

PREEMPTION: COUNTERING OPPOSITION MESSAGING

Coordinated messaging from industry lobbyists and state legislators who support preemption is similar or identical across issues and states.

This document lays out a number of predictable pro-preemption statements or messages, followed by accurate messages you can use to refute them, or to counter them in advance.

In general, expect to counter the argument that “consistent” state standards (that eliminate or limit local governments’ policy making authority) are “pro-business” and will prevent a “hodgepodge” or “patchwork” of local regulation that will “confuse customers” and make it more difficult for businesses to operate. The proponents of preemption also state that preemption promotes “uniformity,” without providing any evidence that uniformly weak laws across diverse communities of differing sizes and characteristics is desirable, let alone beneficial to community health.

OPPOSITION POINT

Stronger health and safety rules at the local level will place an unnecessary burden on businesses.

“I was approached by some local restaurant owners and the state restaurant association, who told me about the dilemma they might find themselves in if we suddenly had a hodgepodge regulation across the state, with one local entity requiring nutrition labeling on menus and another requiring something different.”¹

- Representative Ken Johnson (R), Moulton, Alabama

COUNTERPOINT

In the past, this same argument was used to oppose local smoking ordinances. There is now strong evidence from decades of experience that local health and safety ordinances do not hurt businesses and can, in some cases, improve business (as in the case of smokefree restaurants and bars).²

“I think the less regulation, the better...but there are times when we have to pass ordinances for the health and safety of our people. We’re here every day, and they’re in Austin once every two years.”³

- Mayor Betsy Price (R), Fort Worth, Texas

OPPOSITION POINT

A uniform state (or federal) health standard benefits consumers, families, and children.

*“We feel it is in the best interests of the consumer to have one uniform standard.”*⁴

- Sue Hensley, National Restaurant Association, Washington, D.C.

*“The key words are consistency and uniformity.”*⁵

- Mike Cashion, Mississippi Hospitality and Restaurant Association

COUNTERPOINT

The United States is made up of very diverse states and local communities. Communities need the authority to adopt stronger health protection for their residents than the state, and states need the power to adopt stronger protections than the federal government.

*“You know what? If little Alligator, Miss., wanted to do that, that’s up to the people that live there. It is not up to the state to tell the people at the local level what to do... They’re just using this to mask what the bill is really about, which is about taking away home rule.”*⁶

- Mayor Chip Johnson (R), Hernando, Mississippi

OPPOSITION POINT

Local health ordinances will confuse customers and therefore harm businesses.

*“[Local labeling requirements on trans fats or the size of sodas] create a market that is confusing for consumers and costly for business owners.”*⁷

- Jason Watkins, lobbyist for the Kansas Restaurant and Hospitality Association

COUNTERPOINT

Customers have the right to clear, accurate information that lets them make informed choices and gives them confidence in the products they buy. This is an opportunity for businesses to promote the quality of their [products/services] and respond to customer demand.

*“Cities, the government closest to the people, embody the idea that ‘We the People’ should be in control. Cities provide the services we cannot do without. Those services reflect the will of the local taxpayers. They are not the kind of services people think of when they say they want less government.”*⁸

- Texas Municipal League

OPPOSITION POINT

The existence of different local policies is a liberal strategy contrary to conservative principles.

“Texas is being California-ized with bag bans, fracking bans, tree-cutting bans... We are forming a patchwork quilt of bans and rules and regulations that are eroding the Texas Model... Large cities represent about 75 percent of the population in this state are doing this to us. Unchecked over-regulation by cities will turn the Texas miracle into the California nightmare.”⁹

- Governor Greg Abbott (R), Texas

“[Some] overzealous political subdivisions [have] improperly restricted economic activity by defying state laws that are designed to foster free enterprise and economic freedom... Cities must not get away with undermining or contradicting state law. Local control is not a blank check.”¹⁰

- Senator Don Huffines (R), Dallas, Texas

COUNTERPOINT

The Founding Fathers believed that the government closest to the people governs best. It should also be noted that, while local governments in California have retained and exercised their authority to adopt local laws addressing a wide range of public health and safety issues, in recent years, California's economy has remained among the strongest in the US.¹¹

“It has seemed hypocritical that the state wants the federal government to give the states more power, yet at the state level, they want to take power away from cities and counties.”¹²

- Council member Darren Hodges (R), Fort Stockton, Texas, in support of his town's decision to ban plastic bags

“The government closest to the people is the government best for the people... What you're about to see is a lot of litigation between cities and state government.”¹³

- Sen. Royce West (D-Dallas), speaking on his opposition to HB 40, Texas' oil and gas preemption bill that passed in 2015

“As policymakers in South Dakota, we often recite that the best government is the government closest to the people... [HB 1008] removes the ability of local school districts to determine the most appropriate accommodations for their individual students and replaces that flexibility with a state mandate.

I believe local school officials are best positioned to address them. Instead of encouraging local solutions, this bill broadly regulates in a manner that invites conflict and litigation, diverting energy and resources from the education of the children of this state...

For these reasons, I oppose this bill and ask that you sustain my veto.”¹⁴

- Governor Dennis Daugaard, (R), South Dakota, HB 1008 veto message (March 1, 2016)

OPPOSITION POINT

Setting a ceiling on local or state policies is a reasonable compromise to get a weak state (or federal) law. It assures that some cities and states, which may not pass their own policies, are at least covered to some degree.

“When faced with preemption, public health advocates should carefully weigh the potential benefits of the proposed policy in question and understand that the impacts of preemption may be dependent on their specific political context.”

- Tung et al. Political Factors Affecting the Enactment of State-Level. AJPH (June 2014)

COUNTERPOINT

Preemption puts current and future public health at risk by setting a ceiling on the health protection local and state governments can set. Residents of a city or state may already support higher levels of protection, even if their elected state or federal representatives don't realize it.

Future scientific findings may reveal the need for stronger protections. Ceiling preemption puts an unnecessary roadblock up against policies that protect our communities' health and safety. Savings clauses (non-preemption clauses), not preemption clauses, should be included in every state and federal health and safety bill.

“Federal or state (ceiling) preemption of state and local authority can often be harmful from a public health standpoint because it can compromise the ability of public health practitioners to implement more stringent standards that may be important and well accepted in local settings. Ceiling preemption also interferes with local control over local needs and with local level accountability, and it could limit the ability of jurisdictions to meet the needs of constituents.”¹⁵

- Institute of Medicine, *For the Public's Health: Revitalizing Law and Policy to Meet New Challenges*

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- ⁶ Hess J. Soda Wars Backlash: Mississippi Passes 'Anti-Bloomberg' Bill. NPR. March 12, 2013. <http://www.npr.org/sections/thesalt/2013/03/12/174048623/mississippi-passes-anti-bloomberg-bill>. Accessed January 18, 2017.
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- ¹⁰ Scanlon K. In Texas, State Leaders Attack Local Governments for Going Big on Regulations. The Daily Signal. March 15, 2015. <http://dailysignal.com/2015/03/15/in-texas-state-leaders-attack-local-governments-for-going-big-on-regulations/>. Accessed January 18, 2017.
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