

LOCAL ROOTS of LGBTQ+ Equality in the United States

The advance of LGBTQ+ rights in the United States has deep roots in local activism and lawmaking. In 1974, the city of Minneapolis passed the country's first ordinance at the local level to prohibit discrimination against gay, lesbian, or bisexual individuals.² The ordinance, which prohibited discrimination based on "affectional or sexual preference," was amended one year later to include gender identity.³ In the 50 years since Minneapolis passed its trailblazing local LGBT nondiscrimination ordinance, scores of local governments have followed suit. As of January 1, 2023, the Movement Advancement Project reported "at least 374 municipalities that fully and explicitly prohibit discrimination against LGBTQ people in employment, housing, and public accommodations."⁴

In addition to historic leadership on local nondiscrimination protections, "[a] number of local governments again led the way in providing recognition to same-sex couples as 'domestic partners' and providing health-care benefits to the partners of their employees in same-sex relationships."⁵ In 1985, the city of Berkeley, California became the first government in the United States to provide domestic partner benefits to same-sex and different-sex couples.⁶ By 2000, nearly 50 cities and counties offered some form of domestic partner benefits to their government employees.⁷

These examples of organizing and activism at the local level helped to pave the way for statewide and federal progress on LGBTQ+ rights. In the past decade, for example, the United States Supreme Court has issued several landmark decisions on LGBTQ+ rights. In 2013, the Supreme Court ruled in *United States v. Windsor* that Section 3 of the Defense of Marriage Act—which had defined "marriage" and "spouse" to only include different-sex individuals—was unconstitutional.⁸ Two years later, the Supreme Court built on its *Windsor* decision and ruled in *Obergefell v. Hodges* that "same-sex couples may exercise the fundamental right to marry in all States."⁹ In 2020, five years after the Court's marriage equality decision, the Court held in *Bostock v. Clayton County* that employment nondiscrimination



protections based on sex in Title VII of the Civil Rights Act cover LGBTQ+ individuals. The Court found in *Bostock* that "[i]n Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."¹⁰

2. See Movement Advancement Project, *LGBT Policy Spotlight: Nondiscrimination Ordinances* (2015), p. 1, <https://www.lgbtmap.org/file/policy-spotlight-local-NDOs.pdf>.

3. Id. See also Shalyn L. Caulley, *The Next Frontier to LGBT Equality: Securing Workplace-Discrimination Protections*, 2017 U. Ill. L. Rev. 909, 925 (2017); Emma Margolin, "How Minneapolis Became First U.S. City to Pass Trans Protections," NBC News (June 3, 2016), <https://www.nbcnews.com/feature/nbc-out/how-minneapolis-became-first-u-s-city-pass-trans-protections-n585291>.

4. Movement Advancement Project, "Local Nondiscrimination Ordinances," Last Visited Nov. 12, 2023, https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances.

5. Jon W. Davidson, *A Brief History of the Path to Securing LGBTQ Rights*, American Bar Association (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/a-brief-history-of-the-path-to-securing-lgbtq-rights/.

6. See Nancy D. Polikoff, "Two Parts of the Landscape of Family in America": Maintaining Both Spousal and Domestic Partner Employee Benefits for Both Same-Sex and Different-Sex Couples, 81 *Fordham L. Rev.* 735, 738 (2012).

7. Jonathan Andrew Hein, *Caring for the Evolving American Family: Cohabiting Partners and Employer Sponsored Health Care*, 30 *N.M. L. Rev.* 19, 41, fn 109 (2000).

8. *United States v. Windsor*, 570 U.S. 744 (2013).

9. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

10. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1754, 207 L. Ed. 2d 218 (2020).

THE GROWTH OF ANTI-LGBTQ+ BILLS at the State Level, and the Use of Preemption as an Anti-LGBTQ+ Tactic

Legal advances are one measure of progress on LGBTQ+ rights in the United States. Polling has also shown an increase in popular support for LGBTQ+ rights.¹¹ However, such advances in law and culture have also led to emboldened opposition and legislative attacks on LGBTQ+ equality, including specific targeting of transgender and nonbinary individuals. For example, the Equality Federation tracked 575 anti-LGBTQ+ bills introduced by state lawmakers in 2023, with more than 414 of them targeting transgender individuals.¹²

An enduring, but evolving, tactic of opponents of LGBTQ+ equality is to block local lawmaking to advance LGBTQ+ rights. As noted earlier, at least one-third of anti-LGBTQ+ measures introduced in 2023 included preemption provisions that would block local, inclusive lawmaking or threaten local officials with penalties if they take actions contrary to the state preemption law.¹³ The inclusion of state preemption in anti-LGBTQ+ measures directly targets the rich history of local innovation and progress on LGBTQ+ rights, by seeking to chill the ability of local officials to establish, build upon, or fill gaps in laws that protect LGBTQ+ individuals.

Explicit Preemption of Local LGBTQ+ Nondiscrimination

In recent years, there has been an increase and evolution in abusive state preemption that blocks LGBTQ+ rights. Between 2011 and 2016, three states explicitly preempted local nondiscrimination ordinances in response to local LGBTQ+ protections. In 2011, the Metropolitan Council of Nashville and Davidson County introduced and passed the Contract Accountability Non-Discrimination Ordinance to prohibit government contractors in Nashville from discriminating against LGBTQ+ individuals. The response from Tennessee's Legislature was swift: "Even before the [Nashville] ordinance was formally introduced...a state legislator announced that he intended to sponsor a bill in the upcoming legislative session that would prevent local governments from enacting LGBT-inclusive nondiscrimination ordinances."¹⁴ In the month



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following passage of Nashville's nondiscrimination ordinance, Tennessee's governor signed into law a preemption measure that overturned Nashville's law by prohibiting local governments from passing or applying "an anti-discrimination practice, standard, definition, or provision that shall deviate from, modify, supplement, add to, change, or vary in any manner" from the legal recognition of discriminatory practices under State law; the preemption law similarly applied to anti-discrimination laws as a condition of local government contracts.¹⁵ With no state protections against discrimination based on sexual orientation or gender identity, the preemption law had the intended consequence of blocking Nashville's ordinance and prohibiting other local LGBTQ+ nondiscrimination measures.

11. "Executive Summary: Accelerating Acceptance," GLAAD (2023), <https://assets.glaad.org/m/23036571f611c54/original/Accelerating-Acceptance-2023.pdf>.

12. Equality Federation, "State Legislation Tracker," Last Visited January 30, 2024, <https://www.equalityfederation.org/state-legislation>.

13. See, e.g., "Protecting Local Democracy: 2023 Legislative Session Overview," Local Solutions Support Center (2023), p. 6, <https://static1.squarespace.com/static/5ce4377cae4b1ce00013a02fd/t/64f22c48ca20724fb98f3046/1693592650815/LSSC-2023-EndofSessionReport.pdf>.

14. Alex Reed, Pro-Business or Anti-Gay? Disguising LGBT Animus As Economic Legislation, 9 Stan. J. Civ. Rts. & Civ. Liberties 153, 155 (2013).

15. Tenn. Code Ann. § 7-51-1802; H.R. 600, 107th Gen. Assemb. (Tenn. 2011). Tennessee's preemption statute also targeted transgender and nonbinary individuals through a provision to define "sex" to only include the designation of an individual as male or female as indicated on their birth certificate.



In recent years, there has been a rapid and pernicious growth of state bills and laws targeting LGBTQ+ people in general. These laws—such as bans on gender affirming healthcare for transgender youth—may not be solely preemptive; rather, they often include preemption of local authority as one means of targeting LGBTQ-inclusive policies and equality.”

North Carolina passed LGBTQ+ nondiscrimination measures—a clear example of how the statewide preemption law stifled local innovation and blocked LGBTQ+ rights.²⁰

As described in greater detail in the next section, anti-LGBTQ+ preemption has evolved since Tennessee, Arkansas, and North Carolina explicitly and directly targeted local nondiscrimination measures. In the years since their passage, there has been a rapid and pernicious growth of state bills and laws targeting LGBTQ+ people in general. These laws—such as bans on gender affirming healthcare for transgender youth—may not be solely preemptive; rather, they often include preemption of local authority as one means of targeting LGBTQ-inclusive policies and equality.

Several years after Tennessee preempted local LGBTQ+ nondiscrimination ordinances, two additional states followed suit. In 2015, Arkansas passed a state statute declaring that “[a] county, municipality, or other political subdivision of the state shall not adopt or enforce an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law.”¹⁶ Just as Tennessee’s preemption statute was a response to Nashville’s local lawmaking, the Arkansas preemption law was a response to voter approval of an LGBTQ+ nondiscrimination measure in the city of Fayetteville.¹⁷ Similarly, North Carolina quickly passed a sweeping anti-LGBTQ+ and anti-worker preemption law—popularly known as HB2—as a response to the city of Charlotte’s passage of an LGBTQ+ nondiscrimination ordinance in 2016; in addition to preempting local nondiscrimination ordinances, HB2 preempted local governments on a range of labor issues and prohibited schools and public agencies from protecting transgender individuals’ ability to use bathrooms based on their gender identity.¹⁸

Following its passage, HB2 led to a significant backlash, including from the business community, and North Carolina Governor Pat McCrory subsequently lost reelection in November 2016. Newly elected Governor Roy Cooper and the North Carolina Legislature passed a compromise bill to repeal HB2, while establishing a three-year moratorium on local laws that regulate employment practices or public accommodations.¹⁹ In the years since the expiration of this preemption moratorium, more than 20 local governments in



16. Ark. Code Ann. § 14-1-403(a) (2015).

17. Dilini Lankachandra, Enacting Local Workplace Regulations in an Era of Preemption, 122 W. Va. L. Rev. 941, 952 (2020).

18. Id. at 964; H.R. 2, 2016 Gen. Assemb., 2d Spec. Sess. (N.C. 2016).

19. H.R. 142, 153d Gen. Assemb., 2017-2018 Sess. (N.C. 2017). Mark Dorosin, North Carolina’s H.B.2: A Case Study in Lgbtq Rights, Preemption, and the (Un)democratic Process, 122 W. Va. L. Rev. 783, 809 (2020).

20. “North Carolina’s Equality Profile,” Movement Advancement Project, Last Visited January 25, 2024, https://www.lgbtmap.org/equality-maps/profile_state/NC.



Recent Examples of the New and Growing Forms of PREEMPTION TARGETING LGBTQ+ PEOPLE

To help illustrate the concerning trends in anti-LGBTQ+ preemption, this section highlights several examples of recent state laws that would block local LGBTQ+ rights. These laws are not isolated. Rather, they are part of a coordinated attack in many states against LGBTQ+ people and often transgender individuals specifically. While not solely focused on local governments and their lawmaking authority, these growing forms of anti-LGBTQ+ measures often include preemption as one type of restriction.

Bans on Gender-Affirming Healthcare

Against the clear recommendations of leading medical associations and best medical practices, 23 states have passed laws that prevent transgender youth from accessing affirming medical care.²¹ As a result, approximately 38 percent of transgender youth ages 13-17 live in states with such bans.²² While preemption of local authority is not a focus of these anti-transgender laws, it has been used as one tactic to limit opportunities for local governments to act contrary to the statewide bans.

In 2023, for example, Montana passed SB 99, which prohibited health care professionals from providing an extensive range of gender-affirming care to young people, required medical licensing and disciplinary review boards to suspend health care professionals who engage in such care for at least one year, and restricted coverage and reimbursements for such care under Montana's Medicaid and children's health insurance programs.²³ SB 99 further limited the ability of local governments to act by prohibiting use of public funds for gender-affirming care and specifying that a health care professional employed by a government—including "a county or local government"—is prohibited from knowingly providing such care.²⁴ On September 27, 2023, however, a Montana district court judge issued a preliminary injunction against SB 99, finding that the law likely violates the equal protection clause and the right to privacy under Montana's Constitution.²⁵ The law cannot be enforced as the lawsuit proceeds.



For more tracking resources,

see Equality Federation's state legislation tracker at www.equalityfederation.org/state-legislation and the Local Solutions Support Center's resources and legislative updates at www.supportdemocracy.org/resources.

21. "Bans on Best Practice Medical Care for Transgender Youth," Movement Advancement Project, Last Visited January 25, 2024, https://www.lgbtmap.org/equality-maps/healthcare/youth_medical_care_bans.

22. *Id.*

23. Mont. Code Ann. § 50-4-1004 (West).

24. *Id.*

25. See "Montana Court Blocks Enforcement of Ban on Gender-Affirming Care for Trans Youth," ACLU of Montana, Sept. 27, 2023, <https://www.aclu.org/press-releases/montana-court-blocks-enforcement-of-ban-on-gender-affirming-care-for-trans-youth> (linking to decision in *Van Garderen v. Montana*).

Anti-Transgender Laws Concerning Student Athletics

In 2020, Idaho became the first state to restrict transgender student athletes from participating in sports—from primary school through college.²⁶ Since then, there has been a coordinated effort to target transgender youth through similar laws. According to the Movement Advancement Project, 24 states have passed laws that prohibit transgender young people from participating in student sports consistent with their gender identity, and 37 percent of transgender young adults ages 13-17 live in those states.²⁷ Idaho's first-in-the-nation ban shows how preemption can be one piece of these sweeping, harmful laws. The statute's anti-transgender restrictions apply to “[i]nterscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education. . . .”²⁸ As part of the law's enforcement and compliance provisions, it prohibits any government entity from investigating, entertaining a complaint, or taking any adverse action against a school or institute of higher education for its restrictions on transgender athletes participation in sports; a school or higher education institute can bring a lawsuit seeking damages and other relief against a government agency that violates this provision.²⁹ Therefore, the statute removes the ability of local governments to pursue transgender-inclusive student athletics and can subject them to legal liability under the state law.

A district court preliminarily enjoined Idaho's law (blocked it from taking effect while the court case continues) and found it likely violated the Equal Protection Clause of the U.S. Constitution. The U.S. Court of Appeals for the Ninth Circuit upheld the injunction in August 2023.³⁰ Similar court cases are playing out around the country.³¹



Sweeping Legislation Targeting Drag Performances

In 2023, Tennessee became the first state to pass a law severely restricting drag performances, with a number of other states following suit.³² Although drag performances were the clear and stated target of the sponsors and Legislature, the law itself, known as HB-9, prohibited “adult cabaret performances” on public property or in a location where it could be viewed by a minor; “adult cabaret performances” were defined to include performances harmful to minors that include, among various performers, “male or female impersonators.”³³ First offenses of the prohibition would be a misdemeanor, and subsequent offenses would be a felony.³⁴ Opponents of this anti-LGBTQ+ legislation highlighted the sweeping and vague nature of the legislation, as well as the likely consequence that such vague prohibitions would lead to further policing and harassment of transgender individuals in public spaces. Under the statute, local governments would be limited in their ability to respond to the state law's sweeping and vague restrictions. Although little more than a page in length, HB-9 included explicit preemption—both retroactive and prospective—of any local government “ordinance, regulation, restriction, or license” that conflicts with the anti-LGBTQ+ statute.

In June 2023, a federal district court judge ruled that the Tennessee law violated freedom of speech and was unconstitutionally vague and substantially broad.³⁵ Among other legal defects, the decision stated that the statute would not provide fair notice of what is prohibited and would encourage discriminatory enforcement.³⁶

26. Idaho Code Ann. § 33-6201 et seq. (West); See also Rachel Savage, “Idaho Becomes First U.S. State to Ban Trans Athletes,” Reuters, March 31, 2020, <https://www.reuters.com/article/us-usa-lgbt-lawmaking/idaho-becomes-first-u-s-state-to-ban-trans-athletes-idUSKBN21I2AF>.

27. “Bans on Transgender Youth Participation in Sports,” Movement Advancement Project, Last Visited January 25, 2024, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans.

28. Idaho Code Ann. § 33-6203(1) (West).

29. Id. at § 33-6204 and § 33-6205.

30. *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023); see also “Appeals Court Blocks Idaho Ban on Transgender Youth Athletes,” ACLU, August 17, 2023, <https://www.aclu.org/press-releases/appeals-court-blocks-idaho-ban-on-transgender-youth-athletes>.

31. See, e.g., *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831 (D. Ariz. July 20, 2023); *Roe v. Utah High School Activities Ass'n*, No. 220903262, 2022 WL 3907182 (D. Utah Aug. 19, 2022); *B.P.J. v. West Virginia State Board of Education*, 550 Supp. 3d 347 (S.D. W. Va. 2021).

32. “Restrictions on Drag Performances,” Movement Advancement Project, Last Visited November 14, 2023, https://www.lgbtmap.org/equality-maps/criminaljustice/drag_restrictions.

33. S.B. 3, 113th Gen. Assemb. (Tenn. 2023).

34. Id.

35. *Friends of Georges, Inc. v. Mulroy*, No. 223CV02163TLPTMP, 2023 WL 3790583, at *7 (W.D. Tenn. June 2, 2023).

36. Id.

LGBTQ+ Youth and Curricular Preemption

As detailed by the Local Solutions Support Center (LSSC) in its March 2023 White Paper, [“Curricular Preemption: The New Front of An Old Culture War,”](#) schools have increasingly been on the front lines in America’s culture wars.³⁷ With more local school districts implementing culturally relevant and responsive curricula that address race, sexual orientation, and gender identity, there has been a significant increase in state legislation to interfere and prevent curricula that address LGBTQ+ identities (in addition to structural racism).³⁸ One prominent example is Florida’s “Don’t Say LGBTQ” bill, HB 1557. Passed into law in 2022, this statute prohibited instruction in schools on sexual orientation and gender identity for students in kindergarten through third grade and restricted such instruction for older grades if not “age-appropriate or developmentally appropriate.”³⁹ Sixteen states have some form of state law that censors and restricts LGBTQ-inclusive curricula or requires parental notification (coupled with an opt-in or opt-out).⁴⁰

Equality Florida, the statewide LGBTQ+ rights organization, addressed the immediate and sweeping harms following the law’s passage:

“Graduation speeches have been scrubbed of references to LGBTQ advocacy. Yearbook pages have had images of Don’t Say LGBTQ walkouts blacked out. Conservative religious activists have successfully initiated challenges to dozens of books in multiple school districts. Rainbow-colored COEXIST banners and Pride flags have been stripped from school walls. ... All of these chilling effects come as LGBTQ youth, those already at higher risk of depression, anxiety, and suicidal ideation than their peers, report their mental health being negatively impacted by anti-LGBTQ policies and the debates that surround them. And they come amidst a surge in online harassment against LGBTQ people nationwide and threats of violence against LGBTQ spaces and Pride celebrations...”⁴¹

There have been ongoing efforts to challenge the Florida law in court, as well as recent lawsuits filed against similar laws in other states.⁴²

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37. Steven L. Nelson, Curricular Preemption: The New Front of An Old Culture War, Local Solutions Support Center (March 2023), <https://static1.squarespace.com/static/5ce4377cae1ce00013a02fd/t/640dfab9499775238152c47/1678637822932/LSSC-WhitePaper-CurricularPreemption.pdf>.

38. Id.

39. Fla. Stat. Ann. § 1001.42(8)(c)(3) (West).

40. “LGBTQ Curricular Laws,” Movement Advancement Project, Last Visited November 14, 2023, https://www.lgbtmap.org/equality_maps/curricular_laws.

41. “Don’t Say LGBTQ’ Law, Already Harming Students, Goes Into Effect,” Equality Florida, July 1, 2022, <https://www.eqfl.org/DSLGBTQ-in-effect>.

42. Jim Saunders, “Appeal Over So-Called ‘Don’t Say Gay’ Law Put on Hold Amid Settlement Talks,” Orlando Sentinel, September 12, 2023, <https://www.orlandosentinel.com/2023/09/12/appeals-battle-over-floridas-controversial-education-law-on-hold-amid-settlement-talks/>;

“ACLU of Indiana Challenges Law Censoring Classroom Discussions,” ACLU of Indiana, June 9, 2023, <https://www.aclu-in.org/en/press-releases/aclu-indiana-challenges-law-censoring-classroom-discussions>.



Sweeping Preemption of Local Authority and its HARM TO LGBTQ+ PEOPLE

Another development in recent years has been the rapid increase in sweeping, abusive preemption across a range of issue areas that seek to block local lawmaking and regulations within entire subject areas. Many of these preemption measures, which (as explained below) are referred to as Death Star 2.0 preemption, seek to completely eliminate core elements of local authority.

These sweeping preemption measures do not explicitly target LGBTQ+ people, and state legislators typically pursue such bills for broader, deregulatory purposes unrelated to LGBTQ+ rights. However, these abusive preemption measures often have disproportionate impact on BIPOC and LGBTQ+ individuals. For example, growing increases in preemption of firearm regulations has significant implications for the safety of LGBTQ+ people; in addition to mass murders targeting LGBTQ+ people, transgender people are 2.5 times as likely to experience violent victimization as cisgender people.⁴³ The inability of local governments in the vast majority of states to pass firearm regulations therefore jeopardizes the health and safety of LGBTQ+ people. Similarly, state preemption measures that prohibit local labor regulations—such as paid leave, fair scheduling, nondiscrimination, and minimum wage increases—have negative consequences for working people and communities who too often struggle to make ends meet and lack basic protections in the workplace. Given a greater likelihood of poverty among LGBTQ+ individuals and families, labor protections that raise wages, benefits, and job security can have significant benefits for LGBTQ+ workers and their families.⁴⁴

Public health preemption is another example of this concerning trend. Since the emergence of COVID-19, there has been a sharp increase in preemption of local public health authority in general. Given documented health disparities among LGBTQ+ people—and the likelihood in many states that LGBTQ-inclusive public health measures are more likely at the local level—such preemption will have specific, negative consequences for the LGBTQ+ community.⁴⁵ Across these examples—gun violence, poverty, and health—disparities are even more significant for LGBTQ+ people who are BIPOC.⁴⁶

LSSC has been tracking the growth of sweeping preemption laws. Recently, [LSSC issued a White Paper](#) that outlines the concerning rise of state preemption measures that seek to eliminate local authority altogether, which LSSC has named “Death Star 2.0” preemption:

“Echoing the historical and often racialized origins of states weakening local authority, contemporary Death Star 2.0 preemption aims to eliminate local authority altogether. The impetus behind this preemption remains the same: to maintain structural systems of oppression when marginalized communities are gaining more power, representation, and voice at the local level. Death Star 2.0 preemption takes a variety of forms, but across the board, it takes aim at core elements of local authority.”⁴⁷

43. Everytown for Gun Safety, “Remembering and Honoring Pulse Anti-LGBTQ+ Bias and Guns are Taking the Lives of Countless LGBTQ+ People,” (June 2020; updated June 2023), <https://everytownresearch.org/report/remembering-and-honoring-pulse/#hate-violence-and-stigma-against-the-lgbtq-community>; Everytown for Gun Safety, “State Firearm Preemption Laws” (February 2018), <https://everytownresearch.org/report/fact-sheet-preemption-laws>.

44. See, e.g., Bianca Wilson, et al. “LGBT Poverty in the United States: Trends at the Onset of COVID-19,” UCLA School of Law Williams Institute (February 2023), 1, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Poverty-COVID-Feb-2023.pdf>.

45. See, e.g., Lindsey Dawson, “LGBT+ People’s Health Status and Access to Care,” KFF (June 30 2023), <https://www.kff.org/report-section/lgbt-peoples-health-status-and-access-to-care-issue-brief/>; Local Solutions Support Center, “Preemption of Public Health Authority,” March 28, 2022, <https://www.supportdemocracy.org/issuespecific-preemption-guides/preemption-of-public-health-authority>.

46. Everytown for Gun Safety, *supra* n. 43; Wilson, *supra* n. 44; Dawson, *supra* n. 45.

47. Richard Briffault, et al., “The State Strikes Back: Death Star 2.0 Preemption,” Local Solutions Support Center (Nov. 2023), p.4, <https://www.supportdemocracy.org/the-latest/deathstar20>.

Rather than targeting one policy issue or area, many of these Death Star 2.0 preemption laws simultaneously eliminate multiple areas of local lawmaking authority. This trend is exemplified by HB 2127 in Texas, which Governor Greg Abbott signed into law in June 2023. HB 2127 prohibited local governments from adopting or enforcing ordinances or rules covered by Texas' statutes regarding agriculture, finance, insurance, labor, natural resources, or occupations, unless State



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law explicitly authorized localities to act on the subject. This legislation marked a fundamental change in local authority in Texas. As LSSC has noted, “[p]rior to HB 2127, local governments had home rule authority to pass local laws so long as they were not in direct conflict with state law; under the new law, local governments cannot act unless specifically authorized by state law. This means that local governments cannot pass laws on issues that the state has not addressed, for example, or that go further than state law has already authorized.”⁴⁸

HB 2127 in Texas represents an example of a sweeping Death Star 2.0 preemption law that does not target LGBTQ+ people directly, but will have negative consequences for LGBTQ+ equality. For example, the prohibition on local labor laws that are inconsistent with state law will prevent local governments from raising labor standards in ways that could address disproportionate poverty rates and continued discrimination within the LGBTQ+ community. Although the U.S. Supreme Court's decision in *Bostock* confirmed that Title VII of the Civil Rights Act protects against employment discrimination based on sexual orientation and gender identity, there is still an important opportunity for local governments to build upon federal civil rights law.⁴⁹ For example, Title VII only applies to employers with 15 or more employees. Absent HB 2127, local governments in Texas could pass their own nondiscrimination laws that cover individuals



working for smaller employers. Local governments could also innovate in the future with nondiscrimination protections for independent contractors who are not covered by Title VII. Finally, local nondiscrimination ordinances can establish stronger enforcement mechanisms and/or provide a local avenue to resolve discrimination claims. In fact, multiple cities in Texas—such as Denton, Plano, Dallas, and Austin—include local nondiscrimination ordinances that include sexual orientation and gender identity, which are jeopardized under HB 2127.⁵⁰

Following its signing into law, the fate of HB 2127 remains unsettled. In August 2023, prior to the law taking effect, a judge on the Travis County 459th District Court found HB 2127 unconstitutional.⁵¹ The State is appealing the decision.

48. Id. at 6.

49. A Better Balance and Local Solutions Support Center, “State & Local Nondiscrimination Laws: What the Supreme Court’s *Bostock* Decision Means & Opportunities for Further Action,” (2020), <https://www.abetterbalance.org/resources/bostock/>.

50. Denton Code § 14-203-1, et seq.; Plano Code § 2-11; Dallas Code § 46-6; Austin Code § 5-3-4.

51. Joshua Fechter, “Judge Declares New Texas Law That Would Erode Cities’ Power to Enact Local Rules Unconstitutional,” *The Texas Tribune*, August 30, 2023, <https://www.texastribune.org/2023/08/30/texas-death-star-bill-unconstitutional/>.

TAKING ACTION

to Defend and Advance LGBTQ+ Rights

Around the country, anti-LGBTQ+ state legislators are taking steps to roll back LGBTQ+ rights generally and to target transgender individuals specifically. As part of this assault, state anti-LGBTQ+ bills often seek to prevent local governments from passing measures that will advance LGBTQ+ rights and fill gaps in state and federal protections. Simultaneously, there is a growing threat of sweeping preemption that eliminates the ability of local governments to regulate more generally, which can block important protections that disproportionately help LGBTQ+ and BIPOC individuals. There are significant opportunities, however, to defend and advance LGBTQ+ rights and resist abusive preemption that will harm the LGBTQ+ community.

Mobilizing and Organizing

It is not a coincidence that abusive preemption and anti-LGBTQ+ state lawmaking have both grown in recent years. Both developments have accelerated as part of a coordinated effort to stifle advances in LGBTQ+ rights and undermine local democracy and equality. Through organizing and mobilizing, however, there are opportunities to resist these attacks.

To resist anti-LGBTQ+ preemption, it is important that advocates of equality and local democracy work together across movements. The use of abusive preemption in anti-LGBTQ+ state bills is similar in many ways to the use of abusive preemption to roll back and prevent gun safety, labor protections, environmental standards, immigrant rights, public health authority, and much more. A core strategy of those working to undermine LGBTQ+ equality and local democracy is to divide and seek to pit populations and movements against each other. However, groups like LSSC are actively working to connect and coordinate efforts across issue areas and movements to counter the abuse of preemption. By sharing information and working together in a coordinated fashion, all of our movements are stronger.

As noted in the first section of this paper, there has been a significant increase in sweeping preemption bills that target local government authority itself, often on a broad topic such as labor or public health.

These sweeping, blanket preemption measures would harm LGBTQ+ equality and LGBTQ+ individuals, even though the legislation does not solely or specifically target LGBTQ+ people. Therefore, cross-movement, intersectional organizing around the threat of abusive preemption can help to ensure that legal challenges and responses to these sweeping threats appropriately account for—and raise—the harms to LGBTQ+ rights.

Messaging

Preemption itself is a technical term that is not widely understood. Therefore, it is especially important to ensure that abusive preemption is translated and messaged effectively to ensure different audiences understand what it means and its consequences for equality and democracy.

The most effective way to talk about abusive preemption is to lead with values. For example, everyone wants their children to feel safe and supported in schools, and everyone understands the importance of accessing quality healthcare. Once underlying values are addressed, abusive preemption and a specific piece of legislation can then be introduced as the disruptors that are undermining those shared values.

Where anti-LGBTQ+ measures include abusive preemption, local governments and policymakers themselves can be engaged as effective messengers and allies. Local officials can help to explain the harmful consequences of anti-LGBTQ+ preemption, particularly where local protections will be overturned. Coalitions should also consider whether there are other effective messengers against anti-LGBTQ+ measures and abusive preemption proposals in their particular state, such as allied businesses and faith leaders.⁵²

For more best practices on messaging and specific examples, [LSSC has developed messaging guides](#), informed by research and polling, on how to effectively discuss abusive preemption.⁵³

52. See, e.g., Julie Compton, “More than 100 Faith Leaders Unite to Denounce Tennessee GOP’s ‘Slate of Hate,’” NBC News, March 27, 2019, <https://www.nbcnews.com/feature/nbc-out/more-100-faith-leaders-unite-denounce-tennessee-gop-s-slate-n987611>; Human Rights Campaign Business Sign on Letter to the Tennessee Lieutenant Governor and Speaker of the House, April 23, 2019, https://assets2.hrc.org/files/assets/resources/Open_business_letter_Tennessee_as_shared_with_business_-_update.pdf?_ga=2.88073496.1684083086.1700594718-13687556.1700594718; Elizabeth Gedmark, “Op-Ed: Bill Would Keep Responsible Companies from Bringing Good Jobs to State,” Knox News, Apr. 4, 2019, <https://www.knoxnews.com/story/opinion/2019/04/04/tennessee-bill-tax-incentives-employer-health-benefits-discrimination-policies/3345457002/>.

53. “Connecting the Dots: How to Message the Abuse of State Preemption,” Local Solutions Support Center (Aug. 2022), <https://www.supportdemocracy.org/the-latest/new-messaging-resource-talking-about-preemption-to-different-audiences>; “Preemption & Anti-LGBTQ Bills in State Legislatures,” Local Solutions Support Center (Apr. 2022), <https://www.supportdemocracy.org/issuespecific-preemption-guides/preemption-amp-anti-transgender-bills-in-state-legislatures>.

Legal Challenges

As noted previously, many anti-LGBTQ+ measures highlighted in this paper as examples of abusive preemption are currently being litigated or have been blocked by lower court judges. State legislation that targets LGBTQ+ individuals, such as the growing number of anti-transgender youth laws and anti-drag performance measures, could violate federal or state constitutional provisions that ensure equal protection and freedom of speech. The sweeping and ambiguous nature of so many anti-LGBTQ+ measures could also be challenged as unconstitutionally vague or as violating a state's constitutional home rule protections for local governments.

Strong and intentional coalition organizing can help to ensure that courts recognize the full harms of sweeping preemption that is not specifically targeted at the LGBTQ+ community but would harm LGBTQ+ rights. When LGBTQ+ rights are threatened by broader, blanket preemption, it is important that LGBTQ+ groups are involved and can help to ensure the harms to LGBTQ+ people are recognized and reflected in any legal response. Amicus briefs can be one important way to make sure that courts recognize the significant harm and consequences of sweeping preemption.

It can also be effective to raise the potential of legal challenges—and the strength of legal claims—against preemption bills before they are passed. Some policymakers may be less likely to support an introduced measure if they understand that it is legally vulnerable and will be subject to challenge. Similarly, advocates can work with allied state policymakers to provide talking points, key messaging suggestions, and other resources to both help them counter abusive preemption during the legislative process and to simultaneously develop the legislative record in ways that could be strategic for future legal challenges.⁵⁴

Conclusion

The growing number of anti-LGBTQ+ state bills in recent years poses a significant threat to the health, well-being, and rights of LGBTQ+ individuals in the United States. States are using abusive preemption with increasing frequency to prevent local governments from advancing LGBTQ+ equality. However, there are tools and strategies available to resist these harmful efforts, secure the progress that has been made on LGBTQ+ rights, and ensure full LGBTQ+ equality.

Structural Reform

In the history of the LGBTQ+ rights movement, local governments have played a critical role in advancing inclusive, equitable policies to protect LGBTQ+ individuals and their families. Local governments have played a similar role in advancing rights and protections for BIPOC individuals, immigrants, people with disabilities, and more. The rise of new, punitive forms of abusive preemption seek to undermine local authority and innovation, which increases the ability of state lawmakers to target marginalized communities.

The rise of abusive preemption across issues underscores the importance of reexamining and reassessing “home rule,” or the powers of local governments.⁵⁵ Although strengthening local authority will not necessarily solve the rise of anti-LGBTQ+ lawmaking, it is important to consider innovative ways to ensure local governments can build on state regulations and help to fill gaps in civil rights laws.



To resist anti-LGBTQ+ preemption, it is important that advocates of equality and local democracy work together across movements. ... When LGBTQ+ rights are threatened by broader, blanket preemption, it is important that LGBTQ+ groups are involved and can help to ensure the harms to LGBTQ+ people are recognized and reflected in any legal response.”

54. For example, key questioning of sponsors of abusive preemption during the legislative process could identify intended targets of a sweeping measure.

55. See, e.g., “Principles of Home Rule for the 21st Century,” National League of Cities and Local Solutions Support Center (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf>.