



**The Network**  
for Public Health Law

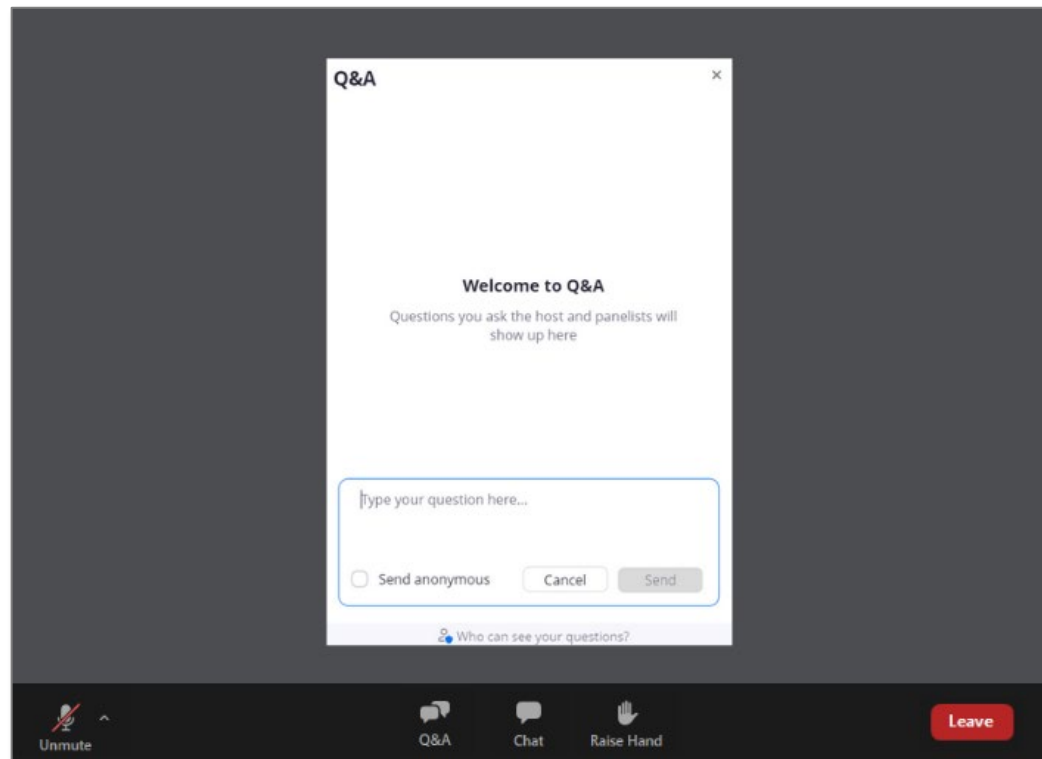
Ideas. Experience. Practical answers.

# **Act for Public Health: Assessing Legislation and Litigation Impacting Public Health Authority**

January 26, 2023 | 1 – 2:30 p.m. EST

## Zoom Q&A

1. Open the Q&A panel
2. Type your question
3. Click “Send”



## Moderator



**Sabrina Adler, J.D.**

Vice President of Law, ChangeLab Solutions



2023

# **PUBLIC HEALTH LAW CONFERENCE**

## **CALL FOR ABSTRACTS**

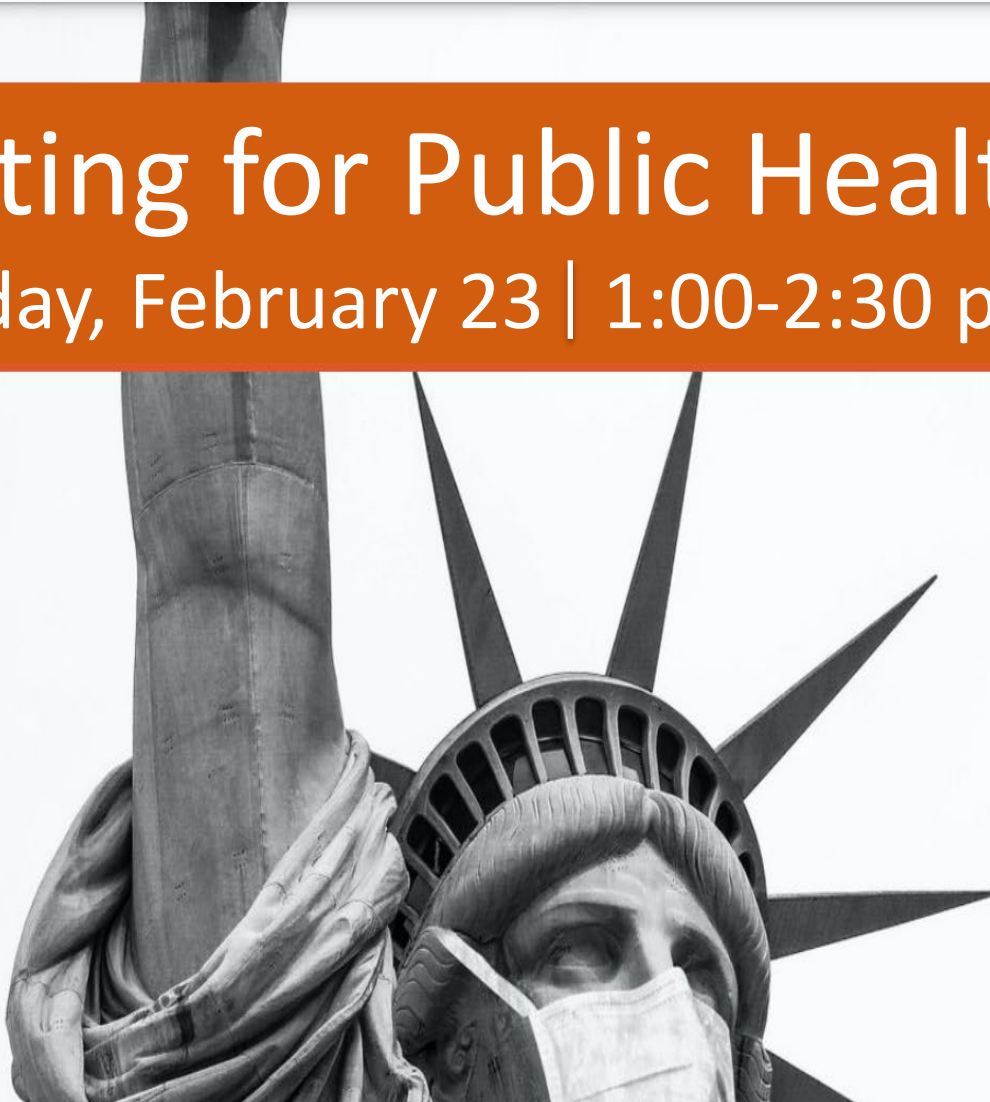
**We invite you to submit an abstract  
for an individual or panel  
presentation at the 2023 Public  
Health Law Conference**

**DEADLINE: February 6, 2023, 11:59 PM ET**

[networkforphl.org/2023conference](https://networkforphl.org/2023conference) | [#PHLC2023](https://twitter.com/PHLC2023)

# Fighting for Public Health

Thursday, February 23 | 1:00-2:30 pm EST

A black and white photograph of the Statue of Liberty's head and crown. The statue is wearing a white surgical face mask. The background is a light blue sky.

**How do we  
strengthen  
public health  
advocacy at  
local, state, and  
national levels?**

**Register online at [www.networkforphl.org](http://www.networkforphl.org)**



## Presenter



### **Katie Moran-McCabe, J.D.**

Lead Law and Policy Analyst, Center for  
Public Health Law Research, Temple  
University Beasley School of Law

## Presenter



### **Elizabeth Platt, J.D.**

Director of Research and Operations,  
Center for Public Health Law Research,  
Temple University Beasley School of  
Law

## Presenter



**Jill Krueger, J.D.**

Director, Network for Public Health  
Law–Northern Region Office



## Presenter



### **Wendy Parmet, J.D.**

Matthews Distinguished University  
Professor of Law and Faculty Director,  
Center for Health Policy and Law,  
Northeastern University School of Law

# Act for Public Health

*An initiative of the Public Health Law Partnership*



ChangeLab Solutions



**The Network**  
for Public Health Law



**PUBLIC HEALTH  
LAW CENTER**  
at Mitchell Hamline School of Law



**Temple  
University**  
Beasley School of Law

Center for  
Public Health  
Law Research

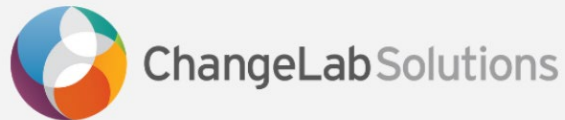
# Assessing Legislation Impacting Public Health

Katie Moran-McCabe, JD  
Elizabeth Platt, JD, MA

January 26, 2023

**ACT** *for*  
**Public**  
**Health**

## Legislative Tracking Partners



ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS



## Legislative Tracking Dataset Topics

- Public Health Authority Limits
- Reallocation of Public Health Authority
- State Limits on Enforcement of Federal Law
- Public Health Preemption
- Regulating Public Health Measures
- Strengthening Public Health



# Standard Variables in Every Dataset

- Bill number
- Bill introduction date
- Bill status
- Date of last action



## **Bill Status:**

- Introduced
- Passed First Chamber
- Passed Second Chamber
- Enacted
- Vetoed
- Failed

How is the [governor's / state health official's / local health official's] authority limited?

- Issuance of emergency order is restricted
- Duration of emergency order is restricted
- Scope of emergency order is restricted
- Termination by legislature
- Termination by another entity
- Local override of state orders

## Reallocation of Public Health Authority

Where does public health authority shift from the [governor / state health official / local health official] . . .

- To the state legislature
- To another state entity
- To another local entity
- To the governor

- **Regulation of Public Health Measures**
  - Vaccine measures
  - Testing measures
  - Mask measures
  - School measures
  - Business measures
  - Place of worship measures
  - Isolation measures
  - Quarantine measures
  - Other

- **Public Health Preemption**
  - Vaccine measures
  - Mask measures
  - School measures
  - Business measures
  - Place of worship measures
  - Other

# Datasets Live on LawAtlas.org now!

[Home](#)[Topics](#)[Learn](#)[About](#)

## State Legislation Addressing Public Health Emergency Authority

State laws setting the scope and limits of emergency authority are crucial to an effective public health response. This suite of legal data captures details of legislation — bills that were enacted and those that were not — that addresses emergency health authority introduced between January 1, 2021, and May 20, 2022, in all 50 US states and the District of Columbia.

The six datasets were created by the Act for Public Health's Legislative Tracking Team in collaboration with the Association of State and Territorial Health Officials and the Network for Public Health Law, using scientific legal mapping techniques to document state bills affecting the nature and/or allocation of public health authority at the state and local levels:

- [Public Health Authority Limits](#)
- [Reallocation of Public Health Authority](#)
- [Strengthening Public Health](#)
- [State Limits on Enforcement of Federal Law](#)
- [Regulating Public Health Measures](#)
- [Public Health Preemption](#)

The Act for Public Health initiative provides direct support to public health departments and others through consultation, training, legal technical assistance, research, and resources to address legislation that weakens their ability to protect the communities they serve. Act for Public Health is a partnership that includes ChangeLab Solutions, the Public Health Law Center at Mitchell Hamline School of Law, the Network for Public Health Law, and Public Health Law Watch.

<https://lawatlas.org/page/state-legislation-addressing-public-health-emergency-authority>



# How to Navigate the Data

## State Limits on Enforcement of Federal Law

State officers are generally permitted, but not required to, enforce federal laws under the U.S. federal system. Yet throughout COVID-19, a handful of states introduced bills aiming to regulate, and in many cases restrict, the enforcement of federal public health laws.

This longitudinal dataset captures details of legislation seeking to limit the enforcement of federal law introduced between January 1, 2021, and May 20, 2022, in all 50 U.S. states and the District of Columbia. Each individual bill is coded as a separate instance and labeled by its bill number. When querying the map below, states with multiple bills will appear as purple; click the state to learn more information about the different bills within that state.

This dataset is one of six that were created in collaboration with the Association of State and Territorial Health Officials and the Network for Public Health Law as part of the Act for Public Health initiative.

CREATED BY: Center for Public Health Law Research

MAINTAINED BY: Center for Public Health Law Research

VALID FROM: January 1, 2021

UPDATED THROUGH: May 20, 2022



Data



Codebook

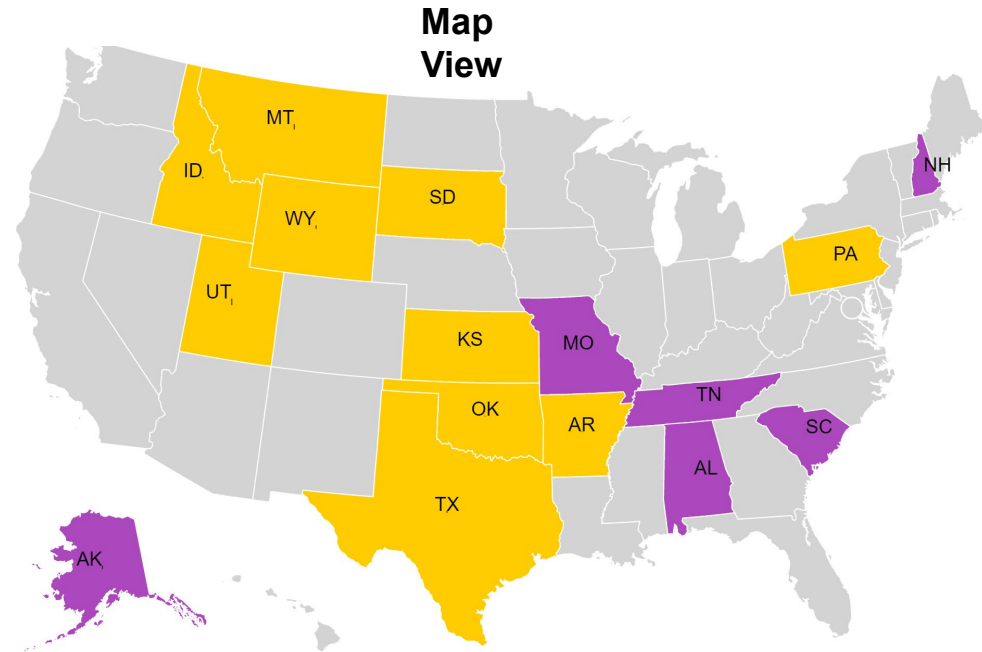
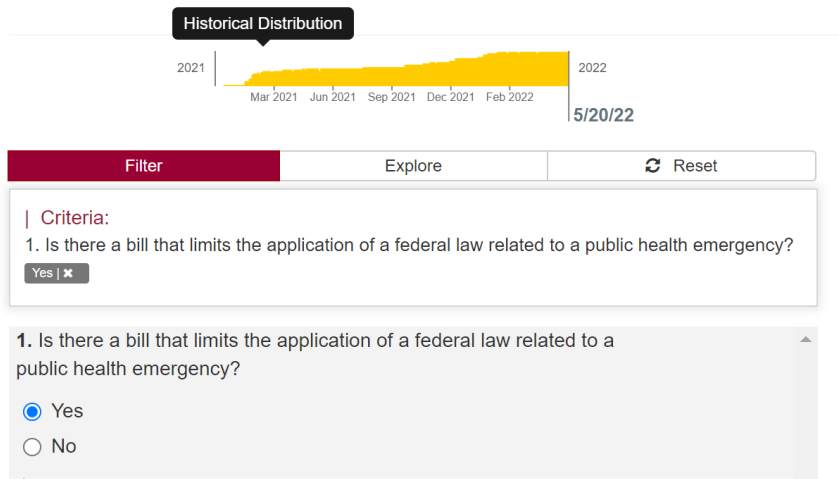


Protocol

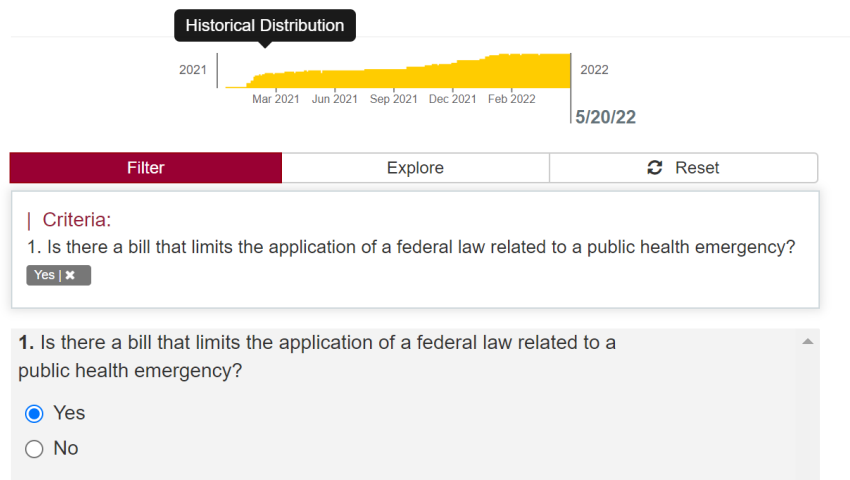


See all related maps

# How to Navigate the Data



# How to Navigate the Data



Jurisdiction ▲	1 Is there a bill
Alabama HB 518	§ Yes
Kansas HB 2535	§ Yes
Missouri HB 1145	§ Yes
Missouri HB 1212	§ Yes
South Carolina H 3126	§ Yes

# How to Navigate the Data

Jurisdiction ▲	1 Is there a bill
Alabama HB 518	§ Yes
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South Carolina H 3126	§ Yes

Excerpts from the law:

KS HB235: AN ACT concerning federal COVID-19 vaccine requirements; enacting the individual liberty preservation act; nullifying certain federal COVID-19 vaccine

...

Any federal COVID-19 vaccine requirement is null, void and unenforceable in the state of Kansas. §§

...

KS HB2535: AN ACT concerning federal COVID-19 vaccine requirements; enacting the individual liberty preservation act; nullifying certain federal COVID-19 vaccine

...

Full Text §§

...

KS HB2535: AN ACT concerning federal COVID-19 vaccine requirements; enacting the individual liberty preservation act; nullifying certain federal COVID-19 vaccine requirements; prohibiting enforcement of such requirements and providing criminal penalties for violations.

Effective: 1/25/22 - Through: 5/20/22

Attached file: [hb2535.pdf](#)

AN ACT concerning federal COVID-19 vaccine requirements; enacting

the individual liberty preservation act; nullifying certain federal

COVID-19 vaccine requirements; prohibiting enforcement of such

requirements and providing criminal penalties for violations.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Sections 1 through 6, and amendments thereto, shall be

known may be cited as the individual liberty preservation act.

(b) As used in the individual liberty preservation act:

(1) "COVID-19 vaccine" means an

# How to Navigate the Data

Excerpts from the law:

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AN ACT concerning federal COVID-19 vaccine requirements; enacting the individual liberty preservation act; nullifying certain federal COVID-19 vaccine requirements; prohibiting enforcement of such requirements and providing criminal penalties for violations.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Sections 1 through 6, and amendments thereto, shall be known may be cited as the individual liberty preservation act.

(b) As used in the individual liberty preservation act:

(1) "COVID-19 vaccine" means an immunization, vaccination or injection against disease caused by the novel coronavirus identified as SARS-CoV-2 or disease caused by a variant of the virus; and

(2) "federal COVID-19 vaccine requirement" means any act, law, treaty, order, rule or regulation of the government of the United States that is in effect and requires a:

(A) Person to receive a COVID-19 vaccine;

(B) person to provide documentation certifying receipt of a COVID-19 vaccine;

(C) person to be tested for COVID-19; or

(D) business or any other entity to enforce a requirement described in subparagraph (A), (B) or (C).

Sec. 2. The legislature declares that the authority for sections 1 through 6, and amendments thereto, is the following:

(a) The tenth amendment to the constitution of the United States guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution and reserves to the state and people of Kansas certain powers as they were understood at the time that Kansas was admitted to statehood in 1861. The guaranty of those powers is a matter of contract between the state and people of Kansas and the United States as of the time that the compact with the United States was agreed upon and adopted by Kansas in 1859 and the United States in 1861.

(b) The ninth amendment to the constitution of the United States guarantees to the people rights not granted in the constitution and reserves to the people of Kansas certain rights as they were understood at the time that Kansas was admitted to statehood in 1861. The guaranty of those

Session of 2022

## HOUSE BILL No. 2535

By Representatives Fairchild, Murphy and Rhiley

1-25

1 AN ACT concerning federal COVID-19 vaccine requirements; enacting  
2 the individual liberty preservation act; nullifying certain federal  
3 COVID-19 vaccine requirements; prohibiting enforcement of such  
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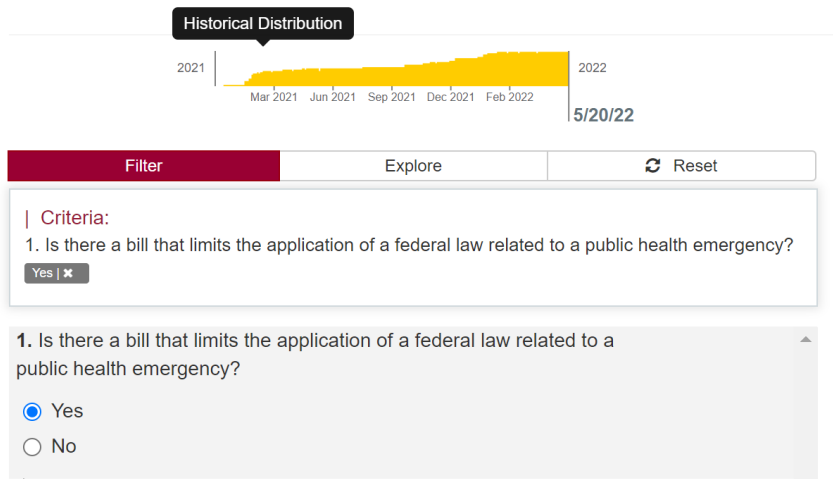
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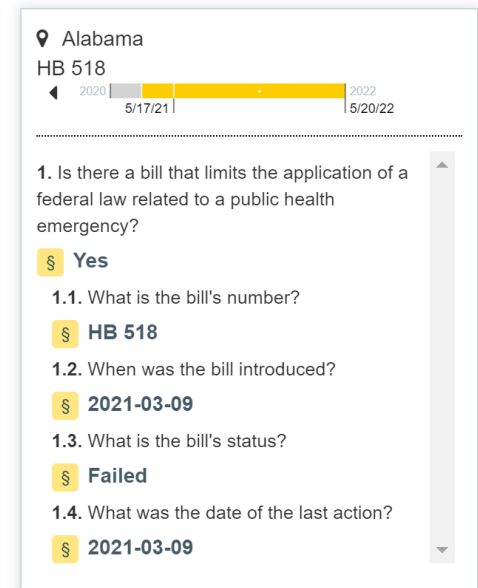
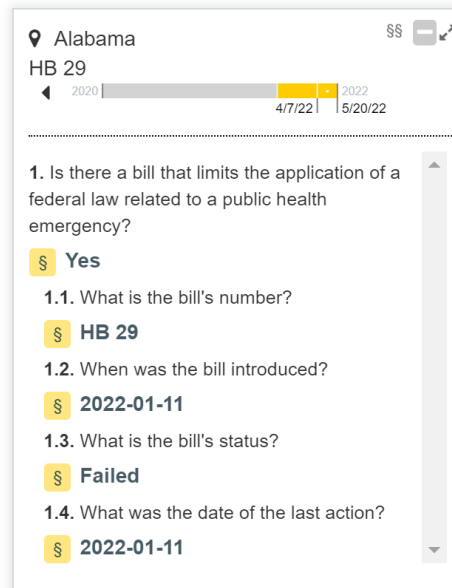
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# How to Navigate the Data



## Profile View



# Results Highlights

January 1, 2021, through May 20, 2022

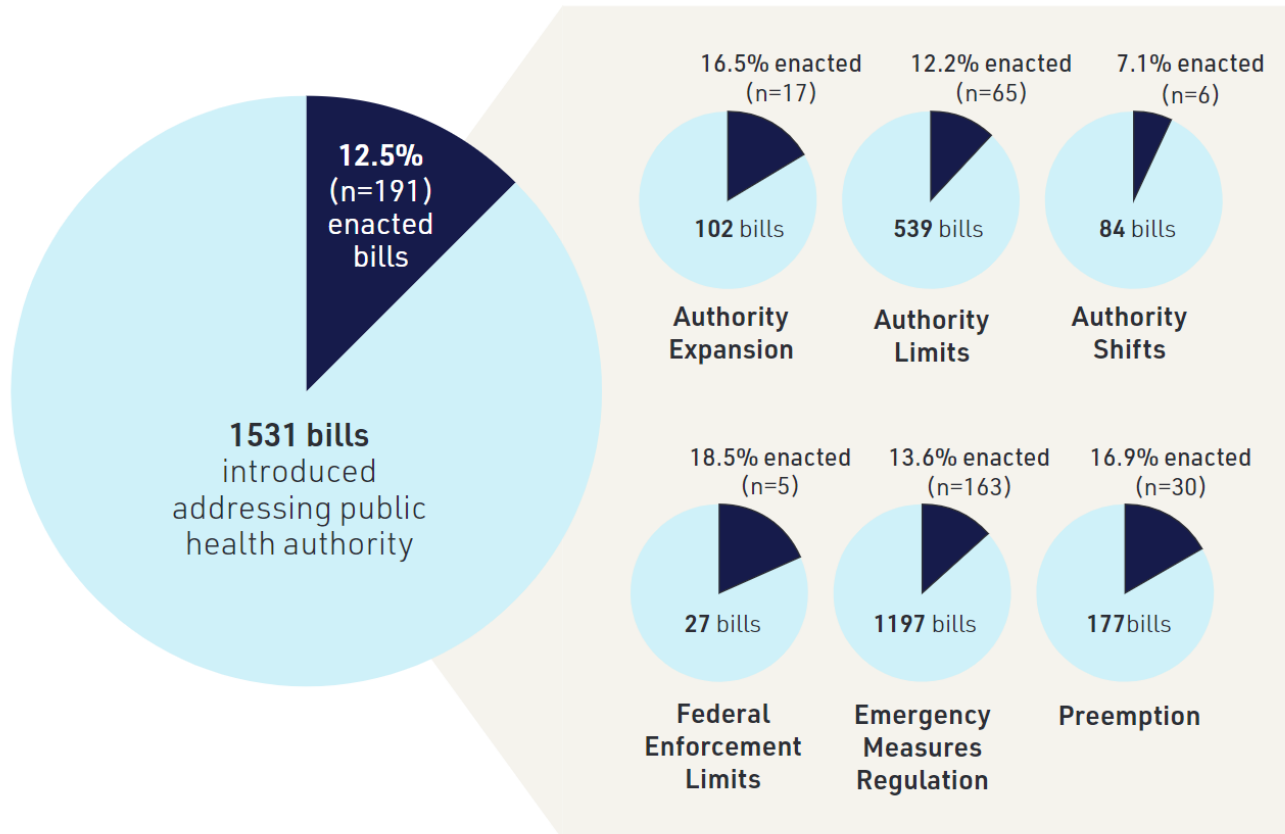
# 1,531

individual bills tracked between  
January 1, 2021 – May 20, 2022

# 191

of the 1,531 bills enacted into law  
into 43 states and D.C.

## Introduced and Enacted U.S. State Legislation Addressing Public Health Authority by Type, January 1, 2021-May 20, 2022

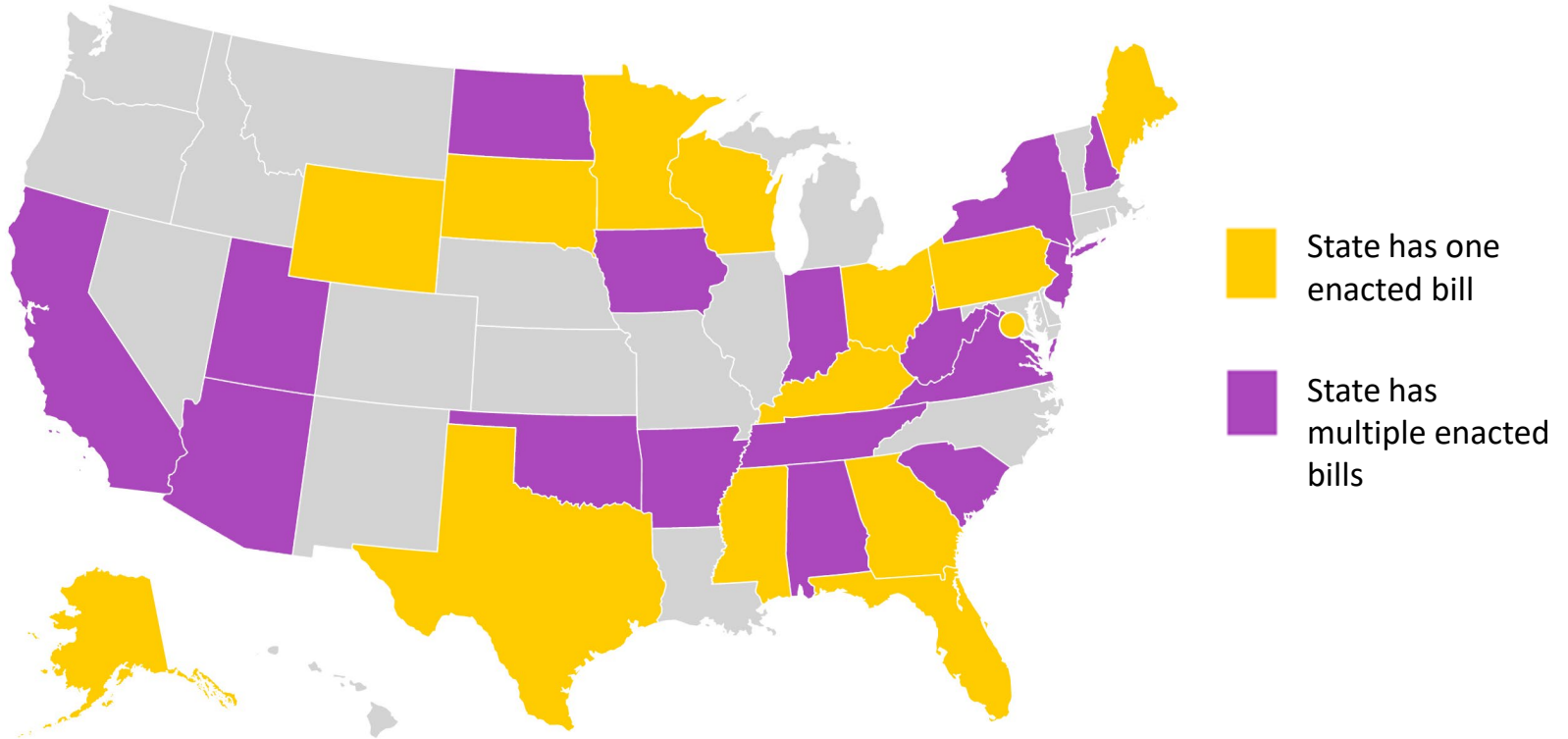


\*Because bills may address more than one topic, totals reported by topic will not sum to the total number of bills.



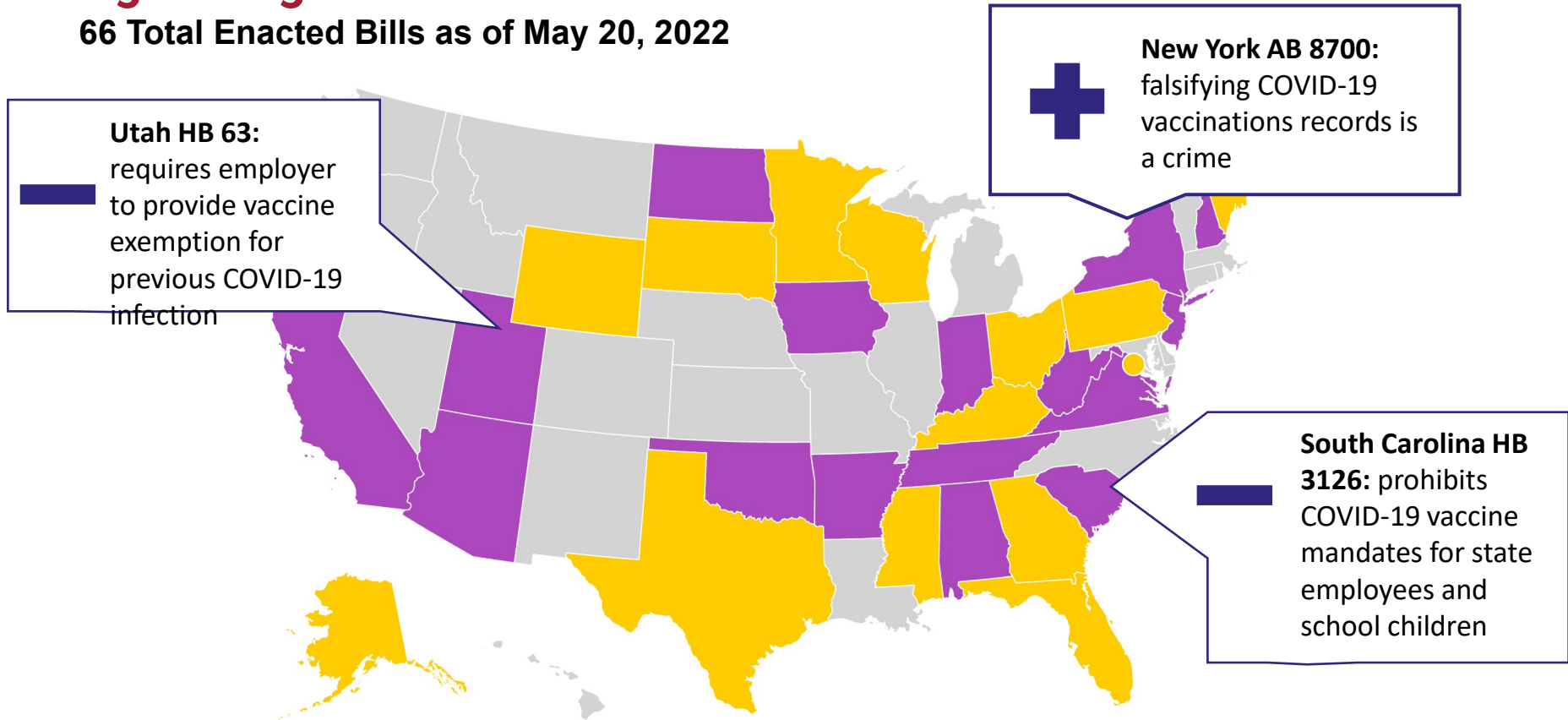
# Regulating Public Health Measures – Vaccines

66 Total Enacted Bills as of May 20, 2022

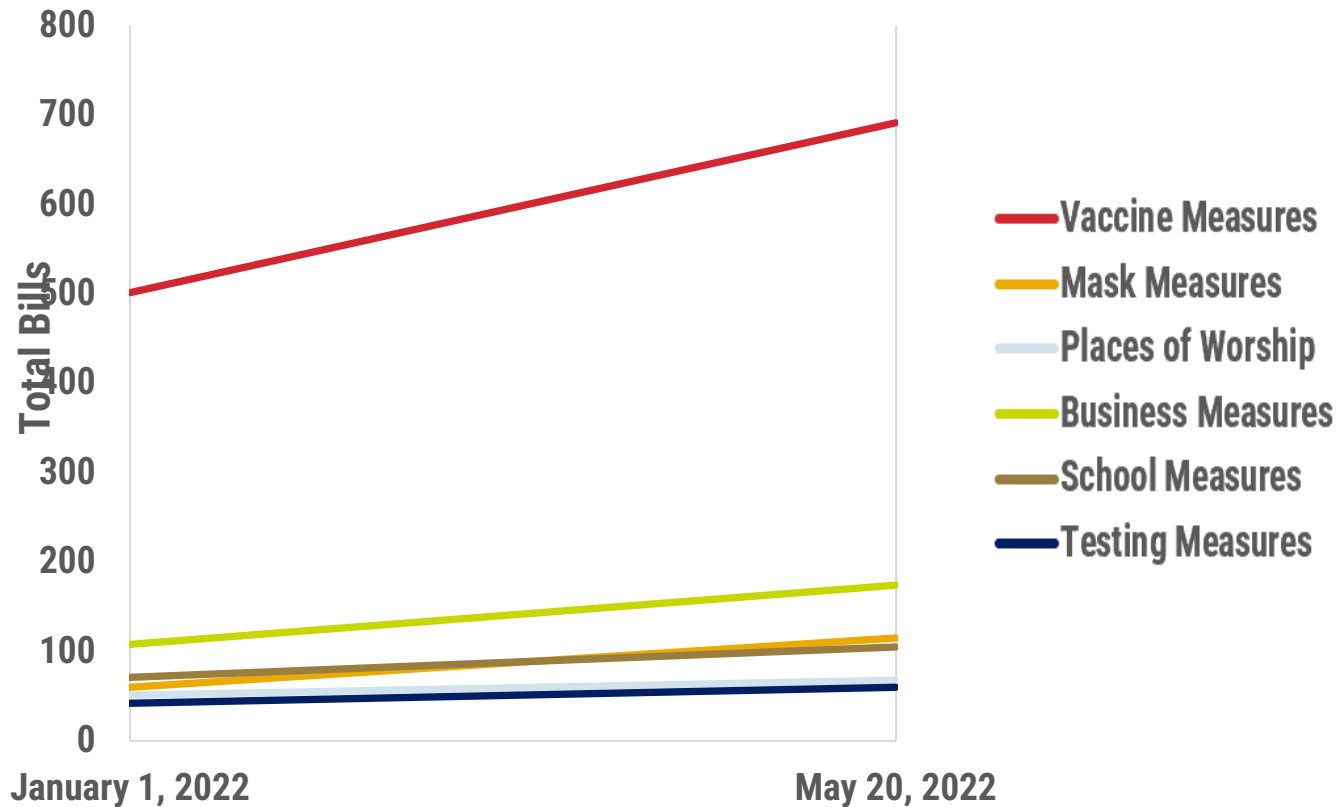


# Regulating Public Health Measures – Vaccines

66 Total Enacted Bills as of May 20, 2022



# Total Bills Regulating Public Health Measures



**Total Bills Introduced  
Since 1/1/2021**

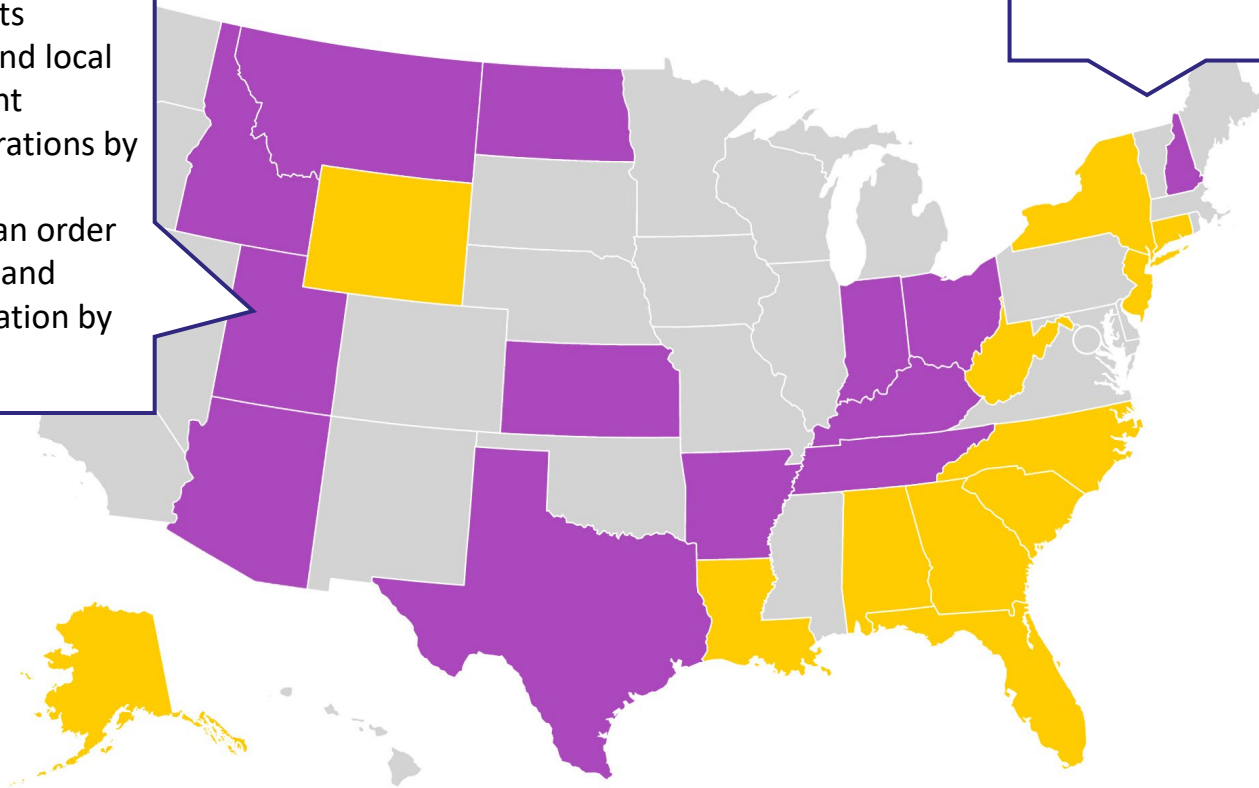
As of 1/1/2022	As of 5/20/2022
501	691
70	115
51	68
108	174
71	105
42	60

# Public Health Authority Limits

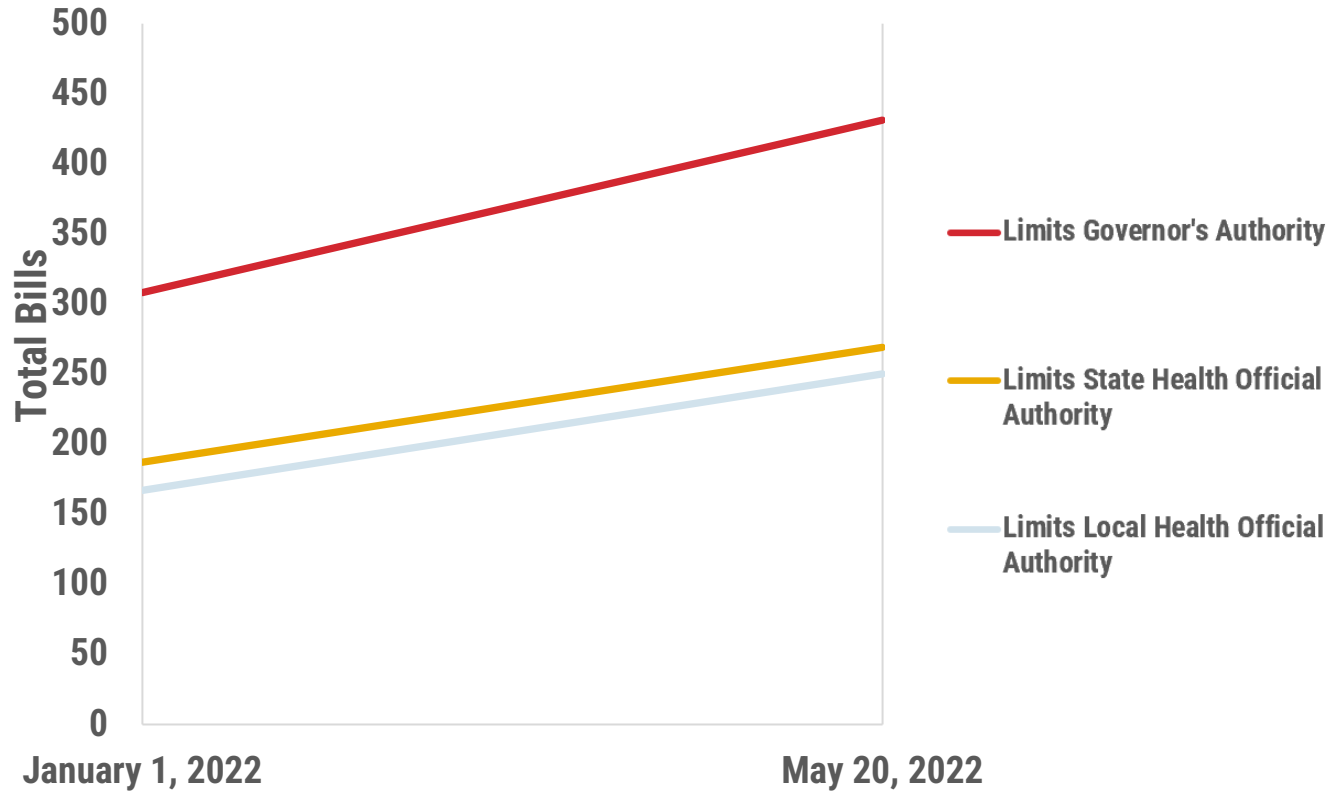
65 Total Enacted Bills as of May 20, 2022

**Utah SB 195:** limits governor, state, and local health department emergency declarations by limiting duration, restricting when an order can be re-issued, and allows for termination by the legislature

**New Hampshire HB 440:** prohibits the suspension of civil liberties during a state of emergency



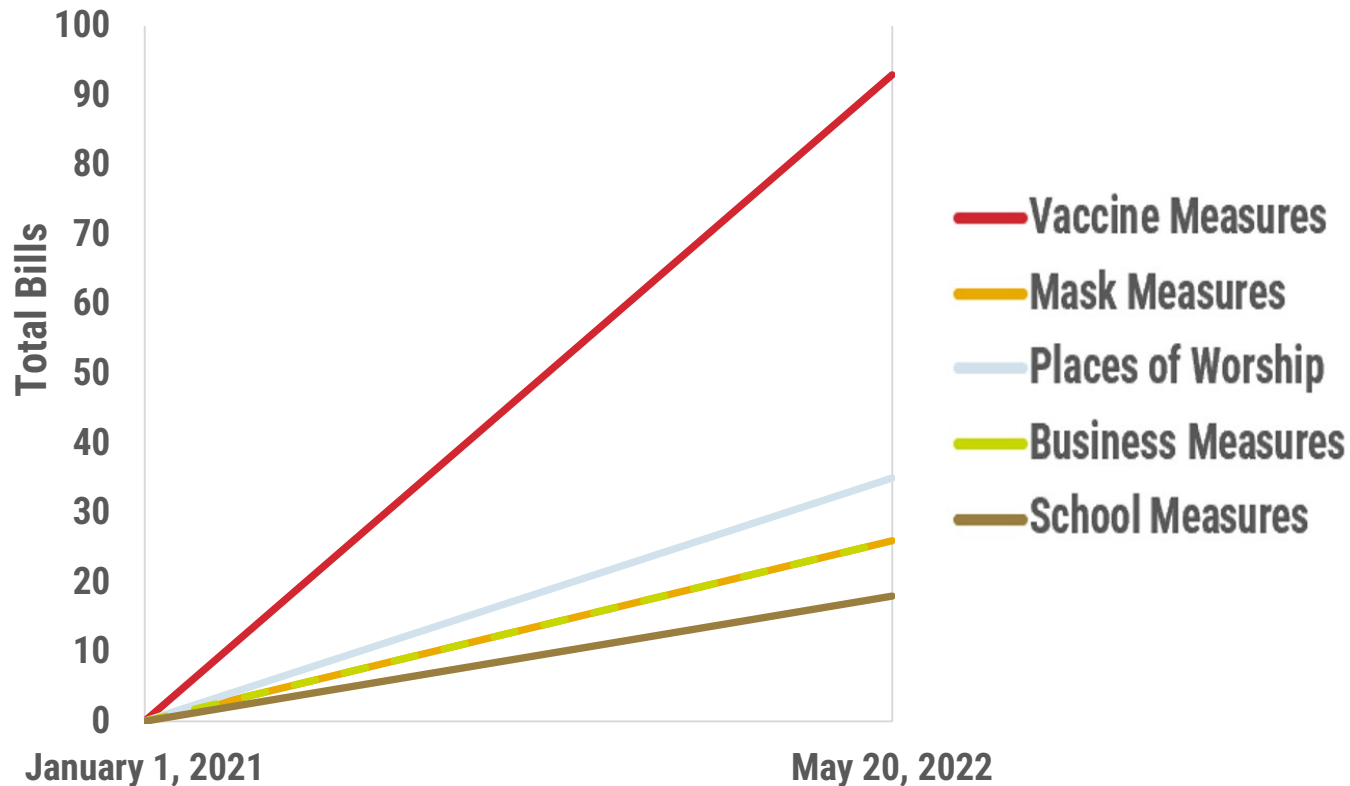
# Total Bills Limiting Public Health Authority



## Total Bills Introduced Since 1/1/2021

As of 1/1/2022	As of 5/20/2022
308	431
187	269
167	250

# Public Health Preemption – Total Bills



**Total Bills Introduced  
Since 1/1/2021**

As of 1/1/2022	As of 5/20/2022
63	93
16	26
23	35
16	26
13	18

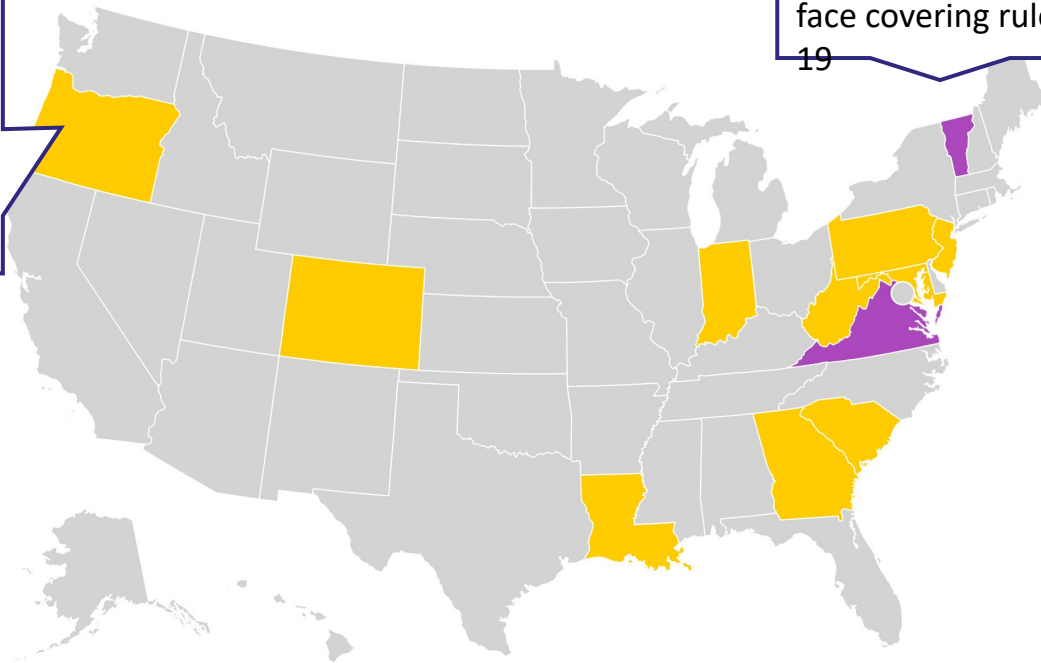
# Strengthening Public Health

17 Total Enacted Bills as of May 20, 2022

## **Oregon HB 2927:**

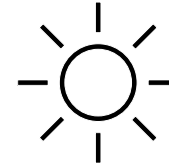
enhances organizational independence to health agencies; appropriates money and increases expenditure limitations during emergencies

**Vermont S 1:** allows the legislative bodies of municipalities to adopt face covering rules during COVID-19



# Scary Bills & Bright Spots

- NH House Bill 1027: sought to establish the crime of “undermining the legislative process by false claim of emergency” and accused President Biden of colluding with OSHA under a false claim of emergency
- Ivermectin and Hydroxychloroquine bills



- 12 states passed 17 laws strengthening emergency authority:
  - Enhanced organizational independence to health agencies
  - Expanded authority in times of emergency
  - More stringent penalties for violating orders
  - Created new emergency rule-making procedures



- **Vaccines measures = main target**

- Most common bills:
  - public health measures (vaccines, masking) &
  - public health authority limits on scope of emergency orders
- Protection of “civil liberties” (right to worship, firearm sales, discrimination based on vaccine status) during an emergency

- **COVID-19 specific vs. generally applicable**

- Generally applicable laws impacting mask & quarantine measures
  - AR SB 590: prohibition on mandatory use of a face mask
  - TN HB 575: restricts when a county can implement a quarantine or isolation order

- Tracking enacted legislation in these six areas
- Technical assistance bill tracking
- Refining our bill tracking scope

**What are the most important positive and negative types of bills to look for in 2023?**

## Contact Us!

- Access the data at [LawAtlas.org](https://LawAtlas.org)
- Follow us at [@PHLR\\_Temple](https://twitter.com/PHLR_Temple)

**Katie Moran-McCabe**

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**Elizabeth Platt**

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**SCAN TO  
EXPLORE THE  
DATA**

# Bright Spots in Recent State Legislation Related to Public Health Powers and Duties

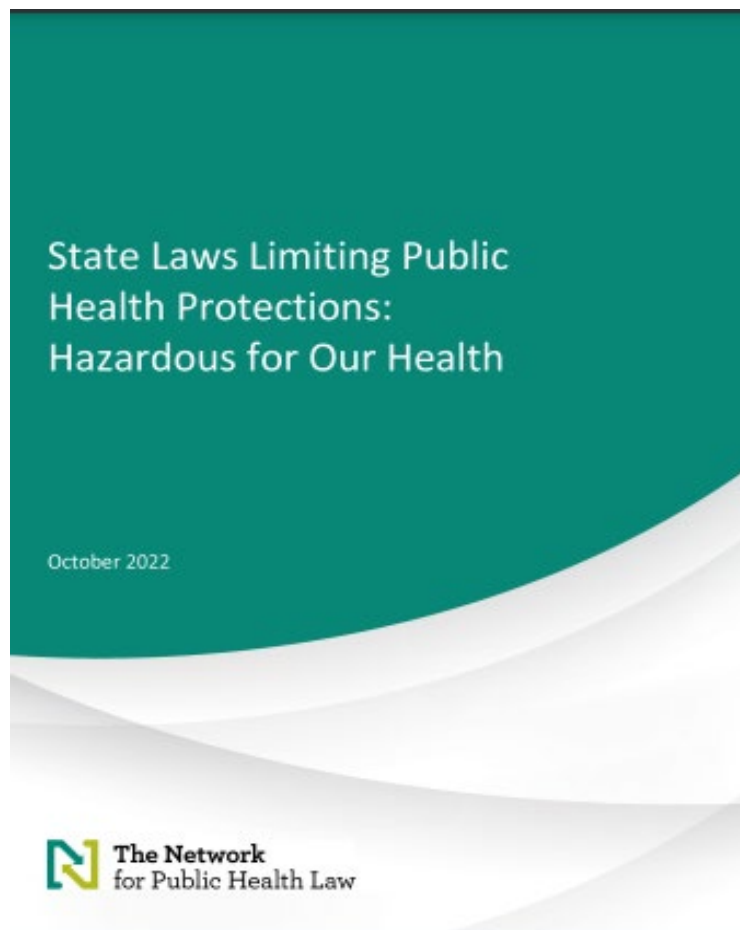
Jill Krueger

January 26, 2023

**ACT** for  
**Public  
Health**



## There has been a Coordinated Backlash



**\*Prohibitions on Public Health Interventions**

**\*Shifts in Authority**

**\*Limitations on Executive Orders**

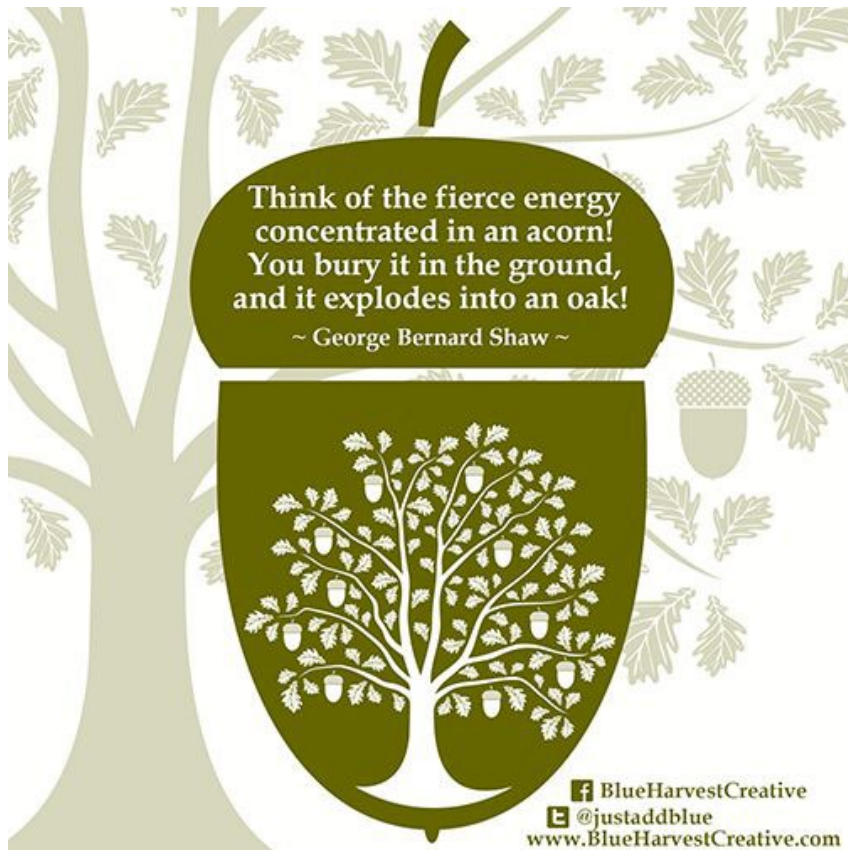
**\*Elevation of Individual Rights over Common Good**



## Has there been a Coordinated Response?

APHA  
Trust for America's Health  
Local Solutions Support Center  
ASTHO  
NEHA  
Act for Public Health  
Bipartisan Policy Center  
NNPHI NALBOH  
NACCHO  
Uniform Law Commission  
CDC Foundation  
American Heart Association

## A Single TA Request is Like an Acorn



March 2021, a public health leader asked during a webinar, “What are the proactive steps that states are taking to strengthen public health and public health authority, rather than simply react to threats to public health authority?”





- » ***What is our vision for public health?***
- » ***What tools will help us get there?***





## **We Need a Public Health System that is:**

- » **Effective**
- » **Informed by Expertise, Emerging Evidence, and Lived Experience**
- » **Equitable and Anti-Racist**
- » **Has Access to Resources (Human, Financial, Data, Infrastructure)**
- » **Able to Act Quickly and Lead Adaptively**
- » **Transparent and Democratic**
- » **Trusted by the Community**
- » **Competent, Confident Resilient**
- » **Balanced between the Common Good and Individual Rights**



## Tools of Public Health Law

- » **Power to tax and spend**
- » **Power to alter the informational environment**
- » **Power to alter the built environment**
- » **Power to alter the socioeconomic environment**
- » **Direct regulation—not the only option!!**
- » **Indirect regulation through the tort system**
- » **Deregulation (when law is a barrier to public health)**

Source: LAWRENCE GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 28–38 (2008, 2<sup>nd</sup> ed.).



## Bright Spots





## Public Health Interventions/ Emergency Orders

- » **WHAT THESE TYPES OF LAWS DO** Empower public health officials and others to take action to protect community health, while designed to restrict individual liberties no more than is reasonable and necessary
- » **EXAMPLES** Maine LD 1 COVID 19 Patient Bill of Rights—requires health insurance providers to cover COVID-19 screening, testing, and vaccine costs at no cost to the patient
- » **HELPFUL BECAUSE** While some individuals sought to be free of a requirement to obtain COVID vaccines (as a condition of employment, for example), other individuals wished to obtain COVID screening, testing, and vaccination, but may have been concerned that costs would be imposed during the pandemic or in the future. Ensuring that those who seek vaccination are not barred by cost protects community health.



# What else “Counts” as a Public Health Intervention/ Exercise of Public Health Authority?

## » **Safety Net Legislation**

Eviction Moratoria

Unemployment Benefits and Paid Sick Leave

Access to Green Space

## » **Climate, Environment, and Environmental Justice Legislation**

Washington State Healthy Environment for All (HEAL) Act

Climate and Equitable Jobs Act in Illinois

## » **Mental Health**

Indiana and Louisiana teacher training re trauma and ACEs

States begin to implement 988, national suicide prevention hotline

Expanded Telehealth (including MAT and OAT for substance use disorder)



## Funding

- » **WHAT THESE TYPES OF LAWS DO** Establish stable, predictable funding streams, providing a strong foundation for a sound public health system
- » **EXAMPLES** Include
  - » **Foundational Public Health Services (Washington)**
  - » **Public Health Modernization (Oregon)**
  - » **Public Health Transformation (Kentucky)**
  - » **State Action for Public Health Excellence (Massachusetts)**
- » **HELPFUL BECAUSE** Predictable funding streams support long-term planning and ongoing implementation, as well as helping to attract and retain a skilled, dedicated workforce with the capacity to address ongoing and emerging public health challenges





## Health Equity

- » **WHAT THESE TYPES OF LAWS DO** Give public health officials the authority to identify, quantify, analyze, and correct disparate health opportunities and outcomes, including those associated with race and racial discrimination
- » **EXAMPLES**
- » **COVID Health Equity Task Forces (Virginia SB 1296)**
- » **Declarations of Racism as a Public Health Crisis (Minn House of Rep HR 1, 2020 2<sup>nd</sup> special session)**
- » **Equitable Engagement Compensation Programs (Oregon DOT)**
- » **HELPFUL BECAUSE** Public health analysis of COVID 19 morbidity and mortality demonstrated disparities associated with race, ethnicity, status as a frontline worker, and rural or urban residence, among others



## Governance

- » **WHAT THESE TYPES OF LAWS DO** Establish the manner of governing in order to achieve goals, provide checks and balances
- » **EXAMPLES** Indiana Executive Order 21-21 establishing public health commission. Commission Report is expected to inform governor's legislative agenda.  
  
[https://www.in.gov/health/files/GPHC-Report-FINAL-2022-08-01\\_corrected.pdf](https://www.in.gov/health/files/GPHC-Report-FINAL-2022-08-01_corrected.pdf)
- » **HELPFUL BECAUSE** The way in which public health (or any other government entity) takes action may support achieving societal goals, or undermine them. Government processes may increase trust and engender community support, or erode them.





## Infrastructure

- » **WHAT THESE TYPES OF LAWS DO** Commit the use of public funds to develop, build, and maintain critical facilities, structures, and systems that provide the foundation for public health
- » **EXAMPLES INCLUDE**
- » **South Dakota SB 58** authorizing construction of a new public health lab
- » **Numerous states** have enacted laws authorizing use of funds appropriated under the federal American Rescue Plan Act
- » **HELPFUL BECAUSE** Infrastructure such as public health labs and modern IT systems support early detection, surveillance, and prevention of disease, including rapid, secure, and useful communication of data, as well as other day to day public health functions. In addition, they provide jobs



## Workforce

- » **WHAT THESE TYPES OF LAWS DO** Support the public health workforce by providing protection from threats and harassment; providing additional pay in recognition of service during a public health emergency; providing systemic supports to address trauma and foster resilience; and providing education and training opportunities to recruit and retain a professional public health workforce
- » **EXAMPLES**
- » **Colorado HB 1041** is an example of a “doxxing law” to protect the personal information of public officials, public employees, or all persons. Other examples include laws in Oklahoma and Oregon
- » **HELPFUL BECAUSE** The public health workforce served at the frontlines of the COVID pandemic, and is integral to a positive vision (and reality) for public health in the future.



# How Do We Decide?



## How Do We Decide?

- » At a workshop on protecting public health authority at APHA Annual in Boston last fall, one of the participants asked, “How did the states decide which model to advocate for?” (asking specifically in reference to innovative legislative approaches to state funding and budget)
- » That’s an excellent question.



## Five Essential Public Health Law Services

**Access to Evidence and Expertise** - What is the problem? What evidence do we have? Who is working on this? What needs to be done?

**Designing Legal Solutions** - What is the best way to use the law to do this?

**Engaging Communities/Building Political Will** – Educate and mobilize to get the good idea into law

**Enforcing and Defending Legal Solutions** – Ensure capacity and accountability for implementation and defense

**Policy Surveillance and Evaluation** - Assess impact of solution, what works

Burris S, Ashe M, Blanke D, Ibrahim J, Levin DE, Matthews G, Penn M, and Katz M. *Better Health Faster: The 5 Essential Public Health Law Services*. Public Health Rep. 2016 Nov;131(6):747-753.



# The Three Bears, Paul Galdone



## Simple Gifts

Tis the gift to be simple, 'tis the gift to be free  
'Tis the gift to come down where we ought to be,  
And when we find ourselves in the place just right,  
'Twill be in the valley of love and delight.

When true simplicity is gained,  
To bow and to bend we shan't be ashamed,  
To turn, turn will be our delight,  
Till by turning, turning we come 'round right.

A dance song by Shaker elder, Joseph Brackett Jr.  
Composed later by Aaron Copeland, Appalachian Spring

## Contact Me

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# TRACKING PUBLIC HEALTH AUTHORITY LITIGATION

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Wendy E. Parmet

Northeastern University School of Law

# Roadmap

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- Our studies
- The early COVID-19 cases
- Two years of judicial decisions
- Religious liberty cases
- Vaccine cases
- The Major Questions doctrine
- Implications for public health practice

# Our Studies

- March 20, 2020 – May 29, 2020: Review of 53 decisions citing *Jacobson*
- March 2020 – July 1, 2022: Review of 1,069 public health authority-related decisions
- July 1, 2022 – Dec. 23, 2022: Review of vaccine mandate cases

Not included: contract claims, tort claims, detention claims, ADA claims, tribal cases

## Judicial Review of Public Health Powers Since the Start of the COVID-19 Pandemic: Trends and Implications

Wendy E. Parmet, JD, and Faith Khalik, JD

During the COVID-19 pandemic, officials in the United States at all levels of government utilized their legal authorities to impose a wide range of measures designed to control the spread of SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2; the causative agent of COVID-19), including shutting down businesses, limiting the size of gatherings, requiring masking, and mandating vaccination.

These orders and regulations were challenged in court cases that resulted in more than 1000 judicial decisions. Common claims were based on alleged procedural and substantive due process violations, violations of religious liberty, and violations of officials' scope of authority. In more than three-fourths of the decisions, the court refused to grant the plaintiffs the relief sought. However, plaintiffs found success in several notable cases, especially in federal court.

These recent decisions, as well as broader prepandemic trends, have important implications for public health officials' exercise of their public health powers, especially when those exercises implicate religious liberty. In this legal environment, officials may need to rely more on the powers of persuasion than on their legal authority alone. (*Am J Public Health*. Published online ahead of print January 19, 2023:e1-e8. <https://doi.org/10.2105/AJPH.2022.307181>)



ANALYTIC ESSAY **AJPH**

PHOTO COURTESY OF ACT FOR PUBLIC HEALTH

# Two Plus Years of Cases

Over 1,000 decisions from March 2020 to July 2022

Majority in federal court (887 vs. 182)

Commonly-discussed claims

- Due process (430 decisions)
- Equal protection (329 decisions)
- Free Exercise (271 decisions)
- Scope of authority (20 decisions by state supreme courts)
- Administrative process (85 decisions)

# MOST COMMONLY CHALLENGED MEASURES (NUMBER OF DECISIONS) MARCH 2020-JULY 2022

ACT<sup>for</sup>  
Public  
Health

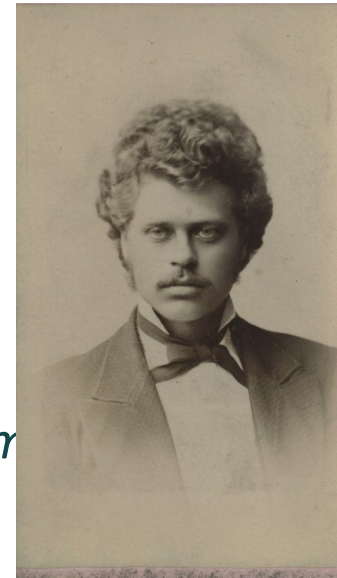


PUBLIC  
HEALTH  
LAW  
WATCH

# The Early Cases

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- Challenging social distancing laws
- What did *Jacobson* mean?
- The “suspension principle”
- The 2-step
- Substantial deference
  - *South Bay United Pentecostal Church v. Newsom*



# A Change in Approach

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- *Roman Catholic Diocese v. Cuomo*
- From the “shadow docket”
- Sidelining *Jacobson*
- Moving to strict scrutiny
- State must show the specific plaintiff caused harm; cannot act to prevent transmission



# Case Outcomes

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- Most decisions in favor of public health authority (over  $\frac{3}{4}$ )
- Plaintiffs more likely to win in administrative procedure cases than other types of cases (33 out of 85)
  - Free Exercise cases – 65 out of 271
  - Due process cases – 61 out of 430
- Significant rulings in favor of plaintiffs
  - *Ala. Assoc. of Realtors v. CDC* (CDC eviction moratorium)
  - *NFIB v. OSHA* (OSHA vaccine mandate)
  - *Health Freedom Defense Fund v. CDC* (transportation mask mandate)



# The Evolution of Free Exercise Law During the Pandemic

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- Pre-pandemic, ***Smith v. Employment Division***
  - Neutral and generally applicable laws subject only to rational basis review
- ***Roman Catholic Diocese v. Cuomo***
  - Strict scrutiny required because some secular activities treated more favorably than religious activities
  - No deference to health officials on why some activities more restricted than others
- ***Tandon v. Newsom***
  - Order did not mention worship, but strict scrutiny still required
- ***Fulton v. City of Philadelphia***
  - Non-COVID cases
  - *Smith* not overruled, but weakened
  - *Discretion to provide an exemption triggers strict scrutiny*

# Implications for Childhood Vaccine Mandates

- Support for all childhood vaccines waning
  - Percentage of adults who think children should receive MMR vaccine to attend school dropped from 82% in 2019 to 71% in 2022 (KFF)
- Pre-*Fulton* and *Tandon* cases
  - *C.F. v. New York City Dep't of Health & Mental Hygiene*
  - *F.F. v. State*
- A shift?
  - *M.A. v. Rockland Cty. Dep't of Health*



# Major Questions Doctrine

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- Bars administrative agencies from issuing orders or regulations with major economic or political significance without explicit statutory authority
- Supreme Court
  - Eviction moratorium, OSHA vaccine mandate, CMS vaccine mandate
- Lower federal courts
  - CDC transportation mask mandate, federal contractor vaccine mandate
- **But what is a “major” question?**

# Takeaways for Public Health

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- Public health wins most of the time, but not always
- It is crucial to assemble a record demonstrating necessity of public health measures
- Take special care with orders that can affect religious practices
  - Need for well-considered procedures for denying exemptions
  - Cannot question whether a law clashes with religious views, but can question whether a belief is sincerely held or religious
  - Processes for exemptions cannot be punitive or burdensome
- Commence rulemaking procedures ASAP
- Persuasion and communications may be ore important than legal orders
- Mandates can be useful; they can also backfire!

# Act for Public Health

..... An initiative of the Public Health Law Partnership .....

[www.ActForPublicHealth.org](http://www.ActForPublicHealth.org)

[What is Public Health Authority FAQ](#)

[Resources](#)

**ACT** for  
**Public  
Health**

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## About Us

We are an initiative of the Public Health Law Partnership, a group of organizations and experts applying their decades of experience in public health law and policy work to help push back against legislative attempts to block public health officials' ability to do their job.

## Resources

### Public Health Authority Litigation Tracking

December 5, 2022



### Nearly Half Of All States Have Now Passed Laws Limiting Authority To Respond To Public Health Emergencies

December 5, 2022



Newly updated data released today by  
the Temple University Center for Public  
Health Law Research on [LawAtlas.org](https://lawatlas.org)

### Public Health Authority

December 5, 2022



Dissatisfaction and anger at perceived  
overreaches by governors and public  
health officials in response to the  
COVID-19 pandemic has resulted in an  
onslaught of legislation to limit the  
authority of public health to act to...

<https://actforpublichealth.org/resources/>

# What is Public Health Authority FAQ

Public health authority refers to a government body's (usually a health or public health department or agency) legal ability to further public health by using tools such as community engagement, data collection, scientific research, laws and regulations, enforcement, and the many methods of sharing information and guidance with those who need it most.

## **How does limiting public health authority impact the practice of public health?**

Rolling back public health authority changes the practice of public health in significant ways, including by wresting control away from the officials closest to the communities they serve, hampering effective responses to rapidly evolving public health emergencies, and elevating politics over public health expertise and evidence-based decision making.

## **How does limiting public health authority impact the health of our communities and health equity?**

By thwarting public health officials' ability to respond quickly and effectively to identified community needs, reactionary rollbacks in public health authority jeopardize the health of our communities and further compound existing community health inequities.

<https://actforpublichealth.org/public-health-authority/>

[WHO WE ARE](#)[OUR WORK](#)[SUPPORT US](#)

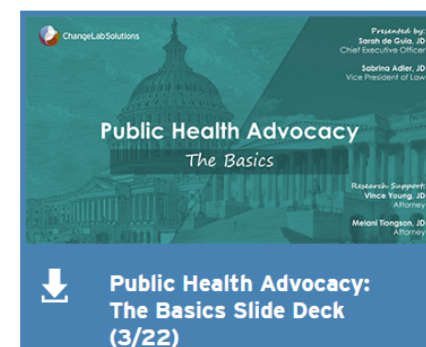
# Public Health Advocacy: The Basics

PRESENTATION

How can public health practitioners engage in advocacy even when faced with restrictions on lobbying? This one-hour webinar, hosted by the American Public Health Association and ChangeLab Solutions, aims to help new and seasoned advocates understand the general ethics and legalities related to lobbying and advocacy. The webinar

- Defines lobbying and distinguishes between direct and grassroots lobbying;
- Explains the restrictions on lobbying for federal agencies and 501(c)(3) nonprofit

## DOWNLOADS







# Preserving Local Public Health Powers

## How to resist policy efforts to limit public health authority

FACT SHEET | GOOD GOVERNANCE

Public health is best served when decisions are driven by experts and experience rather than politics, but in the wake of COVID-19, some state legislatures continue to propose and pass bills that limit the authority of local public health officials. To help localities better protect the public's health, ChangeLab Solutions has developed a set of resources for advocates, detailing what public health authority is, how it works, and the types of restrictions that public health departments are facing.

### DOWNLOADS



#### Help Ensure That Public Health Professionals Can Continue to Protect Community Well-Being

How communities can identify, understand, and resist potential legislative and other legal limitations on their traditional public health powers

What do public health professionals do?

We all want to live in communities where **everyone** has what they need to live healthy, happy lives. Public health professionals in state and local agencies use their governmental powers and resources to protect and promote health and well-being for all. This includes **routine actions** like inspecting to promote safety in our homes and restaurants; preventing illnesses through education and services; providing vaccines; reducing incidents of injury and violence in our neighborhoods; supporting moms and babies in their early days; and counteracting the harmful influence of commercial tobacco companies on our kids. The public health workforce must also prepare for and respond to **emergencies** that threaten our health and safety, such as natural disasters, security threats, and infectious diseases like COVID-19.

Where do public health powers come from?

Governmental public health powers are rooted in states' authority to take actions that will protect residents' health and safety – the police power reserved to them in the US Constitution. Elected officials in state legislatures delegate some of this authority to state and/or local agencies like health departments. These agencies maintain expertise in public health and familiarity with community needs and conditions so that they can respond quickly and flexibly to public health threats. Local health departments also tend to be



#### Help Ensure That Public Health Professionals Can Continue to Protect Community Well-Being (10/22)

FACT SHEET



#### Why Keep Public Health Powers Close to Local Communities? (10/22)

FACT SHEET

## Trends of legal shifts in public health authority, from [“Help Ensure That Public Health Professionals Can Continue to Protect Community Well-Being”](#)

### *Via legislation...*

1. **Preempting** lower level govt actions
2. **Broadening exemptions** from public health measures
3. **Shifting authority** between government entities (risks putting politics above data/expertise)
4. **Chilling legislation** (raises burdens/risks of acting)

### *In the courts...*

1. **Narrowing agency power** (limiting what agencies can do)
2. **Broadening use of stricter review** if any “free exercise” claim is made
3. **Raising evidentiary standards** for agency decisions (increasing amount and type of data required to justify action)

# Messaging

bmsg

real  
Language  
LLC

WHO WE ARE

OUR WORK

SUPPORT US

**UPDATE:** [Act for Public Health](#) commissioned [Berkeley Media Studies Group](#) and [Real Language](#) to assess narratives around the current attacks on public health's authority. As a result, these partners came together to create a report recommending responses that will enable public health practitioners to communicate more effectively about the essential work they do.

## Webinar



**Making the case for public health: A framing and communication webinar**

**Frame public health as indispensable**

Consider the way fire departments are framed

Watch later Share

0:00 / 1:01:46

YouTube

The video player shows a slide with the text 'Consider the way fire departments are framed' and a photograph of a firefighter on a roof. The Berkeley Media Studies Group (BMSG) logo is visible in the bottom right corner of the slide.

2  
0  
2  
2

# Championing public health amid legal and legislative threats

Framing and language  
recommendations



real  
Language  
llc

media  
berkeley studiesgroup

# Act for Public Health

..... *An initiative of the Public Health Law Partnership* .....

## Communications

- Act for PH website
- Email list
- Social media
- Op-eds/media outreach
- Work with communications experts like BMSG and Burness

## Resources

- Analyses of legislative and litigation tracking
- Fact sheet on equity impacts
- Fact sheet on preemption and other forms of legal limitations
- Trainings on messaging
- Trainings on advocacy and lobbying

## TA

- Priority states
- Other states, as needed
- In collaboration with APHA and other partners
- Amicus brief coordination and support



**Website**

<https://actforpublichealth.org/>



**TA Request Form**

**2023**

# **PUBLIC HEALTH LAW CONFERENCE**

## **CALL FOR ABSTRACTS**

**We invite you to submit an abstract  
for an individual or panel  
presentation at the 2023 Public  
Health Law Conference**

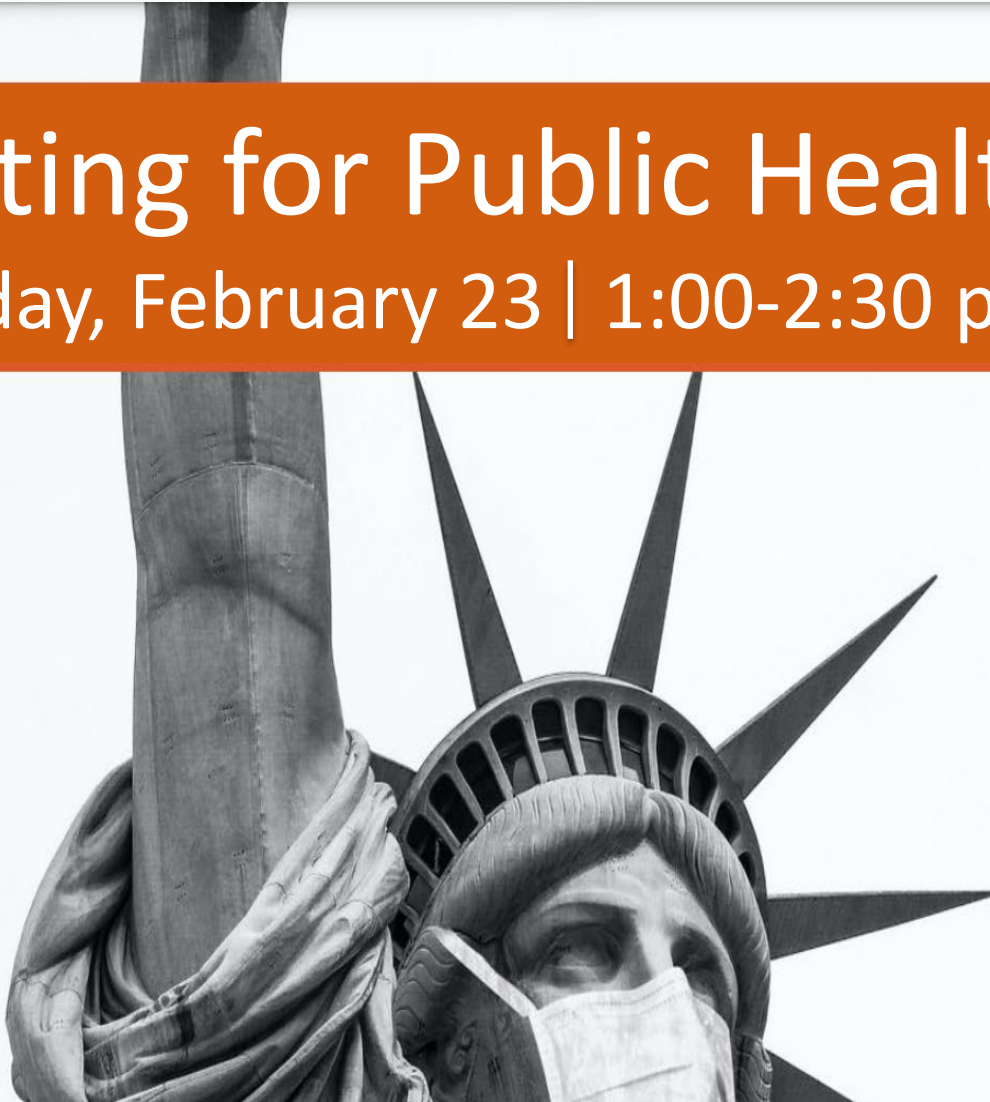
**DEADLINE: February 6, 2023, 11:59 PM ET**

[networkforphl.org/2023conference](https://networkforphl.org/2023conference) | [#PHLC2023](https://twitter.com/PHLC2023)



# Fighting for Public Health

Thursday, February 23 | 1:00-2:30 pm EST

A black and white photograph of the Statue of Liberty's head and crown. The statue is wearing a white surgical face mask over its mouth and nose. The crown's spikes are visible behind the head.

**How do we  
strengthen  
public health  
advocacy at  
local, state, and  
national levels?**

**Register online at [www.networkforphl.org](http://www.networkforphl.org)**