, more recent state efforts use preemption as a tool in a coordinated strategy to advance an anti-regulation agenda and to impose a *maximum* level of protection, or a ceiling, throughout a particular state. The goals of these special interests are to impose a ceiling rather than a floor in an effort to decrease regulation and increase their own profit. This is evidenced by recent state efforts to strip cities of their ability to raise their local minimum wage or guarantee paid sick and safe days, which in effect creates a statewide ceiling—

and often a regulatory vacuum—on the amount of pay and benefits required by law. Many recent efforts have also focused on non-discrimination ordinances (often using anti-transgender rhetoric) or attempting to block measures that promote immigrant rights, environmental protection, public health, gun safety, and more.<sup>3</sup> As *The New York Times* reported in 2017, “[t]he states aren’t merely overruling local laws; they’ve walled off whole new realms where local governments aren’t allowed to govern at all.”<sup>4</sup>

Recent preemption efforts are a clear threat to LGBT people and equality. Local governments, in absence of action by state and federal lawmakers to address the needs of LGBT people, have taken steps to pass policies that reflect their communities’ values. These include raising the minimum wage or guaranteeing workers a few paid sick days a year—policies that happen to have a disproportionate impact on LGBT people—as well as nondiscrimination ordinances that protect residents from discrimination based on sexual orientation and gender identity. State governments, often driven by corporate interests, are attempting to undo this progress in the cities and counties where lawmakers have passed policies they know will benefit their residents and their local economies. When preemption is used in this way to undermine people’s economic security, health, and safety, it is a dangerous threat to local democracy and to equality for all.

## WHAT IS STATE PREEMPTION AND WHERE IS IT HAPPENING?

State preemption laws strip local governments of their power on a certain issue or issues, often overturning existing local ordinances or laws on the subject or making those laws unenforceable. Preemption laws are also increasingly broad-sweeping in their scope and frequently include legally questionable penalties for local governments or elected officials.<sup>5</sup>

When states fail to provide certain rights or protections, cities or local activists often lead efforts to expand residents' rights and to protect important interests such as public health, safety, and the environment. Such examples include cities that have passed gun safety measures, as in Morton Grove, Illinois; LGBT-inclusive nondiscrimination ordinances like in Nashville, Tennessee; raises to the local minimum wage as in St. Louis, Missouri; and taxes or bans on plastic bags or styrofoam to limit city waste, such as Austin, Texas and Coral Gables, Florida.<sup>6</sup>

However, these local initiatives sometimes run counter to state legislatures or the special interests that influence them. For example, some corporate interests and lobbyists have developed a coordinated agenda to increase profits and undermine local efforts to improve people's well-being, with some organizations—such as the American Legislative Exchange Council—even offering model legislation for states to use to preempt

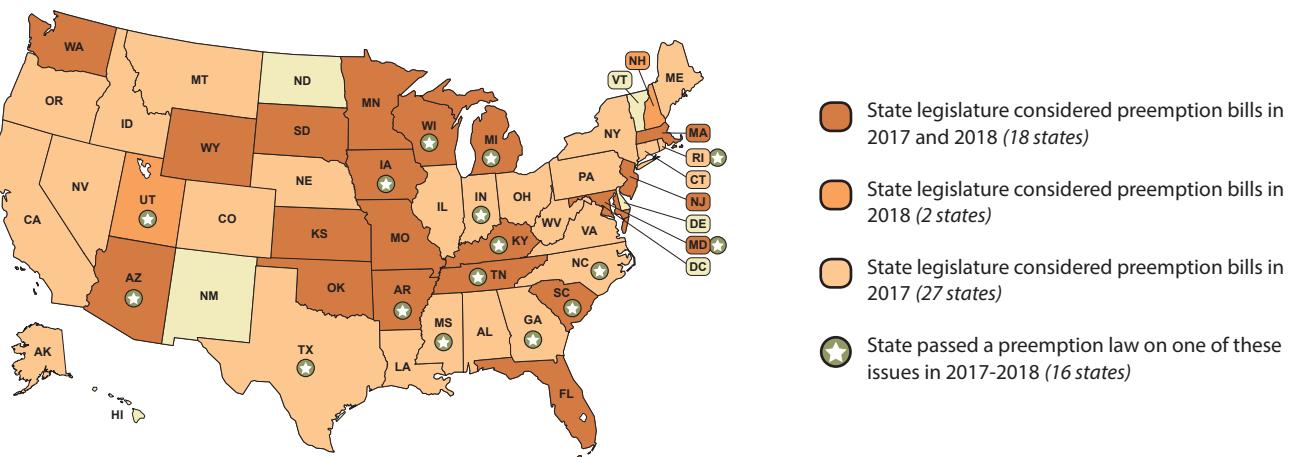
a wide range of policies, including rent control and a living wage.<sup>7,8,9</sup> State legislatures then use preemption to reassert control, limit local authority and activism, and overturn the newly passed ordinances—as was the case in Morton Grove, Nashville, St. Louis, Austin, Coral Gables, and so many other cities around the country.

State efforts to preempt the authority of local governments are on the rise. *Figure 1* shows that, in just the 2017-2018 state legislative cycle and only looking at four general policy issues, at least 46 states considered more than 100 preemption bills. These policy areas are: environmental issues such as plastic bag fees; sanctuary cities and other pro-immigrant policies; LGBT issues such as nondiscrimination protections or restroom use; and worker protections like minimum wage, paid leave, fair scheduling practices, and other benefits. At least 16 states passed one such preemption bill in 2017 or 2018, as of the time of this report's publication.

The use of preemption as a tactic to undermine local progress spans many issues, and historically it was a clear and frequent tactic used by both the tobacco and gun lobbies.<sup>10</sup> For example, 42 states have firearm preemption laws that prohibit municipalities from passing gun-related public safety laws, preemptions which have become increasingly high profile following the recent school shooting in Parkland, Florida.<sup>11</sup> More recently, preemption is being used to undermine local efforts to improve workers' rights and benefits, immigrants' protection, the environment, and, increasingly, LGBT equality.

**Figure 1: Many States Considering Preemption Legislation in 2017-2018**

States that considered preemption legislation in 2017-18 only related to the environment, immigration, LGBT equality, or worker protections



Note: This map does not include many other preemption efforts that focused on other policy areas. This map is current as of April 30, 2018.  
Source: Original MAP analysis.

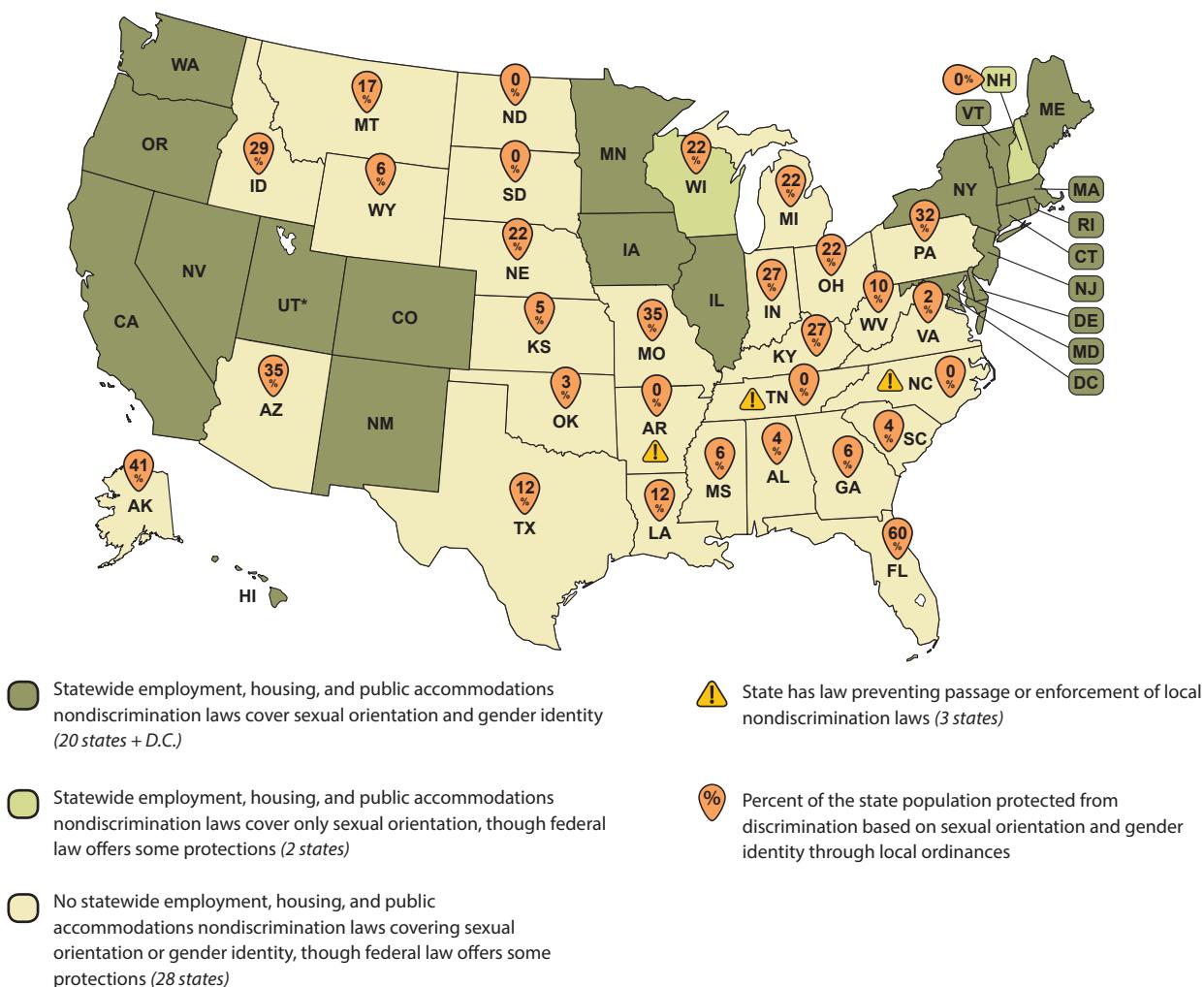
## STATE PREEMPTION OF LOCAL ORDINANCES IS A THREAT TO LGBT EQUALITY

The public strongly supports protecting LGBT people from discrimination: 71% of all Americans, including a majority in every state, support these protections in jobs, public accommodations, and housing.<sup>12</sup> This support only continues to grow. Given the gap between this support and the inaction of the federal government and many state legislatures in providing such protection, more than 300 cities and counties around the country have passed ordinances designed to protect their residents from discrimination based on sexual orientation and gender identity, as

shown in *Figure 2*.<sup>13</sup> These local ordinances, combined with state-level laws, provide important safeguards covering roughly 47% of all LGBT people living in the United States.

Local ordinances have also been instrumental stepping stones toward statewide protections in many of the 20 states that explicitly protect LGBT people from employment discrimination. Successfully passing LGBT-inclusive nondiscrimination protections at the local level demonstrates to state-level lawmakers that their constituencies support these protections, and further that these protections invigorate local economies. Additionally, in states that do provide statewide LGBT nondiscrimination

**Figure 2: Local Nondiscrimination Ordinances Provide LGBT Protections When States Don't**  
Cities and States with LGBT Nondiscrimination Protections



\*Note: Utah's law includes sexual orientation and gender identity in employment and housing, but excludes public accommodations protections.

Note 2: In some states, a larger percentage of the population may be protected based on sexual orientation only. See [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_ordinances](http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances).

Source: Original MAP analysis.

protections, local laws often build on the floor of state law by protecting workers in smaller businesses and/or including additional enforcement mechanisms.<sup>14</sup> Preempting local law therefore poses a significant threat to advancing LGBT equality at not only the local level, but at the state level as well.

Current preemption efforts target LGBT equality in at least two key ways:<sup>15</sup>

**Hindering Local Nondiscrimination Ordinances and Restricting Restroom Access.** Broad preemption laws that limit cities and counties' ability to protect people against discrimination based on sexual orientation and gender identity, and/or restrict bathroom access for transgender people.

**Preventing Cities from Banning Harmful Conversion Therapy.** Anti-LGBT organizations have tried to use preemption to limit local governments' efforts to ban harmful conversion therapy used on minors.

## Hindering Local Nondiscrimination Ordinances and Restricting Restroom Access

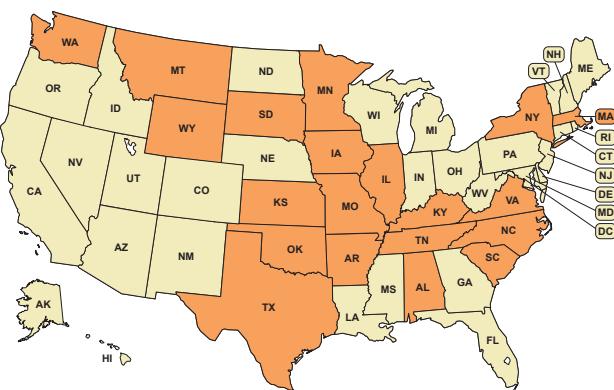
Broad preemption laws prohibit cities and counties from passing new local nondiscrimination protections and also invalidate *existing* local nondiscrimination ordinances throughout the state. These state-level bills often claim to “improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations,” as did a bill introduced—but not passed—in Texas in 2017.<sup>16</sup> In other words, they suggest that, when cities provide additional protections for their residents beyond the state’s floor or minimum requirements, this somehow damages local or state commerce. There is no evidence to support this argument. Businesses already work with varying local laws on zoning, building, environmental concerns, and much more. Furthermore, there is a rich history throughout the country of local governments successfully building on statewide discrimination laws with additional coverage, relief, or protected categories.

Despite the lack of evidence for pro-preemption arguments, three states have nonetheless recently passed such laws, as discussed below. Many more states are also considering "bathroom bills," or preemption efforts to undermine local LGBT nondiscrimination protections and other rights by

### **Figure 3: Many State Legislatures Considering**

## **"Bathroom Ban" Type Preemption B**

### States where “bathroom ban” preemption

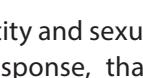


- State legislature considered bathroom legislation in 2017-2018, as of April 12, 2018 (20 states)

Note: While not all state-level “bathroom bans” explicitly prohibit localities from passing their own LGBT-inclusive policies, this report treats bathroom bills as preemption bills because they force localities, schools, or other entities to abide by these new state rules regulating bathroom use.

Sources: ACLU, "Legislation Affecting LGBT Rights Across the Country: Anti-Transgender Bills, Single-Sex Facility Restrooms," as of April 12, 2018, <https://www.aclu.org/other/legislation-affecting-lgbt-rights-across-country#singlesex>; National Conference of State Legislatures, "Bathroom Bill" Legislative Tracking: 2017 State Legislation," <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

explicitly targeting transgender and gender non-conforming people, as shown in *Figure 3*.<sup>17</sup>



In 2011, Nashville, Tennessee expanded a local nondiscrimination law to include protections for gender identity and sexual orientation in government contracts. In response, that same year, the State of Tennessee passed the misleadingly named "Equal Access to Intrastate Commerce Act" (HB600). This law, which overturned Nashville's ordinance, prohibits the enforcement of any local nondiscrimination ordinances that offer protections above and beyond those offered in the state's nondiscrimination law. Additionally, the text of the law explicitly defines "sex" for discrimination purposes as referring only to the designation on an individual's birth certificate, essentially cutting off any legal argument that gender identity is a protected category under the umbrella of sex.



Arkansas passed the "Intrastate Commerce Improvement Act" (SB202) in 2015, invalidating the existing LGBT-inclusive nondiscrimination ordinance in the city of Eureka Springs. Advocates and local communities in the

state are challenging the constitutionality of the law, and five cities have passed new nondiscrimination ordinances since 2015. The new local ordinances are technically unenforceable due to the state law, but they will be used in the legal challenge of the state law.

**Some preemption legislation also targets transgender people's ability to use public restrooms.** The most notorious example of both preemption and its targeting of transgender people is North Carolina's "Public Facilities Privacy & Security Act" (HB2), passed in 2016. Since then, at least 19 additional states have introduced similar bills, as shown in Figure 3, that would prohibit transgender people from using public facilities that match their gender identity or otherwise regulate bathroom use statewide.<sup>18</sup> One common feature of this type of legislation is that it also prevents local laws from offering nondiscrimination protections on the bases of gender identity and/or sexual orientation. The scope of such preemption varies considerably, as some prevent municipalities from protecting transgender people in public buildings and spaces or at work, while others go even further by preventing public schools or school boards from protecting transgender students.



In February 2016, the city of Charlotte, North Carolina added protections against discrimination on the basis of sexual orientation and gender identity. In response, the state legislature called an emergency session specifically to pass the "Public Facilities Privacy & Security Act," also known as HB2, thus overturning Charlotte's new ordinance and much, much more. Under HB2, multiple-occupancy restrooms at public schools and public agencies could only be legally used by individuals in accordance with the sex listed on their birth certificate. In addition to banning transgender people from using restrooms that match their true gender, HB2 also specifically invalidated all local nondiscrimination ordinances, invalidated all local minimum wage and benefit ordinances (again reflecting the corporate agenda driving modern preemption efforts), and prohibited localities from passing new ordinances. HB2 also prevents counties and cities from requiring that their local government can only contract with private companies that have LGBT- or trans-inclusive nondiscrimination policies, a practice frequently used by localities to promote diversity and equal opportunity. Although HB2 was repealed in March 2017, its

replacement (HB142) still bars cities and counties from passing ordinances that provide nondiscrimination protections for LGBT people until December 1, 2020, and permanently bars cities from protecting transgender people's access to restrooms.<sup>19</sup>

In the first half of 2017 alone, at least 27 such "bathroom bills" were considered in 17 different states.<sup>20</sup> In some states, such as Texas, similar language was attached as amendments to unrelated bills in addition to the introduction of legislation specifically targeting public facility access.<sup>21</sup> More bathroom bills will likely be introduced as the 2018 legislative cycle unfolds.

## Preventing Cities from Banning Harmful Conversion Therapy

A growing number of cities and counties, as shown in *Figure 4* on page 7 are banning the harmful practice of conversion therapy, in which providers engage in practices seeking to change the sexual orientation or gender identity of minors. In Florida, for example, 19 cities and counties have banned conversion therapy for minors. These legislators, including city councils, are acting to protect their youth from harm.

In response, some conversion therapy advocates are using preemption to instead protect this dangerous practice, arguing that existing state law already prevents bans on conversion therapy, or pursuing new legislation to do so. For example, in a lawsuit challenging the City of Tampa's ordinance, advocates of conversion therapy argued that Florida law prohibits the city from imposing civil penalties on mental health providers—though nothing in the law says that.<sup>22</sup>

# STATE PREEMPTION: A THREAT TO EQUALITY



**STOP**

**STATE PREEMPTION LAWS STOP LOCAL CITIES AND COUNTIES FROM  
PASSING ORDINANCES THAT BENEFIT THEIR COMMUNITIES**

## INCLUDING:



Increases to the minimum wage



Paid family leave or sick time



Protections for LGBT people,  
veterans, or pregnant workers



Protecting local immigrant members  
of the community

## RECENT EXAMPLES



North Carolina's HB2, passed in 2016, invalidated all local nondiscrimination and minimum wage ordinances. Though repealed, its replacement bars cities and counties from passing nondiscrimination ordinances until 2020 and ordinances allowing transgender people to use the correct restroom indefinitely.

## PREEMPTION LAWS HURT COMMUNITIES



Leave residents open  
to discrimination



Place profits  
over people



Hurt low-income  
communities

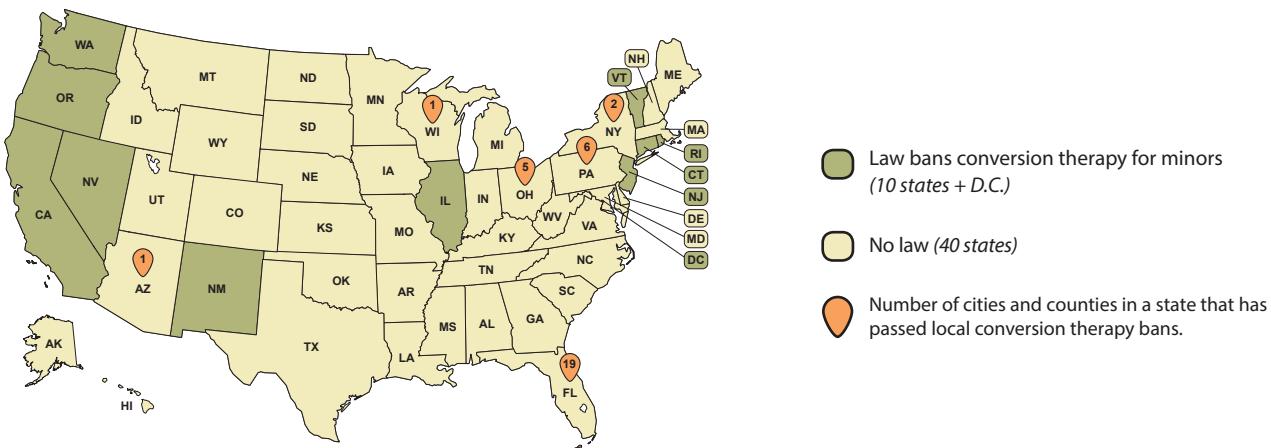


Limit cities' ability to create  
diverse, thriving economies



Hamstring local officials' ability to  
do what is right for their cities

**Figure 4: States and Municipalities That Ban Dangerous Conversion Therapy For Minors**



Note: At the time of this report's publication, both Hawaii and Maryland have passed bills banning conversion therapy, but are waiting for the governors' signature.  
 Source: Movement Advancement Project, "Conversion Therapy Laws," [http://www.lgbtmap.org/equality-maps/conversion\\_therapy](http://www.lgbtmap.org/equality-maps/conversion_therapy).

## OTHER EFFORTS TO PREEMPT LOCAL PROGRESS HURT MANY COMMUNITIES

While much attention has been paid to efforts to limit LGBT equality through preemption—particularly in the context of nondiscrimination ordinances and so-called “bathroom bans”—there are many preemption efforts underway beyond explicitly LGBT-related issues, as shown in *Figure 5* on the following page. These efforts include, but are not limited to:

- Limiting cities' abilities to increase the minimum wage
- Preventing cities from extending paid sick and safe days
- Restricting cities' efforts to assist unauthorized immigrants

These efforts demonstrate that preemption is not solely an LGBT issue, but rather a dedicated effort on the part of states, often motivated by special interests, to undermine local governments and their ability to enact policies that reflect the needs of their own communities. The anti-regulation agenda at work here, often driven by corporate special interests, is particularly obvious given the efforts to prevent a higher minimum wage, the provision of paid sick days, fair scheduling laws, and project-labor agreements—all policies that affect corporate profit but empower local communities and families. These same corporate interests drive state efforts to preempt LGBT protections.

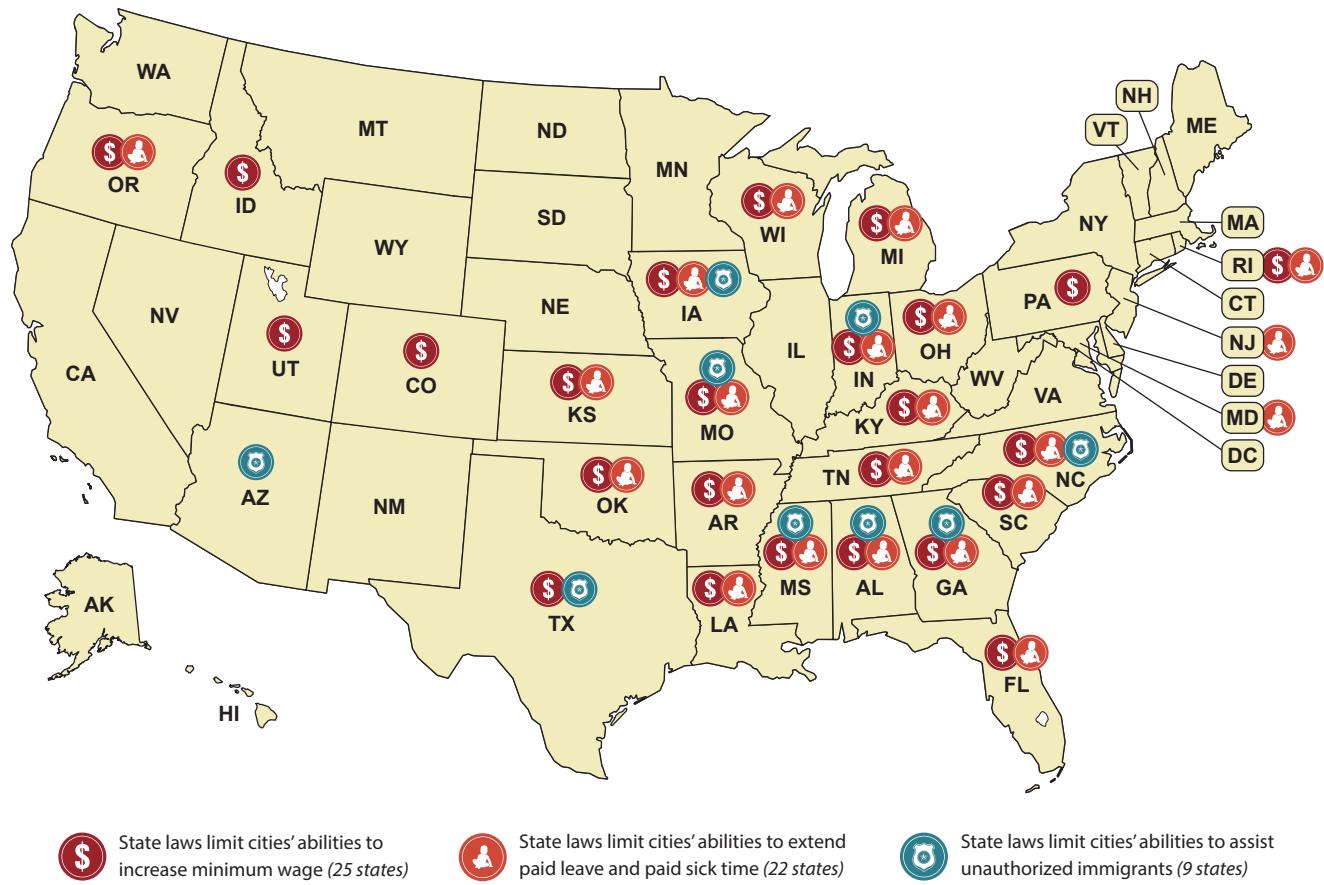
While these issues are not explicitly LGBT-related, they nevertheless have a disproportionate, negative impact on LGBT people.

### Limiting Cities' Abilities to Increase the Minimum Wage

More than 40 localities have passed ordinances to increase the minimum wage.<sup>23</sup> Increases to the minimum wage are an important step toward improving the economic security of LGBT people. Research finds that LGBT people, particularly LGBT people of color, are more likely to live in poverty than their peers. For example, data from a nationally representative Gallup survey found that 22% of LGBT women and 20% of LGBT men living alone lived in poverty, compared to 19% of non-LGBT women and 14% of non-LGBT men.<sup>24</sup> The Williams Institute's analysis of individuals in same-sex couples found that raising the national minimum wage to \$15 per hour would lift almost 30,000 people in same-sex couples out of poverty—cutting the poverty rate for women in same-sex couples in half and for men by a third.<sup>25</sup>

Yet, 25 states have passed laws preempting local governments from regulating the minimum wage.<sup>26</sup> While proponents of these efforts say they are concerned about businesses having to navigate different wage requirements across city and county lines, businesses are already used to adjusting practices to a variety of other local laws including licensing and zoning requirements.<sup>27</sup>

**Figure 5: State Preemption Laws Reach Many Areas of Life**



Note 1: Some states generally limit local authority through Dillon's Rule or other means, but do not explicitly preempt these specific issues (e.g., New Hampshire). These cases are not included in this map.  
 Note 2: Four states (Maryland, New Jersey, Oregon, and Rhode Island) guarantee paid sick and safe time to workers, but also involve some form of preemption of local paid sick and safe time laws.  
 Note 3: In 2017 alone, 33 more states considered bills that would preempt pro-immigrant policies such as sanctuary cities.

Sources: Richard Briffault et al. "The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond," September 2017, American Constitution Society for Law and Policy. [https://www.acslaw.org/sites/default/files/ACS\\_Issue\\_Brief\\_-Preemption\\_.pdf](https://www.acslaw.org/sites/default/files/ACS_Issue_Brief_-Preemption_.pdf); National Conference on State Legislatures, "Sanctuary Policy FAQ," July 28, 2017, <http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx#bills>.

## Preventing Cities from Extending Paid Sick and Safe Days

Paid sick and safe days are of key importance to public health because they result in fewer workers going to work when they or loved ones are sick, reducing the spread of illness in the community. They also allow workers to address needs they or a family member may have related to domestic violence or other safety concerns. Thirty-two percent of workers in the United States—and nearly 60% of the bottom quarter of wage earners in the country—lack even a single paid sick day.<sup>28</sup> Additionally, many people can't use the paid sick and safe time they do receive when a loved one has a health need, often due to overly narrow definitions of "family member" that exclude loved ones without a biological or legal

connection to the worker. A 2017 survey by the Center for American Progress found that 32% of Americans report taking time off to care for a friend or chosen family member with a health-related need.<sup>29</sup> For LGBT people, these broader definitions of family are critical: the same CAP survey found that 42% of LGBT people reported taking time to care for a friend or chosen family member compared to 31% of non-LGBT people.<sup>30</sup> The widespread lack of paid sick and safe days threatens the health and finances of LGBT people, who are more likely to face economic insecurity and less likely to have legal ties to their close loved ones.

Despite the clear individual and public health concern, 22 states have passed laws preempting local governments from enacting policies to mandate paid

sick and safe days.<sup>31</sup> Encouragingly, however, nine recent paid sick leave laws, covering an estimated 14 million Americans, include definitions of “family member” that are inclusive of chosen family members or those who lack a biological or legal connection.<sup>32</sup>

## Restricting Cities’ Efforts to Assist Unauthorized Immigrants

As the fate of unauthorized immigrants in the United States remains uncertain, more than 300 municipalities have passed ordinances or created policies that govern whether and how local law enforcement can cooperate with federal immigration enforcement efforts. These so called “sanctuary city” policies are rooted both in recognizing the humanity of unauthorized immigrants but also based in the belief that public safety is undermined when communities fear local law enforcement and that people are less likely to report crime or seek assistance if they are afraid of being deported or discriminated against. Within the unauthorized immigrant community, there are an estimated 267,000 LGBT immigrants.<sup>33</sup>

In the 2017-2018 legislative cycle, at least 33 states have already considered legislation that would limit cities’ abilities to implement sanctuary policies or that would withhold funding from cities that have such policies.<sup>34</sup> For example, a law passed in Texas prevents local cities and counties from protecting their residents, and instead forces local governments to verify or report on their residents’ immigration status, even if doing so creates risk to their constituents. What’s more, any local official who violates this law can be fined and even jailed.<sup>35</sup>

## Dangerous License-to-Discriminate Legislation and Court Cases

While not explicitly preemption bills, it is worth noting that several states have also passed religious exemption laws in an effort to circumvent both marriage equality and existing nondiscrimination protections. Although these laws do not invalidate nondiscrimination laws, they may give permission for citizens to ignore nondiscrimination laws if those laws conflict with the citizen’s beliefs. For example, in 2016, Mississippi passed a sweeping law that allows businesses and government officials to refuse service to LGBT people and unmarried parents, and further allows health care providers to refuse any kind of medical treatment to transgender people.<sup>a</sup> Similar discriminatory legislation has already been introduced in at least 16 states in 2018 alone.<sup>b</sup>

The U.S Supreme Court agreed in June 2017 to hear arguments on this issue by taking on *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a case in which a Colorado baker is arguing that he should be able to refuse service to same-sex couples based on his belief that marriage should only be between one man and one woman, despite the fact that Colorado prohibits places of public accommodation from discriminating on the bases of sexual orientation and gender identity.<sup>c</sup>

<sup>a</sup> TH.B. 1523, “Protecting Freedom of Conscience from Government Discrimination Act,” <http://billstatus.ls.state.ms.us/documents/2016/html/HB/1500-1599/HB1523SG.htm>.

<sup>b</sup> Equality Federation, “Legislative Action Center: Religious Exemptions,” as of April 25, 2018. <http://www.equalityfederation.org/lac/religiousexemptions>.

<sup>c</sup> *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, U.S. Docket No. 16-111, cert. granted June 26, 2017; Heather Timmons and Ephrat Livni, “If the US Supreme Court decides cake baking is free speech, it will affect more than gay weddings,” Quartz Media, June 27, 2017, <https://qz.com/1015011/supreme-court-cases-if-the-court-decides-cake-baking-is-free-speech-it-will-affect-far-more-than-same-sex-weddings>.

## RECOMMENDATIONS

Given that preemption is increasingly being used across the country as a tactic to undermine local progress on issues of the minimum wage, workers' rights and benefits, immigrant protections, LGBT equality, and more, it is likely that many state legislatures will consider additional preemption bills in the coming years. The following recommendations are not comprehensive but provide a starting point for local advocates and allies to protect local authority and progressive policies.

- **Affirm voters' beliefs in local control and draw attention to who is pushing for preemption.** Communicate that preemption itself is not the issue, but rather that corporations, lobbyists, and special interests—often from outside the state—are the ones designing and benefitting from these laws, not local residents. Reaffirm voters' beliefs in local control and emphasize that outside special interests are attempting to interfere in local law-making in order to increase their own profits. Preemption is not the issue, but when preemption is used to protect profits over people, this is a threat to local control, democracy, and equality.<sup>36</sup>
- **Build and emphasize cross-issue coalitions.** A preemption bill targeting one issue (such as LGBT nondiscrimination protections) can often foreshadow future preemption bills on other issues (such as minimum wage). Once legislators see this tactic can be used successfully, they are more likely to continue using it in the future. Therefore, one of the most important steps local advocates and allies can take is to build cross-issue coalitions to fight against preemption. For example, if a bill is targeting nondiscrimination protections, seek coalition partners in other communities that would be affected. For example, if local laws protect veterans and survivors of domestic violence, but state law does not, these groups are also at risk of losing protection and are therefore natural potential coalition partners.<sup>37</sup>
- **Focus on the true intention of preemption bills.** Often, preemption bills aimed at local LGBT protections are written in seemingly neutral ways that do not explicitly mention sexual orientation, gender identity, or nondiscrimination. In these cases, local advocates and allies in the state legislature should encourage floor debate, hearings, and official statements in order to draw out comments that reveal the true intention of these bills: targeting the LGBT community. These statements can be used to build communications or education campaigns against the bill, or in legal challenges to the bill if it passes.<sup>38</sup>
- **Questioning the motivation of preemption legislation.** Preemption bills often argue that statewide uniformity is better for business. However, there is no evidence to support this, and this argument should be challenged. Ask why there's a need now to preempt local policies, when cities and counties typically have a long history of providing additional protections or business requirements without their state's interference. This can similarly reveal the underlying motivation of these bills.<sup>39</sup>
- **Show how cities drive economic development and highlight the negative consequences of preemption.** Preemption defenders often claim that preemption is necessary to curb "out of control" cities or their "activist overreach" when they provide protections to their own residents.<sup>40</sup> One potential response to this argument is to shift the narrative about cities, and instead emphasize the role of cities as economic engines and drivers of development in the state. Allowing cities to determine for themselves what will best stimulate their own economy in turn helps the state economy, while a state legislature imposing a one-size-fits-all approach may not.<sup>41</sup> Additionally, highlight the negative economic consequences and potentially national media attention caused by preemption, as in the case of North Carolina's HB2.

## CONCLUSION

Increasingly, state legislatures are attempting to prevent, or preempt, cities and counties from passing their own laws. While preemption has often been used in the past to promote progress, more recent efforts use preemption to undermine it, and to instead impose a maximum level of protections that can be provided. State legislatures are using preemption as a tool against progress on a wide range of policy issues, from the minimum wage and workers' rights to protecting people from discrimination. This is the direct result of a coordinated special interest agenda to increase corporate profits without regard for local authority or human impact.<sup>42</sup>

When preemption is used to protect profits rather than people, to undermine progress, and to undo cities and counties' efforts to improve the economic security, health, and safety of their residents—including their LGBT residents—it is a dangerous threat to equality for all.

## ENDNOTES

- <sup>1</sup> National League of Cities, "City Rights in an Era of Preemption: A State-by-State Analysis 2018 Update," 2018, <http://nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>.
- <sup>2</sup> Ted Mermin, "Preemption: What it is, how it works, and why it matters for public health," National Policy & Legal Analysis Network to Prevent Childhood Obesity, 2009, [http://www.changelabsolutions.org/sites/default/files/documents/PreemptionMemo\\_FINAL\\_web\\_090625.pdf](http://www.changelabsolutions.org/sites/default/files/documents/PreemptionMemo_FINAL_web_090625.pdf).
- <sup>3</sup> A Better Balance, "State Preemption of Local Laws: Preliminary of Substantive Areas," August 9, 2017, <https://www.abetterbalance.org/resources/state-preemption-of-local-laws-preliminary-review-of-substantive-areas>.
- <sup>4</sup> Emily Badger, "Blue Cities Want to Make Their Own Rules. Red States Won't Let Them," The New York Times, July 6, 2017, <https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html>.
- <sup>5</sup> Local Solutions Support Center, "A Troubling Trend: States are Turning Towards "Blanket Preemption" to Stifle Progressive Local Policymaking and Block Local Democracy," February 2018, <https://www.abetterbalance.org/resources/a-troubling-trend-states-are-turning-towards-blanket-preemption-to-stifle-progressive-local-policymaking-and-block-local-democracy>; Richard Briffault, "The Challenge of the New Preemption," Columbia Public Law Research Paper No. 14-580, February 1, 2018, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3119888](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119888).
- <sup>6</sup> Everytown for Gun Safety, "State Firearm Preemption Laws," February 20, 2018, <https://everytownresearch.org/fact-sheet-preemption-laws>; Movement Advancement Project, "Local Nondiscrimination Ordinances," [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_ordinances](http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances); David Graham, "How St. Louis Workers Won and Then Lost a Minimum-Wage Hike," The Atlantic, August 29, 2017, <https://www.theatlantic.com/business/archive/2017/08/st-louis-minimum-wage-preemption/538182>; National Conference on State Legislatures, "State Plastic and Paper Bag Legislation: Fees, Taxes and Bans | Recycle and Reuse," February 5, 2017, <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx>; Ted Mermin, "Preemption: What it is, how it works, and why it matters for public health."
- <sup>7</sup> Lori Riverstone-Newell, "The Rise of State Preemption Laws in Response to Local Policy Innovation," The Journal of Federalism, 47(3):403-425, July 2017, <https://academic.oup.com/publius/article/47/3/403/3852645>.
- <sup>8</sup> American Legislative Exchange Council, "Model Policy: Rent Control Preemption Act," accessed April 10, 2018. <https://www.alec.org/model-policy-rent-control-preemption-act>
- <sup>9</sup> American Legislative Exchange Council, "Model Policy: Living Wage Mandate Preemption Act," accessed April 10, 2018. <https://www.alec.org/model-policy/living-wage-mandate-preemption-act>
- <sup>10</sup> Grassroots Change. "Preemption Watch: Preemption Map: Firearms," accessed April 10, 2018. <https://grassrootschange.net/preemption-watch/#/category/guns>
- <sup>11</sup> Everytown for Gun Safety, "State Firearm Preemption Laws," February 20, 2018; Greg Allen, "In Florida, Cities Challenge State On Gun Regulation Laws," NPR, April 2, 2018, <https://n.pr/2GiXZNh>.
- <sup>12</sup> Betsy Cooper, Daniel Cox, Rachel Lienesch, and Robert P. Jones, "Beyond Same-sex Marriage: Attitudes on LGBT Nondiscrimination Laws and Religious Exemptions from the 2015 American Values Atlas," PRRI, February 18, 2016, <https://www.pri.org/research/poll-same-sex-gay-marriage-lgbt-nondiscrimination-religious-liberty/>.
- <sup>13</sup> Movement Advancement Project, "Local Nondiscrimination Ordinances."
- <sup>14</sup> Movement Advancement Project, "LGBT Policy Spotlight: Local Employment Nondiscrimination Ordinances," 2015, <http://www.lgbtmap.org/policy-and-issue-analysis/policy-spotlight-local-NDOs>.
- <sup>15</sup> Andy Garcia, "Preemptions: The Lurking Threat to LGBTQ Nondiscrimination Protections," March 17, 2016, <http://www.equalityfederation.org/2016/03/3673>; Elizabeth Reiner Platt, "States Attempting to Preempt LGBT-Friendly Municipalities," February 11, 2016, <http://blogs.law.columbia.edu/publicrightsprivateconscience/2016/02/11/states-attempting-to-preempt-lgbt-friendly-municipalities>.
- <sup>16</sup> S.B. no. 92, "Intrastate Commerce Improvement Act," <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB000921.pdf>.
- <sup>17</sup> National League of Cities, "City Rights in an Era of Preemption: A State-by-State Analysis 2018 Update."
- <sup>18</sup> ACLU, "Legislation Affecting LGBT Rights Across the Country," <https://www.aclu.org/other/legislation-affecting-lgbt-rights-across-country>.
- <sup>19</sup> National League of Cities, "City Rights in an Era of Preemption: A State-by-State Analysis 2018 Update."
- <sup>20</sup> National Conference of State Legislatures, "Bathroom Bill" Legislative Tracking: 2017 State Legislation," <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.
- <sup>21</sup> ACLU, "Legislation Affecting LGBT Rights Across the Country."
- <sup>22</sup> Vazzo v. City of Tampa, U.S. District Court, No. 8:17-cv-02896-CEH-AAS, [https://www.splcenter.org/sites/default/files/motion\\_to\\_dismiss.pdf](https://www.splcenter.org/sites/default/files/motion_to_dismiss.pdf).
- <sup>23</sup> National Employment Law Project, "Fighting Preemption: The Movement for Higher ages Must Oppose State Efforts to Block Local Minimum Wage Laws," July 2017, <http://www.nelp.org/content/uploads/Fighting-Preemption-Local-Minimum-Wage-Laws.pdf>.
- <sup>24</sup> M.V. Lee Badgett, Laura E. Durso, and Alyssa Schneebaum, "New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community," The Williams Institute, June 2013 <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>.
- <sup>25</sup> M.V. Lee Badgett and Alyssa Schneebaum, "The Impact of a \$15 Minimum Wage on Poverty Among Same-Sex Couples," The Williams Institute, September 2016, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Poverty-and-the-15-Minimum-Wage-1.pdf>.
- <sup>26</sup> National Employment Law Project, "Fighting Preemption: The Movement for Higher ages Must Oppose State Efforts to Block Local Minimum Wage Laws"; National League of Cities, "City Rights in an Era of Preemption: A State-by-State Analysis 2018 Update."
- <sup>27</sup> National Employment Law Project, "Fighting Preemption: The Movement for Higher ages Must Oppose State Efforts to Block Local Minimum Wage Laws."
- <sup>28</sup> Bureau of Labor Statistics, National Compensation Survey, "Table 32. Leave benefits: Access, civilian workers, March 2016," <https://www.bls.gov/ncs/ehs/benefits/2016/ownership/civilian/table32a.pdf>.
- <sup>29</sup> Katherine Gallagher Robbins, Laura E Durso, Frank J. Bewkes, and Eliza Schultz, "People Need Paid Leave Policies that Cover Chosen Family," Center for American Progress, October 30, 2017, <https://www.americanprogress.org/issues/poverty/reports/2017/10/30/441392/people-need-paid-leave-policies-that-cover-chosen-family>.
- <sup>30</sup> Katherine Gallagher Robbins, Laura E Durso, Frank J. Bewkes, and Eliza Schultz, "People Need Paid Leave Policies that Cover Chosen Family."
- <sup>31</sup> Jennifer L. Pomeranz and Mark Perschuk, "State Preemption: A Significant and Quiet Threat to Public Health in the United States," American Journal of Public Health 107(6):900-902, June 2017, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5425871>; National League of Cities, "City Rights in an Era of Preemption: A State-by-State Analysis 2018 Update"; National Partnership for Women and Families, "Paid Leave," <http://www.nationalpartnership.org/issues/work-family/paid-leave.html>.
- <sup>32</sup> A Better Balance, Family Values @ Work, and Center for American Progress, "5 Facts About Chosen Family," November 2017, <https://www.abetterbalance.org/resources/5-facts-chosen-family>. Note, following publication of this document, Austin TX became the eighth jurisdiction to pass a paid sick and safe time law that covers chosen family.
- <sup>33</sup> Gary J. Gates, "LGBT Adult Immigrants in the United States," The Williams Institute, March 2013, <https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/us-lgbt-immigrants-mar-2013>.
- <sup>34</sup> National Conference on State Legislatures, "Sanctuary Policy FAQ," July 28, 2017, <http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx#bills>.
- <sup>35</sup> *Ibid.*
- <sup>36</sup> A Better Balance, "Protecting Local Control: A Research and Messaging Toolkit," August 2017, <https://www.abetterbalance.org/resources/protecting-local-control-a-research-and-messaging-toolkit>.
- <sup>37</sup> A Better Balance, "How to Respond to State Attempts to Prohibit Local LGBTQ Nondiscrimination Laws," August 2017, <https://www.abetterbalance.org/resources/how-to-respond-to-state-attempts-to-prohibit-local-lgbtq-nondiscrimination-laws>.
- <sup>38</sup> *Ibid.*
- <sup>39</sup> *Ibid.*
- <sup>40</sup> Gregory Krieg, "North Carolina Gov. Pat McCrory blames Democrats for 'bathroom bill,'" May 11, 2016, <https://www.cnn.com/2016/05/11/politics/north-carolina-pat-mccrory-bathroom-bill-the-lead/index.html>.
- <sup>41</sup> National League of Cities, "City Rights in an Era of Preemption: A State-by-State Analysis 2018 Update," 2018, <http://nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>.
- <sup>42</sup> Lori Riverstone-Newell, "The Rise of State Preemption Laws in Response to Local Policy Innovation," The Journal of Federalism, 47(3):403-425, July 2017, <https://academic.oup.com/publius/article/47/3/403/3852645>.

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