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## PREEMPTION: Executive Order by the Governor to Ensure a Safe & Healthy Georgia

Marisa P. Ahlzadeh

Georgia State University College of Law, mahlzadeh1@student.gsu.edu

Fanny Chac

Georgia State University College of Law, fchac1@student.gsu.edu

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## PREEMPTION

### *Executive Order by the Governor to Ensure a Safe & Healthy Georgia: Preemption*

GEORGIA CONSTITUTION:	GA. CONST. art. III, § 6
CODE SECTIONS:	O.C.G.A. §§ 38-3-51; 45-12-30
EXECUTIVE ORDER:	Ga. Exec. Order No. 04.02.20.01
EFFECTIVE DATE:	April 2, 2020
SUMMARY:	The doctrine of preemption expresses the idea that “a higher authority of law will displace a lower authority of law when the two authorities come into conflict.” <sup>1</sup> Preemption exists on both the federal and state level. According to the Georgia Constitution, local laws are permissible if they do not conflict with the state law on the subject. <sup>2</sup> During a Public Health State of Emergency, the Governor of Georgia maintains certain expanded powers to take necessary action for the health and safety of the public. <sup>3</sup> On April 2, 2020, Governor Brian Kemp (R) used these expanded powers to enact an Executive Order that preempted local Georgia Orders related to the COVID-19 pandemic. <sup>4</sup>

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1. *Preemption*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/Preemption> [<https://perma.cc/9DXN-EEM9>].

2. GA. CONST. art. III, § 6, para. 6.

3. Memorandum from Georgia Gov.’s Office on the Pub. Health State of Emergency to Members of the Georgia Gen. Assemb. (Mar. 15, 2020) (on file with the Georgia State University Law Review) [hereinafter Memorandum from Georgia Gov.].

4. Ga. Exec. Order No. 04.02.20.01, at 8 (Apr. 2, 2020) (on file with the Georgia State University Law Review).

*Introduction*

Amidst chaos and fear, as the COVID-19 pandemic spread throughout the country and the world, leaders on the local, state, and federal levels faced the challenge of deciding how to best protect their citizens. On March 11, 2020, the World Health Organization designated COVID-19 a global pandemic as concerns about the virus surged across the nation, and the death toll surpassed 100,000 worldwide.<sup>5</sup> Two days later on March 13, 2020, President Donald Trump (R) declared a national emergency to address the spread of COVID-19 in the United States.<sup>6</sup> As the days passed and the virus continued to spread, President Trump issued Executive Orders regarding the allocation of medical resources and an Order designed to prevent the hoarding of medical supplies.<sup>7</sup> Like the President's Executive Orders, leaders such as Georgia's Governor Brian Kemp (R) and local leaders such as Mayor Shirley Sessions of Tybee Island, Georgia, issued their own Orders to protect their citizens and communities.<sup>8</sup>

Governor Kemp declared a Public Health State of Emergency for the State of Georgia one day after President Trump declared a national emergency.<sup>9</sup> Governor Kemp's declaration marked Georgia's first-ever public health emergency, which granted the Governor additional powers beyond a general state of emergency.<sup>10</sup> After hours of debate, Georgia lawmakers ratified Governor Kemp's additional and expanded powers, which included authority to extend the Public Health State of Emergency without their further approval, but the decision was not an easy one.<sup>11</sup> One concern, expressed by

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5. Jamie Ducharme, *World Health Organization Declares COVID-19 a 'Pandemic.' Here's What that Means*, TIME (Mar. 11, 2020, 12:39 PM), <https://time.com/5791661/who-coronavirus-pandemic-declaration/> [<https://perma.cc/4TGW-CFMG>].

6. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

7. Exec. Order No. 13,909, 85 Fed. Reg. 56 (Mar. 23, 2020); Exec. Order No. 13,910, 85 Fed. Reg. 59 (Mar. 23, 2020).

8. Ga. Exec. Order No. 03.14.20.01 (Mar. 14, 2020) (on file with the Georgia State University Law Review); Tybee Island, Ga., Ordinance 2020-14 (Apr. 2, 2020) (on file with the Georgia State University Law Review).

9. Ga. Exec. Order No. 03.14.20.01, *supra* note 8.

10. Memorandum from Georgia Gov., *supra* note 3.

11. Jill Nolin, *Lawmakers Grant Kemp Expanded Powers in Public Health Emergency*, GA. RECORDER (Mar. 16, 2020), <https://georgiarecorder.com/2020/03/16/lawmakers-grant-kemp-expanded->

State Representative Bert Reeves (R-34th), was what would happen if too many lawmakers became sick and could not vote on whether Governor Kemp's powers should continue without their approval.<sup>12</sup> While Governor Kemp's expanded emergency powers enjoyed bipartisan support within the legislature, interest groups such as the American Civil Liberties Union (ACLU) of Georgia expressed concerns.<sup>13</sup> Andrea Young, Executive Director of the ACLU of Georgia, noted the Governor's emergency powers lacked additional oversight and transparency.<sup>14</sup>

### *Background*

#### *Preemption*

Preemption is the legal doctrine that recognizes that a higher level of government can limit or eliminate "the power of a lower level of government to regulate a certain issue."<sup>15</sup> Preemption comes in several forms. Express preemption describes when a law explicitly states that it "preempt[s] a lower-level law-making authority."<sup>16</sup> Implied preemption does not include explicit preemptive language but occurs if the higher-level law comprehensively regulates the issue or if the lower-level law interferes with the goal of the higher-level law.<sup>17</sup> In addition, preemption varies based on how mild or concerning the form of preemption may be.<sup>18</sup> Floor preemption, the

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powers-in-public-health-emergency/ [https://perma.cc/NY6P-8ER7].

12. *Id.*

13. Greg Bluestein & Maya T. Prabhu, *Georgia Lawmakers Grant Kemp Vast New Powers to Combat Coronavirus*, ATLANTA J.-CONST. (Mar. 16, 2020), <https://www.ajc.com/blog/politics/georgia-lawmakers-poised-give-kemp-new-powers-combat-coronavirus/IBjcf2rXIGecEI1SpFhesK/> [https://perma.cc/X8SV-B3ZQ].

14. *Id.*

15. PUB. HEALTH L. & POL'Y, FUNDAMENTALS OF PREEMPTION 1 (2010), <https://www.publichealthlawcenter.org/sites/default/files/resources/nplan-fs-fundamentals-2010.pdf> [https://perma.cc/LX5B-2WP7].

16. *Id.* at 2. Preemptive intent can be worded in many ways. CHANGELAB SOLUTIONS, PREEMPTION BY ANY OTHER NAME: WORDS AND PHRASES INDICATING PREEMPTIVE INTENT 1 (2013), [https://www.changelabsolutions.org/sites/default/files/Preemption\\_OtherName\\_FS\\_FINAL\\_20130911.p](https://www.changelabsolutions.org/sites/default/files/Preemption_OtherName_FS_FINAL_20130911.pdf)df [https://perma.cc/H2PM-K63M].

17. PUB. HEALTH L. & POL'Y, *supra* note 15, at 2.

18. *Id.* at 2.

mildest form of preemption, occurs “where the higher level of government passes a law that establishes a minimum set of requirements, and expressly allows lower levels of government to pass or enforce laws that impose more rigorous requirements.”<sup>19</sup> Ceiling preemption prevents lower levels of governments “from requiring anything more or different.”<sup>20</sup> Preemption is a tool that, if used effectively, can make higher-level government responses more effective.

Historically, the Georgia Constitutions of 1945 and 1976 contained uniformity clauses, which stated that “[l]aws of a general nature shall have uniform operation through the State, and no special law shall be enacted in any case for which provision has been made by existing general law.”<sup>21</sup> The Supreme Court of Georgia interpreted that uniformity clause provision as both a preemption rule and a conflict rule.<sup>22</sup> Thus, there were two opposing ways to read the uniformity clause. According to the preemption analysis, if the legislature “entered a field by enacting a general law,” that field was not open to regulation by special or local laws.<sup>23</sup> Under the conflict analysis, special laws were only prohibited if they were in “genuine conflict” with a general law.<sup>24</sup> “Based on these differing interpretations, it was unclear whether the uniformity clause preempted any special or local law when the [S]tate had passed a general law on the subject or whether [the clause] merely prohibited conflicts between general and local laws.”<sup>25</sup>

The Georgia Constitution of 1983 resolved this interpretation issue, granting local governments “concurrent jurisdiction with the state to exercise certain police powers in areas of concern to both.”<sup>26</sup> The current Georgia Constitution uniformity clause states:

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19. *Id.* at 3.

20. *Id.*

21. GA. CONST. of 1945, art. I, § 4, para. 1; GA. CONST. of 1976, art. I, § 2, para. 7.

22. *Franklin Cnty. v. Fieldale Farms Corp.*, 270 Ga. 272, 274, 507 S.E.2d 460, 462 (1998).

23. *Id.* A general law preempts local or special laws or ordinances on the same subject and applies uniformly throughout the entire state, whereas a special law is a municipal ordinance that deals with matters covered by the general law and has the same effect as a local law enacted by the state legislature. *Sturm, Ruger & Co. v. City of Atlanta*, 253 Ga. App. 713, 718, 560 S.E.2d 525, 529 (2002).

24. *Franklin Cnty.*, 270 Ga. at 274, 507 S.E.2d at 462.

25. *Id.*

26. *Id.* at 274–75, 507 S.E.2d at 462.

Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.<sup>27</sup>

Thus, under the Georgia Constitution, local laws are preempted by state laws that regulate the same subject matter. However, if the local law does not conflict with the state law and the state law so authorizes, the local government may act despite the state law. Sometimes a state law “occupies a field” so that a local order is preempted even if the state law “insufficiently achieves essential public health outcomes.”<sup>28</sup> When a state statute occupies such an area of the law, Georgia courts uniformly strike local ordinances that take more restrictive actions than are permissible per the statute. As explained by Georgia courts, however, laws are not conflicting so long as “the local law does not impair the general law, but rather augments and strengthens it.”<sup>29</sup>

For example, in *Hill v. Tschannen*, the court addressed whether a local ordinance was preempted by state statute.<sup>30</sup> The statute required apartment buildings to have a battery-operated smoke detector in good working order, whereas the local Ordinance only required smoke detectors powered by the building’s electrical system.<sup>31</sup> The court held that the local Ordinance was preempted by the state statute because the Ordinance conflicted with and provided stricter

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27. GA. CONST. art. 3, § 6, para. 4.

28. James G. Hodge Jr. & Alicia Corbett, *Legal Preemption and the Prevention of Chronic Conditions*, 13:E85 PREVENTING CHRONIC DISEASE 1, 2 (2016), [https://www.cdc.gov/pcd/issues/2016/pdf/16\\_0121.pdf](https://www.cdc.gov/pcd/issues/2016/pdf/16_0121.pdf) [<https://perma.cc/C7RA-TF6P>].

29. *Hill v. Tschannen*, 264 Ga. App. 288, 291, 590 S.E.2d 133, 135 (2003); *see also* Grovenstein v. Effingham Cnty., 262 Ga. 45, 47, 414 S.E.2d 207, 210 (1992) (finding an Effingham County local Ordinance did not impede operation of state law where it prohibited the sale of alcohol to minors under circumstances more specific than those provided by state law).

30. *Hill*, 264 Ga. App. at 290, 590 S.E.2d at 134.

31. *Id.*

requirements than the state statute, hindering the operation of the state law rather than strengthening it.<sup>32</sup>

*Tybee Island's Emergency Directive & Beach Ordinance*

On March 19, 2020, Governor Brian Kemp (R) recommended that local officials take action to keep their communities safe from the spread of COVID-19 and “make decisions based on what their communities’ needs were.”<sup>33</sup> In Tybee Island, a small beach town known for large gatherings and socializing, local leaders took this call very seriously. Without enough “enforcement officers to do anything about most of the activities [the mayor of Tybee Island] was seeing,” along with additional factors such as underage drinking that could lead to increased spread of the virus, the mayor and city council decided to close the beach.<sup>34</sup> The mayor issued the Tybee Island Emergency Directive (Directive) on March 20, 2020, closing all the beaches on the island to keep citizens safe and healthy.<sup>35</sup> One day later, Hilton Head, Saint Simons, and Jekyll Island followed Tybee’s lead and closed their beaches as well.<sup>36</sup> Mayor Shirley Sessions hoped that closing Tybee’s beaches would allow residents to “get back to some sort of normal and welcome people back to the beach once [Tybee] got past the [COVID-19] issues.”<sup>37</sup>

On April 2, 2020, Mayor Sessions issued an Emergency Declaration and Ordinance (Declaration), which took immediate effect to protect the safety and health of Tybee’s constituents.<sup>38</sup> The Declaration established a local state of emergency in Tybee Island that would continue to exist “until the conditions requiring this

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32. *Id.* at 291, 590 S.E.2d at 135.

33. Telephone Interview with Mayor Shirley Sessions, Mayor of Tybee Island, Ga. (May 27, 2020) (on file with the Georgia State University Law Review) [hereinafter Mayor Sessions Interview]. Although many Georgia cities and towns were affected by Governor Kemp’s executive orders, this *Peach Sheet* focuses specifically on Tybee Island due to the national media attention received when the island’s local legislation was preempted and Tybee’s beaches were reopened by Governor Kemp.

34. *Id.*

35. Tybee Island, Ga., Emergency Directive (Mar. 20, 2020) (on file with the Georgia State University Law Review) [hereinafter Tybee Emergency Directive].

36. *See* Mayor Sessions Interview, *supra* note 33.

37. *Id.*

38. Tybee Island, Ga., Ordinance 2020-14 (Apr. 2, 2020) (on file with the Georgia State University Law Review).

declaration [were] abated.”<sup>39</sup> The Declaration limited city council meetings to virtual teleconferences and closed all nonessential businesses and dine-in services; it also listed previous directives for clarity, including the Directive that closed all public beaches for the foreseeable future.<sup>40</sup> On April 2, Governor Kemp issued an Executive Order superseding these local Orders, which shocked local leaders.<sup>41</sup> While the Governor’s Order restricted dining rooms, barbershops, and gyms across the State of Georgia, the Order opened the beaches of Tybee Island to the public.<sup>42</sup> Mayor Sessions described her initial reaction to the Order as shocked and disappointed, and stated that she “did not understand why someone did not communicate why the state was taking such a direct and drastic turn . . . .”<sup>43</sup>

Mayor Sessions explained that learning about Governor Kemp’s announcement through a press release “was very disappointing.”<sup>44</sup> She had no “heads up, [no] phone calls, no letters, no email ahead of time” to warn her, and she “had to learn like everybody else,” leaving her unsure of how to react.<sup>45</sup> Although localities like Tybee Island were still able to regulate use of the beaches by prohibiting umbrellas and tents, as well as banning possession or consumption of alcohol, Georgians would be free to visit and roam the beaches as they pleased.<sup>46</sup>

### *Georgia Governor’s Executive Order*

On March 14, 2020, Governor Brian Kemp (R) declared a Public Health State of Emergency in Georgia due to the magnitude and spread of COVID-19.<sup>47</sup> Declaring a state of emergency conferred

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39. *Id.* at 2.

40. *Id.* at 4; *see also* Tybee Emergency Directive, *supra* note 35.

41. *See* Mayor Sessions Interview, *supra* note 33; Ga. Exec. Order No. 04.02.20.01, *supra* note 4.

42. Ga. Exec. Order No. 04.02.20.01, *supra* note 4, at 6, 8; Rick Rojas, *In Georgia, Shelter-in-Place Order Closes Businesses and Reopens Beaches*, N.Y. TIMES (Apr. 4, 2020), <https://nyti.ms/2UJM1BS> [<https://perma.cc/K6KA-49KN>].

43. *See* Mayor Sessions Interview, *supra* note 33.

44. *Id.*

45. *Id.*

46. *Governor’s Shelter in Place Order: What It Means for Tybee*, CITY OF TYBEE ISLAND, GA. (Apr. 4, 2020), <https://www.cityoftybee.org/CivicAlerts.aspx?AID=550&ARC=> [<https://perma.cc/2WX9-GK7K>].

47. Ga. Exec. Order No. 03.14.20.01, *supra* note 8. A public health emergency is defined as “the



certain powers upon Governor Kemp, including, but not limited to, enforcing laws related to emergency management, performing duties necessary to protect the population, and using available state resources to manage the emergency.<sup>48</sup> During a Public Health State of Emergency, the Governor has the authority “[t]o compel a health care facility to provide services[,] . . . to implement a mandatory vaccination or quarantine program[,] . . . [and] [t]o direct the Department of Public Health to coordinate” the state’s response to the threat.<sup>49</sup> According to Jonathan Todres, Distinguished University Professor and Professor of Law of the Georgia State University College of Law’s Center for Law, Health & Society, “the circumstances around COVID-19 clearly warranted a public health emergency declaration, which, if well-executed, could have helped ensure a coordinated, effective response” among both relevant agencies and the levels of government.<sup>50</sup>

According to the Governor’s office, Governor Kemp used his expanded emergency powers in March to implement measures targeted to slow the spread of the virus and protect vulnerable populations. The administration achieved this by closing schools; implementing teleworking policies; authorizing temporary licenses for out-of-state doctors, nurses, and pharmacists; and increasing the state stockpile of personal protective equipment.<sup>51</sup> Pursuant to Code section 38-3-51, the Governor has the authority to renew the emergency declaration and keep the Public Health State of

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occurrence or imminent threat of an illness or health condition that is reasonably believed to be caused by bioterrorism or the appearance of a novel . . . infectious agent.” Memorandum from Georgia Gov., *supra* note 3.

48. Memorandum from Georgia Gov., *supra* note 3; *see also* Janelle Alleyne et al., *Coronavirus: Georgia Governor Declares Public Health Emergency to Combat COVID-19*, JD SUPRA (Mar. 24, 2020), <https://www.jdsupra.com/legalnews/coronavirus-georgia-governor-declares-11516/> [<https://perma.cc/4XQH-5FKP>].

49. Memorandum from Georgia Gov., *supra* note 3; *see also* Alleyne et al., *supra* note 48.

50. Electronic Mail Interview with Professor Jonathan Todres, Distinguished Univ. Professor and Professor of L., Ga. State Univ. Coll. of L. (June 18, 2020) (on file with the Georgia State University Law Review) [hereinafter Todres Interview].

51. Press Release, Brian P. Kemp, Gov. of Georgia, Gov. Kemp Issues New Executive Orders, Provides COVID-19 Update (Mar. 23, 2020), <https://gov.georgia.gov/press-releases/2020-03-23/gov-kemp-issues-new-executive-orders-provides-covid-19-update> [<https://perma.cc/YT2N-6UDC>].

Emergency in effect until the Governor determines “the threat or danger has ended.”<sup>52</sup>

Although the Governor commonly uses Executive Orders to create advisory commissions and address management and administrative issues, Governor Kemp used his emergency powers to issue several Executive Orders to contain the spread of COVID-19.<sup>53</sup> Notably, Governor Kemp’s Executive Order 04.02.20.01 preempted all local ordinances, including the Georgia coastal communities’ beach closures in March.<sup>54</sup> The Order declared that enforcement of any local ordinance issued since March 1, 2020, would be suspended if such Order or ordinance conflicted or differed with the terms of the Executive Order.<sup>55</sup>

According to Code section 38-3-51(d)(1), the Governor’s emergency powers include the power to “[s]uspend any regulatory statute prescribing the procedures for conduct of state business . . . if strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster.”<sup>56</sup> In this case, Code section 38-3-51(d)(1) can be interpreted to permit the Governor to use his Executive Order authority to effectively supersede prior local ordinances in the State of Georgia.<sup>57</sup> In addition, pursuant to Code section 45-12-30, the Governor has the power in emergencies to prevent violence and maintain order if the citizens of the state are threatened.<sup>58</sup> Therefore, Code section 45-12-30, if construed broadly, also granted the

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52. O.C.G.A. § 38-3-51 (2012 & Supp. 2020); *see also* Benjamin Della Roca et al., *State Emergency Authorities to Address COVID-19*, LAWFARE (May 4, 2020, 3:03 PM), <https://www.lawfareblog.com/state-emergency-authorities-address-covid-19> [https://perma.cc/A3EY-UFDM].

53. *See* Ga. Exec. Order Nos. 04.08.2020.01–05 (Apr. 8, 2020) (on file with the Georgia State University Law Review); Ga. Exec. Order Nos. 04.30.2020.01–02 (Apr. 30, 2020) (on file with the Georgia State University Law Review); Ga. Exec. Order Nos. 05.28.2020.01–02 (May 28, 2020) (on file with the Georgia State University Law Review); *see also* *Governors’ Powers & Authority*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/consulting-2/powers-and-authority/> [https://perma.cc/766Y-DF3Z].

54. Ga. Exec. Order No. 04.02.20.01, *supra* note 4.

55. *Id.*

56. § 38-3-51(d)(1).

57. *Id.*

58. O.C.G.A. § 45-12-30 (2016).

Governor power to enforce the Executive Orders to maintain order during the COVID-19 Public Health State of Emergency.<sup>59</sup>

*A Public Health Law Perspective on Local Preemption*

During a pandemic, the Governor and senior officials have the authority and responsibility to protect the public's health, maintain critical services and state infrastructure, and shape the recovery process.<sup>60</sup> It is important for the Governor and senior officials to coordinate with local government to prepare effective responses.<sup>61</sup> According to Professor Todres, "in a pandemic, it can be more difficult to develop an effective response if different jurisdictions are adopting very different responses. Consistency across jurisdictions can be important, but it also can constrain local authorities."<sup>62</sup> When Governor Kemp issued Executive Order 04.02.20.01, preempting the local ordinances of Georgia municipalities, including Tybee Island, many local officials and members of the public were outraged.<sup>63</sup> Before issuing the Order, Governor Kemp failed to inform local officials of his intent to include the preemption provision.<sup>64</sup> Governor Kemp's staff, along with supportive members of the public, believed

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59. *Id.*

60. Richard Thompson Ford, *Why Counties Are Handling the Coronavirus Better than Trump*, SLATE (Apr. 13, 2020, 1:32 PM), <https://slate.com/news-and-politics/2020/04/local-government-coronavirus-federalism.html> [https://perma.cc/BDJ2-HQKB].

61. *Id.*

62. Todres Interview, *supra* note 50; see also *Who Calls the Shots During a Pandemic, the U.S. Government or States? Q&A with RAND Experts*, RAND CORP.: THE RAND BLOG (Apr. 16, 2020), <https://www.rand.org/blog/2020/04/who-calls-the-shots-during-a-pandemic-the-us-government.html> [https://perma.cc/6BHP-AEZA]. RAND researcher, Rebecca Haffajee stated:

The challenge here is that with other public health issues, or infectious diseases, the speed with which exposure can spread and the harm from exposure may be different. COVID-19 is quite efficient at traveling quickly across country, state, and town lines, and it inflicts a lot of harm.

That makes it really challenging when we have one town reacting one way and right next door another town reacting in another way. There's no way their actions don't affect each other.

*Id.*

63. Greg Bluestein, *Kemp Allies Defend Reopening Georgia Beaches Despite Coastal Criticism*, ATLANTA J.-CONST. (Apr. 6, 2020), <https://www.ajc.com/blog/politics/kemp-allies-defend-decision-reopen-georgia-beaches-despite-coastal-pushback/FLFtv9dKz12VfXupvJ9XmL/> [https://perma.cc/MAV6-UV75].

64. *Id.*

that the social distancing required by the Order and law enforcement patrols were adequate protective measures to allow Georgia's beaches to reopen.<sup>65</sup>

Disagreements between local and state government affect decision-making and coordination at the state level:

It is critical for any leader—whether at the federal or state level—to work with local jurisdictions. . . . There may be disagreements, but . . . declarations at the state level need local support to ensure successful implementation. . . . [I]t is still important for those levels of government to solicit input from localities and have open lines of communication.<sup>66</sup>

In a few states, Governors enacted regulatory stay-at-home Orders acting as floors that allowed local governments to pursue tighter measures on their own.<sup>67</sup> In states such as Georgia, Florida, South Carolina, and Texas, stay-at-home Orders acted as regulatory ceilings, preventing local efforts to impose stricter requirements than the State wanted to enact.<sup>68</sup> In declaring the local preemption, Governor Kemp stressed that “local action [could not] be taken that is more or less restrictive” than the State's Order.<sup>69</sup>

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65. *Id.*

66. Todres Interview, *supra* note 50.

67. Nestor M. Davidson & Kim Haddow, *State Preemption and Local Responses in the Pandemic*, AM. CONST. SOC'Y (June 22, 2020), <https://www.acslaw.org/expertforum/state-preemption-and-local-responses-in-the-pandemic/> [<https://perma.cc/95FS-NHCZ>].

68. *Id.*

69. Press Release, Brian P. Kemp, Gov. of Georgia, Gov. Kemp Updates Georgians on COVID-19 (Apr. 20, 2020), <https://gov.georgia.gov/press-releases/2020-04-20/gov-kemp-updates-georgians-covid-19> [<https://perma.cc/P7ET-GE3G>].

*Analysis**The Governor's Executive Order Expressly Preempted the Local Ordinance*

Whereas the federal government is, in many instances, restrained by the principles of federalism from exercising direct control over state governments, state governments are the grantors of the powers held by cities, counties, and other municipal creations of the state.<sup>70</sup> The power granted to municipalities can be withdrawn or subject to stringent conditions that govern how locales can act in response to an issue.<sup>71</sup>

Mayor Shirley Sessions's Directive denied the public access to the beaches in Tybee Island completely.<sup>72</sup> Under the Directive, "the beaches of the Island and access thereto [would] be closed to the public commencing March 20, 2020, at 9:00 AM."<sup>73</sup> This limitation conflicted with Governor Brian Kemp's (R) Executive Order 04.02.20.01 because the Directive provided a stricter requirement for the public. The Executive Order expressly stated that local ordinances would be preempted if they pertained to the pandemic unless the local ordinance enforced compliance with the Order.<sup>74</sup> Governor Kemp's Order suspended "any local ordinance or order adopted or issued since March 1, 2020, with the stated purpose or effect of responding to a public health state of emergency . . . that in any way conflicts, varies, or differs from the terms of this Order."<sup>75</sup> Because the Directive was put in place to respond to the Public Health State of Emergency and provided more restrictive guidelines regarding beach use than Executive Order 04.02.20.01, the Directive conflicted with the Executive Order rather than augment or strengthen it.<sup>76</sup> Under these circumstances, the express preemption effectively rescinded the guidelines established in the Directive.

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70. Hodge Jr. & Corbett, *supra* note 28, at 1.

71. *Id.*

72. Tybee Emergency Directive, *supra* note 35.

73. *Id.*

74. Ga. Exec. Order No. 04.02.20.01, *supra* note 4.

75. *Id.*

76. Tybee Emergency Directive, *supra* note 35.

In a very similar fashion, the Georgia Court of Appeals found in *Hill v. Tschannen* that a local Macon Ordinance regarding the maintenance of smoke detectors in apartment buildings was preempted by Georgia law because the Ordinance provided more restrictive guidelines than the state statute.<sup>77</sup> The court held that the Macon Ordinance would hinder the operation of state law, as opposed to augmenting or strengthening it, because the Ordinance essentially rendered the state regulations insufficient by requiring stricter standards that apartment complexes needed to abide by.<sup>78</sup> Given the doctrine of preemption and the wealth of case law preempting the enforcement of local laws that conflict with state laws, the result here could likely be foreseen, even though the results of preemption may have been upsetting to local leaders such as Mayor Sessions.<sup>79</sup>

### *Local Preemption Debate Growing in Georgia*

Executive Order 04.02.20.01 was not the only Order issued by Governor Kemp that effectively rejected Orders issued by local officials and city councils. Since the Order preempted the Tybee Island beach closure Ordinance in the early spring, Atlanta Mayor Keisha Lance Bottoms (D) and Governor Kemp debated the legality of the Executive Order preempting local mandatory masks Orders.<sup>80</sup>

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77. *Hill v. Tschannen*, 264 Ga. App. 288, 291, 590 S.E.2d 133, 135 (2003).

78. *Id.*

79. Madeleine Carlisle, *Georgia Gov. Brian Kemp Sued to Block Atlanta's Face Mask Ordinance. Here's What to Know*, TIME (July 18, 2020, 6:00 PM), <https://time.com/5868613/georgia-governor-brian-kemp-face-mask-atlanta-keisha-lance-bottoms/> [<https://perma.cc/GE85-KPLB>].

80. Vanessa Romo, *Georgia Gov. Brian Kemp Sues Atlanta Mayor Keisha Lance Bottoms Over Face Mask Order*, NPR (July 16, 2020, 7:19 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/16/892109883/georgia-gov-brian-kemp-sues-atlanta-mayor-keisha-lance-bottoms-over-face-mask-or> [<https://perma.cc/PWQ8-DMDR>]. This was not the first time Mayor Bottoms and Governor Kemp have encountered differences in opinions in handling the pandemic. James Hohmann, *The Daily 202: Reopening Debate Pits Mayors Against Governors. Atlanta vs. Georgia is a Preview*, WASHINGTON POST (Apr. 24, 2020, 11:40 AM), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2020/04/24/daily-202-reopening-debate-pits-mayors-against-governors-atlanta-vs-georgia-is-a-preview/5ea271f8602ff14af7434165/> [<https://perma.cc/9SSL-RAMA>]. Mayor Bottoms criticized Governor Kemp's Executive Order 04.23.20.02, which allowed business such as gyms, bowling alleys, barbershops, and more to reopen in Atlanta and throughout the state. *Id.*; see also Ga. Exec. Order No. 04.23.20.02 (Apr. 23, 2020) (on file with the Georgia State University Law Review). Importantly, Mayor Bottoms conceded that "[Governor

On July 8, July 10, and July 13, 2020, Mayor Bottoms issued City of Atlanta Executive Orders 2020-113, 2020-114, and 2020-115, respectively, ordering the mandatory use of masks in the Atlanta.<sup>81</sup> Subsequently, on July 15, 2020, Governor Kemp issued a statewide COVID-19 directive encouraging, rather than mandating, the wearing of face coverings by Georgians.<sup>82</sup>

Tensions and conflict between the State and Atlanta elevated when Governor Kemp filed a lawsuit in the Superior Court of Fulton County on July 16, 2020, seeking to “enjoin Mayor Bottoms and the City Council of Atlanta from enforcement of Mayor Bottoms[‘s] COVID-related executive orders and enjoin the City Council of Atlanta from enacting any ordinances that [were] inconsistent with any COVID-related executive order.”<sup>83</sup> The lawsuit alleged that the Mayor’s mask directives were inconsistent with the Governor’s Executive Orders and thus were preempted.<sup>84</sup> This debate was heavily discussed by legal experts across the State of Georgia.<sup>85</sup> According to Cathy Cox, Dean of the Mercer University School of Law, “municipalities have broad emergency powers under Georgia law, . . . but that same law says that cities cannot use their powers to do anything that is ‘inconsistent’ with an order issued by the governor.”<sup>86</sup> To the contrary, Professor Clark Cunningham, Georgia

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Kemp’s] authority as governor is what it is, and it certainly supersedes my authority as mayor on paper . . .” Hohmann, *supra*.

81. City of Atlanta Exec. Order No. 2020-113 (July 8, 2020) (on file with the Georgia State University Law Review); City of Atlanta Exec. Order No. 2020-14 (July 10, 2020) (on file with the Georgia State University Law Review); City of Atlanta Exec. Order No. 2020-115 (July 13, 2020) (on file with the Georgia State University Law Review).

82. Ga. Exec. Order No. 07.15.20.01 (July 15, 2020) (on file with the Georgia State University Law Review).

83. Complaint for Declaratory and Injunctive Relief at 9, *Kemp v. Bottoms*, No. 2020CV338387, 2020 WL 4036827 (Ga. Super. Ct. July 16, 2020) [hereinafter *Mask Mandate Complaint*]. Several other Georgia cities have issued similar mask ordinances, but the Governor’s lawsuit only addresses Atlanta. Michael King, *Lawyers for Mayor Bottoms File Brief Responding to Gov. Kemp’s Mask Lawsuit*, 11ALIVE (July 27, 2020, 6:47 PM), <https://www.11alive.com/article/news/health/coronavirus/lawyers-for-mayor-bottoms-file-brief-responding-to-gov-kemps-lawsuit/85-6cb8e0fc-f8a6-4621-9cd5-a6f47ab83330>.

84. *Mask Mandate Complaint*, *supra* note 83; *Kemp v. Bottoms Unmasked: Emergency Powers and State Preemption*, NETWORK FOR PUB. HEALTH L. (July 23, 2020), <https://www.networkforphl.org/news-insights/kemp-v-bottoms-unmasked-emergency-powers-and-state-preemption/> [<https://perma.cc/2KM9-45KB>].

85. Carlisle, *supra* note 79.

86. *Id.*

State University College of Law W. Lee Burge Chair of Law & Ethics and Professor of Law, explained Mayor Bottoms could argue “that the order preventing her from mandating face masks was contrary to Kemp’s declaration of a public health emergency.”<sup>87</sup> Since the filing of the lawsuit, the parties have entered mediation as ordered by Fulton County Superior Court Judge Jane Barwick.<sup>88</sup>

Similarly to Executive Order 04.02.20.01’s express preemption of more restrictive local ordinances, Executive Order 07.15.20.01 expressly preempted Mayor Bottoms’s mandatory mask Order. The Order stated that: “Any . . . county, or municipal law, order, ordinance, rule or regulation that requires persons to wear face coverings, masks, face shields, or any other Personal Protective Equipment while in places of public accommodation or on public property are suspended to the extent they are more restrictive than this Executive Order.”<sup>89</sup> It is clear that the Governor’s Order did not mandate citizens to wear masks; therefore, Mayor Bottoms’s Order requiring the use of masks in the City of Atlanta would be “more restrictive” and conflict with the Governor’s Order.<sup>90</sup> Additionally, Code section 38-3-51 likely supports Governor Kemp’s Order preempting more restrictive mask mandates by granting the Governor additional authority when dealing with a Public Health State of Emergency.<sup>91</sup>

The outcome of this lawsuit will affect every other city in Georgia because it will establish whether city officials have the authority to impose contradicting or more restrictive mandates than the Governor’s Executive Orders on issues related to this pandemic. This lawsuit and these local preemption debates shine a light on the importance of consistency and coordination between state and local governments.

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87. *Id.*

88. Rich McKay, *Georgia’s Governor and Atlanta’s Mayor Ordered to Mediate Coronavirus Mask Fight*, REUTERS (July 23, 2020, 8:05 PM), <https://www.reuters.com/article/us-health-coronavirus-usa-georgia/georgias-governor-and-atlantas-mayor-ordered-to-mediate-coronavirus-mask-fight-idUSKCN24P002>.

89. Ga. Exec. Order No. 07.15.20.01, *supra* note 82, at 32.

90. *Id.*; City of Atlanta Exec. Order No. 2020-113, *supra* note 81.

91. O.C.G.A. § 38-3-51(d)(1) (2012 & Supp. 2020).



*Conclusion*

The Public Health State of Emergency, the first of its kind in Georgia, brought preemption issues to the forefront of Georgia politics. Georgians and government officials, along with the rest of the country, will hopefully continue to work together and do their best to navigate the COVID-19 pandemic. As state and local government officials grapple with how best to handle the pandemic for Georgia, Professor Todres reminds us that “ultimately, as this pandemic has shown, it is critical for all entities at the federal, state, and local levels to invest in preparedness. . . . It was, and still is, critical that everyone works together to adopt measures that will flatten the curve and, ultimately, dramatically reduce if not eliminate COVID-19.”<sup>92</sup>

*Marisa P. Ahlzadeh & Fanny Chac*

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92. Todres Interview, *supra* note 50.