

September 28, 2021

The Honorable James E. Clyburn
Chair, House Select Subcommittee on
the Coronavirus Crisis
274 Cannon House Office Building
Washington, D.C. 20515

The Honorable Steve Scalise
Ranking Member, House Select Subcommittee on
the Coronavirus Crisis
2049 Rayburn House Office Building
Washington, D.C. 20515

SUBMITTED ELECTRONICALLY

Dear Chair Clyburn, Ranking Member Scalise, and Distinguished Members of the Select Subcommittee,

On behalf of the Network for Public Health Law, I submit this letter to the House of Representatives Select Subcommittee on the Coronavirus Crisis for the record of the hybrid hearing scheduled to be held on September 29, 2021, entitled, “Upgrading Public Health Infrastructure: The Need To Protect, Rebuild, And Strengthen State And Local Public Health Departments.”

The Network for Public Health Law (Network) provides visionary leadership in the use of law to protect, promote and improve health and health equity. We provide non-partisan legal technical assistance and resources, collaborating with a broad set of partners across sectors to expand and enhance the use of practical legal and policy solutions. For more than ten years, the Network has helped build the capacity of local, state, tribal, and national public health agencies and organizations around the country to effectively develop, implement, and enforce evidence-based, equitable laws and policies. The Network is committed to using public health law and policy to improve the conditions, as well as strengthen the services and systems, that make our communities safer, healthier, stronger and more equitable. The views expressed in this letter are solely those of Network staff and may not represent those of any affiliated individuals or institutions, including funders and constituents.

In the course of our work to provide legal technical assistance and legal resources to support a coordinated and effective public health response to the COVID-19 pandemic,¹ the Network has

been concerned about (1) harassment of and threats to public health officials and practitioners, (2) ongoing efforts to limit and/or shift public health authority and emergency powers in many state legislatures, and (3) the effect of episodic, inconsistent, and reactive investment in public and environmental health infrastructure and workforce. The case for stable and increased investment and modernization in public health has been made in reports by the Bipartisan Policy Center, National Network for Public Health Institutes, and Trust for America's Health, among others, so this letter will focus upon the first two concerns.²

During the pandemic, the Network collaborated with the National Association of County and City Health Officials (NACCHO) and other partners to:

- conduct a 50-state legal analysis, *Legal Protections for Public Health Officials*, to raise awareness of laws that address threats to public health officials or interference with their duties³ and
- publish a report, *Proposed Limits on Public Health Authority: Dangerous for Public Health*, to analyze emerging trends and share initial conclusions regarding state legislation that would limit public health authority and emergency powers.⁴

To protect, rebuild, and strengthen state and local public health departments in their mission to protect and improve the health of communities across the country, we recommend the federal government take the following steps:

- I. Educate the public about public health interventions and consider promoting protections from harassment, threats, and violence for public health officials.**

Toning down the political polarization related to the COVID-19 pandemic could go a long way toward reducing the volume and intensity of harassment, threats, and violence directed at public health officials. The federal government could play a critical role in supporting educational campaigns aimed at people across the political spectrum in order to address the importance and meaning of public health and public health interventions and to describe the steps being taken to balance the common good with individual liberties, as well as the vital contribution that public health officials make to keeping our communities safe. These steps are critical to the nation's ability to retain and recruit public health leaders and frontline public health workers.

The federal government could also play a role in providing opportunities to strengthen relationships and bolster collaboration among local law enforcement, prosecuting attorneys, and public health officials. The benefits associated with this could extend well beyond protecting public health officials and strengthening the COVID-19 response, to areas ranging from opioid overdose prevention and harm reduction to preventing adverse childhood experiences.

The federal government could also consider measures to better understand, monitor, and deter harassment, threats, and violence against public health officials. Approaches to consider might include (1) a national reporting system for incidents of harassment, threats, and violence against the public health workforce to be operated by the CDC; (2) funding, training, and technical assistance for states with protections for public health officials to increase awareness of those protections among public health practitioners, law enforcement, and the general public, and to provide support for implementation and enforcement efforts; and/or (3) creating a federal peace order which could serve states as a model of a legal mechanism to protect public health officials from continuing threats and harassment.

II. Increase understanding of, and address, newly-enacted limits and shifts in public health authority that magnify the challenges faced by state and local health departments.

The *Proposed Limits on Public Health Authority: Dangerous for Public Health* Report provided a snapshot of bills that had been enacted, were still pending, and had failed at that time, and identified five emerging trends in legislation to limit or shift public health authority. These trends included bills that would:

1. Prohibit certain types of state or local public health orders
2. Shift legal authority from local public health agencies to other local entities
3. Shift legal authority from local public health agencies to the state public health agency
4. Shift legal authority from the state public health agency to the governor or state legislature
5. Shift legal authority from the state executive to the state legislature

The report concluded that if these trends continued, the newly-enacted laws would change the nature and allocation of the power to protect the public's health among the executive, legislative, and judicial branches of state and local governments, as well as the balance of power between state and local governments. It further concluded that many of the proposed bills would impede effective governmental response to public health emergencies as well as the essential day-to-day work of protecting, promoting and improving public health. These legislative trends have continued in the intervening months, with every state having had at least one such bill introduced, and about half of states having passed at least one such bill.⁵ One additional trend has been identified. It entails nullification-style bills, which purport to empower state attorneys general to review the constitutionality of federal executive orders, and to halt state executive branch implementation of federal executive orders, if the state attorney general concludes the federal executive order is unconstitutional.⁶ These nullification-style bills violate the supremacy clause and separation of powers established in the Constitution.

Legislation to block reasonable public health measures like mask wearing, social distancing, and quarantine poses an immediate threat to life and health.

Legislation should not limit the flexibility public health officials need to act in response to specific threats. Prohibiting specific public health orders or providing exemptions for certain classes of businesses endangers the ability to respond to threats that are most readily transmitted in a particular setting and is dangerous for the greater community.

Legislation to sidestep the expertise of expert public health agencies to lead the response to health emergencies creates unforeseen, yet foreseeable, serious risks to life and health.

Public health officials have specific training and experience in developing evidence-based policies and medical countermeasures to address public health emergencies. Public health officials are best positioned to coordinate a statewide response to public health emergencies or one informed by expert assessment of local conditions.

Legislation that strips authority from public health agencies and the executive branch and transfers it to the legislature undermines effective government response and violates the constitutional separation of powers.

Rather than engaging in a deliberative and nuanced review of the public health response in each state, many laws and bills take a blunt approach to block or severely limit evidence-based public health measures, often while simply shifting authority from the local to the state level or from the executive to the legislative branch without setting forth any criteria or principles by which to guide or assess subsequent decisions and actions.⁷ This raises a number of concerns, including the following:

- Establishing an absolute maximum duration for emergency declarations can result in inaction, and reduce the ability to help citizens, businesses, and other entities to take needed public health measures.
- To save lives and prevent disease, public health emergencies require swift responses and nimble adjustments.
- Moving power to state legislatures limits the ability to tailor orders to local circumstances and could lead to slowed and/or poorly informed responses.
- State legislatures are generally not in a position to respond quickly to a public health emergency.
- Legislative procedures often require days or weeks to build consensus among large numbers of representatives with widely divergent political views.
- Elected legislative officials may be reluctant to take necessary, but unpopular, action.

Beyond policy questions about the wisdom and effectiveness of shifting legal authority for implementing the public health response in the first instance from the executive to the legislative branch, a striking number of the new laws and proposed bills go beyond shifting legal authority and emergency powers from public health agencies and the executive branch in a conventional manner, but employ novel procedural means in order to do so. As evidenced by legislative analysis and gubernatorial vetoes in states such as Ohio and Idaho, these procedural innovations raise substantial constitutional concerns.⁸ Examples of novel procedural approaches include those that:

- Grant authority to review and amend content of emergency declarations and executive orders to the legislature; including through joint resolution of the legislature, rather than through a bill subject to gubernatorial approval or veto.
- Delegate legislative decisions to a subset of the legislature, such as leadership or an existing or newly-created committee.
- “Poll” the legislature if not in session.
- Set forth the standard of review in the bill, such as requiring a compelling governmental interest and narrow tailoring.
- Grant authority to the legislature to call itself into special session to review emergency declarations and executive orders.
- Require legislative approval before expenditure of federal COVID relief funds.
- Grant authority to the state attorney general to review federal executive orders and halt state executive actions to carry them out.

Limiting public health authority makes it harder to advance health equity during a pandemic that has disproportionately sickened and killed Black, Hispanic and Latino, and Indigenous Americans.

Communities across the country have sought to direct COVID testing, contact tracing, vaccines, and personal protective equipment to hard hit communities, including communities of color, but have sometimes been blocked by states. Limiting emergency authority puts communities at risk by potentially limiting access to emergency funding intended to mitigate the effects of public health emergencies on affected communities.

III. Consider utilizing legal and federal funding strategies to support effective public health effectiveness and authority at the state and local levels.

As noted above, many recently-enacted state laws limiting public health authority were drafted and adopted hastily and may be susceptible to legal challenges and federal action.⁹

Federal programs that condition receipt of funds upon states taking affirmative steps to strengthen public health effectiveness and authority, or upon states refraining from taking steps to weaken public health effectiveness and authority, with respect to program activities, could be

one federal funding strategy. Another federal funding strategy that some local health departments might welcome would be providing county and city health departments and other agencies with the option to apply directly for program funds to support their efforts to exercise local control and implement evidence-based medical countermeasures and public health interventions.¹⁰

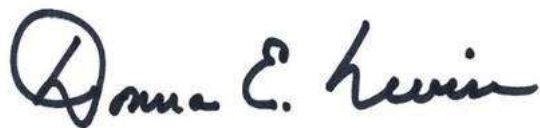
While they may be smaller in number, some recently enacted state laws have the potential to protect and strengthen state and local health departments.¹¹ Examples include:

- Funding, combined resources, and technical assistance for shared public health services at the local or regional level (Massachusetts, Oklahoma, Washington).
- Increased transparency and accountability in executive orders and public health orders (Colorado and Florida).
- Task Force to prioritize health equity in response to COVID-19 (Massachusetts).
- Commission or Task Force to assess COVID-19 response and make recommendations (Alabama).
- Request task force to assess public health system and make recommendations (New Mexico).

As suggested by this smaller sample of laws, a state legislative response (which makes the laws that will govern the public health response ongoing for COVID-19 as well as for future public health emergencies) may benefit from more deliberation, more nuance, more general applicability, and more evidence that it has taken the knowledge and perspectives of public health and executive branch officials and researchers, as well as the lived experiences of those in front-line occupations and communities, into account.

Thank you for the opportunity to submit this letter for the hearing record. We would be pleased to answer any questions, and to provide additional legal information, research, and analysis upon request.

Sincerely,

A handwritten signature in black ink that reads "Donna E. Levin". The signature is written in a cursive style with a large initial "D".

Donna E. Levin
National Director

¹ Burris, S., de Guia, S., Gable, L., Levin, D.E., Parmet, W.E., Terry, N.P. (Eds.) (2021). *COVID-19 Policy Playbook: Legal Recommendations for a Safer, More Equitable Future*. Boston: Public Health Law Watch.

² Bipartisan Policy Center, *Positioning America's Public Health System for the Next Pandemic* (June, 2021). Accessed September 28, 2021 at <https://bipartisanpolicy.org/report/preparing-for-the-next-pandemic/> ; Trust for America's Health, *The Impact of Chronic Underfunding upon America's Public Health System: Trends, Risks and Recommendations*, 2021 (May, 2021). Accessed September 28, 2021 at https://www.tfah.org/wp-content/uploads/2021/05/2021_PHFunding_Fnl.pdf ; National Network of Public Health Institutes, *Challenges and Opportunities for Strengthening the US Public Health Infrastructure* ((May, 2021). Accessed September 28, 2021 at <https://nnphi.org/wp-content/uploads/2021/06/NNPHI-E2A-Kresge-Report-Web.pdf>.

³ The Network for Public Health Law. *50-State Survey: Legal Protections for Public Health Officials*. Accessed September 12 2021 at: <https://www.networkforphl.org/wp-content/uploads/2020/11/50-State-Survey-Legal-Protections-for-Public-Health-Officials.pdf> .

⁴ Network for Public Health Law and National Association of County and City Health Officials, *Proposed Limits on Public Health Authority: Dangerous for Public Health*. May 2021 accessed September 20, 2021 at <https://www.networkforphl.org/wp-content/uploads/2021/05/Proposed-Limits-on-Public-Health-Authority-Dangerous-for-Public-Health-FINAL.pdf>.

⁵ Lauren Weber and Anna Maria Barry-Jester, *More than Half of States Have Rolled Back Public Health Powers in Pandemic*, Kaiser Health News and AP (September 15, 2021).. Accessed September 28, 2021 at <https://khn.org/news/article/over-half-of-states-have-rolled-back-public-health-powers-in-pandemic/> .

⁶ Examples include Montana Senate Bill 277 (2021) and Utah House Bill 415 (2021).

⁷ Lindsay F. Wiley, *Public Health Emergency Reform is Coming—These Six Principles Should Guide It*, Health Affairs blog, January 12, 2021. Accessed September 28, 2021 at <https://www.healthaffairs.org/doi/10.1377/hblog20210105.516753/full/>; Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, Yale Journal of Health Law, Policy, and Ethics (2020). Accessed on September 28, 2021 at <https://digitalcommons.law.yale.edu/yjhple/vol19/iss3/2/> .

⁸ Ohio Legislative Service Commission, *SB 22 Bill Analysis* (March 10, 2021). Accessed September 28, 2021 at <https://www.legislature.ohio.gov/download?key=15961&format=pdf>; Office of Ohio Governor Mike DeWine, *Veto Message: Statement of the Reasons for the Veto of Substitute Senate Bill 22* (March 23, 2021). Accessed on September 28, 2021 at https://content.govdelivery.com/attachments/OHOOD/2021/03/23/file_attachments/1732100/SB%2022%20Veto%20Message.pdf ;

Office of Idaho Governor Brad Little, *All Four Living Former Idaho Governors support Gov. Little's veto of emergency powers bills*, (April 16, 2021). Accessed September 28, 2021 at <https://gov.idaho.gov/pressrelease/all-four-living-former-idaho-governors-support-gov-littles-veto-of-emergency-powers-bills/>.

⁹ Hodge, James G. and Piatt, Jennifer and Barraza, Leila, *Legal Interventions to Counter COVID-19 Denialism* (August 25, 2021). Hodge JG, Piatt JL, Barraza L, *Legal interventions to counter COVID-19 denialism*, Journal of Law, Medicine & Ethics (Forthcoming) , Accessed September 28, 2021 at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911198 .

¹⁰ U.S. Department of Education, *US Department of Education Awards Project SAFE Funds to Florida School District Following State-Imposed Penalty for Implementing COVID-19 Safety Measures*, (September 23, 2021). Accessed on September 28, 2021 at <https://www.ed.gov/news/press-releases/us-department-education-awards-project-safe-funds-florida-school-district-following-state-imposed-penalty-implementing-covid-19-safety-measures> .

¹¹ Network for Public Health Law, *Strengthening Public Health Authority to Contain and Prevent Communicable Disease*, (June, 2021). Accessed September 28, 2021 at <https://www.networkforphl.org/wp-content/uploads/2021/06/2021-Strengthening-Public-Health-Authority-to-Contain-and-Prevent-Communicable-Disease.pdf> .