

# OUTSIDE THE SECOND AMENDMENT: PREEMPTION, CONSTITUTIONAL SHERIFFS, AND THE UNDERMINING OF STATE AND LOCAL FIREARM REGULATION

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## ABSTRACT

Forty-three states have passed broad firearm preemption laws that bar local governments from enacting their own gun regulations. State legislatures often cite the need for uniform firearm laws to justify this prohibition on local lawmaking around guns. Yet, in recent years, hundreds of sheriffs across the country have promised not to enforce state gun laws. These sheriffs, who are loosely organized as a coalition known as the “constitutional sheriffs movement,” believe that they have the power and duty to not enforce laws that they believe to be unconstitutional. As more states have enacted democratically-supported gun regulations, constitutional sheriffs have announced their opposition to these laws and refused to enforce them.

Through nonenforcement, constitutional sheriffs undermine the uniformity of firearm laws by creating pockets of looser local gun regulation within states. Meanwhile, state preemption laws ensure that localities favoring stricter gun regulations remain absolutely barred from implementing the local laws they desire—and cite the necessity of uniform statewide firearm laws as justification. When municipalities try to defy state preemption laws by passing local ordinances that regulate firearms, the preemption laws make it easy to swiftly strike these local frameworks down. Yet, at the same time, state legislatures have implemented no mechanism to curb local resistance to statewide gun laws by sheriffs. States have thus stifled

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local anti-gun action and debate as they allow local pro-gun measures to flourish.

This selective state action against local resistance to statewide gun laws creates an untenable situation. It allows some localities to have a say in their local gun regulations while denying that power to others, and it casts doubt on the legitimacy of states' justification for preemption in the first instance: uniformity. Further, the sheriffs' underenforcement of state gun laws dilutes the effectiveness of statewide gun laws due to the mobility of guns. This means that, in states with firearm preemption laws and an active constitutional sheriffs movement, voters seeking stricter gun laws are not only prevented from enacting gun regulations at the local level, but any state law they vote to enact is also weakened by sheriffs' underenforcement. Selective state action against local resistance thus causes voters seeking stronger gun control to be subverted at both the state and local level. States allow these anti-democratic conditions to thrive when they prohibit local anti-gun initiatives at the same time that they tolerate pro-gun local resistance to state law.

Ultimately, this Note argues that, in the firearm context specifically, ensuring uniformity of regulations throughout a state is an important goal due to the mobility of guns and the collateral effects of weaker gun laws. States should therefore focus reform efforts on stymying the negative spillover effects of weak local gun laws, including by ensuring that firearm safety regulations are being implemented consistently throughout the state.

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## INTRODUCTION

Americans today are living through a kind of pro-gun renaissance. At the federal level, the 2022 Supreme Court decision in *Bruen* created a new Second Amendment standard<sup>1</sup> that has made it more difficult for states to enact modern gun laws.<sup>2</sup> At the local level, state lawmakers in forty-three states have stripped local governments of their authority to regulate firearms by enacting preemption laws.<sup>3</sup> This legal landscape has left the state route as the path of least resistance for lawmaking around guns.

In the past decade, however, a new force has arisen that creates an obstacle to effective state gun regulations. It comes in the form of constitutional sheriffs, who contend that they have the power and duty to refuse to enforce laws that they believe to be unconstitutional.<sup>4</sup> As more states have enacted democratically-supported gun regulations in recent years,<sup>5</sup> constitutional sheriffs

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1. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022); Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L. J. 67, 69 (2023), ("Demanding past regulatory precedent to support modern laws sets this test apart from other constitutional rights contexts that employ historical inquiry.").

2. Courts declared more gun laws violative of the Second Amendment in the first eight months after the *Bruen* decision than in the first few years after *Heller*, which was the Supreme Court's prior Second Amendment decision in 2011. Still, of the Second Amendment claims filed in federal courts, only 14% of these challenges were ultimately successful in invalidating gun laws under *Bruen*'s new standard. Jacob Charles, *By the Numbers: How Disruptive Has Bruen Been?*, DUKE CTR FOR FIREARMS (Mar. 27, 2023), <https://firearmslaw.duke.edu/2023/03/by-the-numbers-how-disruptive-has-bruen-been> [<https://perma.cc/8RDR-K2WS>].

3. See generally Rachel Simon, *The Firearm Preemption Phenomenon*, 43 CARDOZO L. REV. 1441 (2022) (describing the rise in the use of preemption by states seeking to prevent local governments from enacting firearm regulations).

4. See generally *When Sheriffs Refuse to Follow the Law*, EVERYTOWN LAW, <https://everytownlaw.org/when-sheriffs-refuse-to-follow-the-law/> [<https://perma.cc/KR8Q-97SY>] (highlighting the resistance of local sheriffs to recently enacted state gun laws and arguing that "[t]hese sheriffs seek to disregard the will of the voters of their states, circumvent the legislative process, and short-circuit the judicial function"); *Constitutional Sheriffs and Peace Officers Association*, MARSHALL PROJECT, <https://www.themarshallproject.org/records/2587-constitutional-sheriffs-and-peace-officers-association> [<https://perma.cc/3GW7-YU4T>] (compiling a list of resources from different news sources on the Constitutional Sheriffs and Peace Officers Association).

5. See *infra* note 105 and accompanying text.

have announced their opposition to these laws and refused to enforce them.<sup>6</sup>

There are reasons why categorical nonenforcement of gun laws by sheriffs has an anti-democratic impact in all states where the sheriffs are active.<sup>7</sup> In states with firearm preemption laws, however, the constitutional sheriffs' nonenforcement of gun laws creates additional tensions. In these states, localities that wish to enact local gun laws that are stricter than the state laws are barred from doing so by the state's preemption statute. Yet, at the same time, localities that wish to create less restrictive regulatory regimes than those at the state level are effectively able to do so by electing sheriffs who refuse to enforce state gun laws. States are thus allowing some locally-elected officials—sheriffs—to act on their constituents' desire for looser gun laws while preventing other elected officials—local lawmakers—from acting on their constituents' desire for stricter local regulation of firearms.

This Note argues that this selective state action against local resistance to state firearm laws creates a situation that is untenable for three reasons. First, preempting counties from passing stricter gun laws while allowing sheriffs to implement less restrictive regulatory regimes has democratic implications—it gives some localities the power to have a say in their local gun laws while denying that power to others. Second, allowing only some forms of local resistance undermines states' justification for firearm

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6. See, e.g., Joe Barrett, *Most Illinois Sheriffs Say They Won't Enforce New Assault-Weapons Ban*, WALL ST. J. (Jan. 20, 2023), <https://www.wsj.com/articles/most-illinois-sheriffs-say-they-wont-enforce-new-assault-weapons-ban-> (on file with the *Columbia Human Rights Law Review*) (reporting that “all but a handful” of Illinois sheriffs have said they will not be enforcing the new assault weapons ban). See also *infra* Section II.A.3.

7. Regardless of one's opinion of categorical nonenforcement and enforcement discretion by executive officials generally, nonenforcement of gun laws by sheriffs is troubling for several reasons. First, sheriffs' actions are less visible and scrutinized than other publicly-elected officials, making them less accountable to the public and their decisions less representative of public opinion. Second, guns are mobile, meaning nonenforcement of gun laws can have more wide-reaching consequences than nonenforcement of other types of laws. See *infra* Section III.C for a discussion of this point. While nonenforcement of gun laws by sheriffs is a cause for concern in all states where constitutional sheriffs are active, this Note is focused more particularly on how the combination of firearm preemption laws and the constitutional sheriffs movement together amplify the anti-democratic implications of sheriffs' nonenforcement of gun laws. See *infra* Sections III.C, III.D.

preemption laws: uniformity. Many state legislators cite the need for uniform gun regulations in all localities across the state to justify preemption statutes,<sup>8</sup> yet constitutional sheriffs defy this goal by creating pockets of local resistance to state gun laws. When states allow sheriffs to defy gun laws, it casts doubt on the legitimacy of uniformity as a justification for firearm preemption laws. Third, when sheriffs undermine statewide uniformity, they dilute the law everywhere in the state due to the mobility of guns.<sup>9</sup> In states with broad preemption laws, citizens in favor of stricter gun laws are thus not only prevented from enacting such regulations at the local level but are also denied the full benefits of any state laws that they have voted to enact.<sup>10</sup>

Ultimately, this Note argues that, in the firearm context specifically, ensuring uniformity of regulations throughout a state is an important goal in the firearm context due to the mobility of guns and the collateral effects of weaker gun laws. States should therefore focus reform efforts on stymying the negative spillover effects of weak

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8. For example, the Ohio preemption statute is commonly known as the “Firearm Uniformity Law” and it “finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, other transfer, manufacture, taxation, keeping, and reporting of loss or theft of firearms, their components, and their ammunition, and knives.” OHIO REV. CODE ANN §9.68 (West 2007).

9. For a discussion on the collateral effects of weak gun laws, see *infra* Section III.D.

10. See *infra* Section III.D. These tensions are mostly playing out in states where there exists both a strong enough appetite for gun control that statewide gun laws have been passed in recent years (typically driven by big cities in those states) and also localities that are strongly against stricter gun control measures that have been enacted at the state level (usually more rural areas). If such a state has a firearm preemption law, there exists an untenable situation wherein local governments desiring stronger gun laws are prevented from enacting them while law enforcement officials in areas that desire weaker gun laws are openly defying state laws, unchecked. States where this tension is playing out include, but are not limited to, Florida, Illinois, Maryland, Michigan, New Mexico, Oregon, Pennsylvania, Virginia, and Washington. There are also several states, like New York and Colorado, that have active constitutional sheriffs movements, but no state preemption laws. Further, there are many states that have both a preemption law and constitutional sheriffs, but there are so few state gun laws in place that it is mostly symbolic when sheriffs declare that they will refuse to enforce them. When this Note refers to “selective state action,” it is referring to action by the states in which both preemption of local laws and sheriffs defying state firearm laws exist.

local gun laws, which would include taking action to ensure that state gun laws are being enforced.<sup>11</sup>

Other scholarship has highlighted the benefits of local lawmaking in the firearm space and has argued for the repeal of state preemption statutes.<sup>12</sup> The constitutional sheriffs movement and the interplay between the sheriffs, preemption laws, and selective action against local resistance to firearm laws has received little academic attention. This Note attempts to fill in that gap by revealing the tension created by the interaction of these forces.

Part I of this Note provides background on the balance of power between state and local governments. It examines how states have used preemption to bar local gun control measures. Part II assesses the rise of the constitutional sheriffs movement and the role that constitutional sheriffs play in local resistance to state firearm regulations. Part III argues that states have taken selective action to prohibit only local measures that promote gun control reforms while allowing local measures that seek to resist gun control reforms to flourish unchecked. This local resistance and the lack of state action against it weakens the efficacy of statewide gun laws, undermines the state's interest in uniform firearm regulation, and subverts the democratic choices of individuals who have voted to enact gun laws at

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11. This Note advances an argument that is limited only to the firearm context. The mobility and deadliness of guns create a set of conditions that make enforcement of state gun laws and uniformity of laws across a state crucial to effective regulation. *See infra* Section III.D. These conditions do not exist in other policy areas where there is tension between state and local policy preferences. Further, because sheriffs' actions are less visible and therefore less scrutinized than other public officials, underenforcement of laws by sheriffs specifically are more concerning than underenforcement by other local elected officials, such as prosecutors. *See infra* Section III.C. Moreover, this Note is focused on underenforcement of gun laws by sheriffs, who primarily operate in suburban and rural areas. Yet, in many cities, there is the opposite problem of *overenforcement* of gun laws, particularly against young Black and brown men. *See* Sharone Mitchell, Jr., *There's No Second Amendment on the South Side of Chicago*, NATION (Nov. 12, 2021), <https://www.thenation.com/article/politics/gun-control-supreme-court> [<https://perma.cc/3J28-NFE7>]. Although outside the scope of this Note, discrepancies in gun law enforcement along racial lines throughout the country arguably exacerbate the anti-democratic impacts of sheriffs' nonenforcement identified here.

12. *See* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 82, 85 (2013) (arguing that gun policy should account for the "longstanding and sensible" differences between urban and rural regulation so that it can both "protect rural gun culture while permitting cities to address urban gun violence"). For an argument that firearm preemption statutes should be repealed, or at the very least "dramatically scal[ed] back," *see* Simon, *supra* note 3, at 1446.



the state level. Part IV argues that, because of the importance of uniformity in effective firearm regulation, states should take action to ensure that state firearm safety laws are being enforced consistently throughout the state.

## I. LOCAL GUN CONTROL ACTION PROHIBITED BY STATE LAW

This Part provides background on preemption and the balance of power between state and local governments. It describes traditional preemption doctrine and the new form of preemption, which states increasingly use to prevent local lawmaking in a wide range of subject areas, even though there are no overarching statewide regulations in place. This Part then assesses how states have used preemption in the firearm context to prevent local gun ordinances and to chill local action and debate on the issue.

### A. Background on Authority of Localities to Regulate

Local governments<sup>13</sup> hold a precarious position in our federalist system.<sup>14</sup> The U.S. Constitution does not mention local governments,<sup>15</sup> and, as a matter of traditional legal doctrine, states enjoy near plenary power over local governments.<sup>16</sup> The U.S.

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13. As of 2022, there were over 90,000 local governments in the United States. Press Release, United States Census Bureau, Census Bureau Releases 2022 Census of Governments: Organization Data (Aug. 24, 2023), <https://www.census.gov/newsroom/press-releases/2023/census-of-governments.html> [<https://perma.cc/4TJV-LL8A>]. This Note will use the words “local government,” “locality,” “county,” “municipality,” “city,” and “town” interchangeably to mean any subdivision of government that is lower than the state.

14. Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1166 (2018) (“The American city’s legal and political autonomy has long been precarious.”).

15. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). See also Alexandra B. Klass & Rebecca Wilton, *Local Power*, 75 VAND. L. REV. 93, 99 (2022) (“The U.S. Constitution contains specific grants of authority for the federal government and preserves plenary authority for the states, but says nothing at all about local governments.”).

16. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990) [hereinafter Briffault, *Our Localism: Part I*] (“Under both federal and state constitutional law, local governments have no rights against their states.”); see also Simon, *supra* note 3, at 1449 (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)) (“In the federal system, local governments were traditionally viewed as ‘convenient

Supreme Court has determined that local governments have no inherent lawmaking authority, and residents of a given geographical area have no inherent right to local self-government.<sup>17</sup> Instead, a locality's power stems from its state.<sup>18</sup>

Today, forty-seven states have chosen to formally authorize and protect at least some local law-making power through state constitutional amendments or by statute.<sup>19</sup> This is a system of governance known as home rule.<sup>20</sup> Through home rule, states have

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agencies' or 'political subdivisions' of the state without any inherent power to act.”).

17. *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923) (holding that “[i]n the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state, but are merely departments of the state, with powers and privileges such as the state has seen fit to grant, held and exercised subject to its sovereign will”); *Hunter*, 207 U.S. at 178 (holding that the authority of local government entities “rests in the absolute discretion of the state”); *Reynolds v. Sims*, 377 U.S. 533, 576 (1964) (stating in dicta that “[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities”). See generally Briffault, *Our Localism: Part I*, *supra* note 16, at 7 (summarizing conventional legal theory, which asserts that “states enjoy complete hegemony over local governments”).

18. *Klass & Wilton*, *supra* note 15, at 99 (“Because the U.S. Constitution makes no mention of cities and grants them no independent authority, local governments are dependent on state constitutions and state statutes for their authority.”).

19. Simon, *supra* note 3, at 1450. Forty-one states have authorized home rule through constitutional amendment and the remaining six have done so statutorily. *Id.*; see also Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045 app. B at 1105–14 (2017) (providing state-by-state summaries of home rule provisions and the powers available to local governments). The grants of authority to localities vary widely by state. *Id.*

20. Simon, *supra* note 3, at 1450. The term “home rule” can take on different meanings in legal scholarship on local government, but this Note uses the term to mean a “system of state and local relations that gives some degree of permanent substantive lawmaking authority to localities beyond that which was provided by the typical Dillon’s Rule regime.” Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124 (2007) [hereinafter Diller, *Intrastate Preemption*]. Dillon’s Rule was a prominent nineteenth-century judicial doctrine that viewed cities as administrative conveniences of the state. At the time, there was a public debate about whether the Constitution contained any right to local self-government. See *Klass & Wilson*, *supra* note 15, at 104–05. The leading voices in the debate were legal scholar and Iowa Supreme Court Justice John Dillon, “who contended that local governments had no authority apart from that expressly given to them under state law,” and Justice Thomas Cooley of the Michigan Supreme Court, who “relied on early American history and local practice to argue that local government autonomy should be protected as a matter of state constitutional law

granted local governments varying degrees of authority to regulate over “matters of local concerns,”<sup>21</sup> but home rule does not totally insulate local governments from the overarching power of the state.<sup>22</sup> In recent years, state lawmakers have used their authority to claw back power from local governments.<sup>23</sup> The remainder of this Part discusses preemption doctrine and how states have used preemption to strip local governments of their authority to regulate across a wide range of fields. States have applied these tactics particularly aggressively in the firearm context.

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or at least as a matter of historical practice.” *Id.* at 104. The Supreme Court formally endorsed Dillon’s Rule in *Hunter v. City of Pittsburgh*, where it declared that a state “at its pleasure, may modify or withdraw” any power that it has entrusted to its cities. 207 U.S. at 178. Under Dillon’s Rule, courts determined that municipalities could exert only certain powers that were “indispensable to the purposes of their incorporation” in addition to any powers that the state expressly granted to them. Diller, *Intrastate Preemption*, *supra*, at 1122. Some of these “indispensable powers” included authority to operate public utilities, bid on public works, and regulate local planning and zoning. Briffault, *Our Localism: Part I*, *supra* note 16, at 15. Without an express grant of power from the state, which were rarely made, local governments were constrained to very limited substantive policy-making. Diller, *Intrastate Preemption*, *supra*, at 1122; *see also* Briffault, *Our Localism: Part I*, *supra* note 16, at 8 (describing local government as akin to a “state administrative agency” because a local government serves the state in its narrow area of expertise (local problems and needs), and because Dillon’s Rule required that “all local powers be traced back to a specific delegation”). Over time, growing dissatisfaction with the inability of local governments to regulate issues of local import led states to grant more lawmaking authority to cities. Diller, *Intrastate Preemption*, *supra*, at 1124. Beginning around the start of the twentieth century, Dillon’s Rule was gradually abandoned in favor of home rule. *Id.* at 1125. Under home rule, states have formally authorized and protected local law-making power through state constitutional amendments or via statute. Simon, *supra* note 3, at 9. Even still, local government expert Professor Gerald Frug and other scholars have contended that although Dillon’s Rule has been formally abandoned, the tradition still “leads state courts to construe local government powers narrowly.” Briffault, *Our Localism: Part I*, *supra* note 16, at 8.

21. Briffault, *Our Localism: Part I*, *supra* note 16, at 1.

22. *Hunter*, 207 U.S. at 178–79. Professor Frug has noted that even after states amended their constitutions to give cities home rule authority, “local self-determination is still limited” since “little if anything is sufficiently ‘local’ to fall within [a home rule provision’s] definition of autonomy.” Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1063 (1980). He describes that home rule did not change the fact that cities have no natural or inherent power to do anything—and since city authority is “unquestionably delegated” by the state, that authority remains “subject to absolute state control.” *Id.* at 1062.

23. *See infra* Sections I.B and I.C.

## B. Traditional Preemption

As states have granted more lawmaking authority to cities, the possibility that local regulations will overlap or conflict with state regulations has increased.<sup>24</sup> Often, state and local laws can coexist, as there are many subjects on which both state and local governments have the authority to regulate.<sup>25</sup> In some cases, however, state and municipal governments adopt conflicting laws on the same subject, and courts must step in to determine whether a local law has been preempted.<sup>26</sup>

Traditionally, preemption occurs when a court determines that a law created by a lower level of government conflicts with pre-existing law enacted by a higher level of government.<sup>27</sup> Federal law can preempt state or local law,<sup>28</sup> and state law can preempt local law.<sup>29</sup> Preemption is considered to be a well-established tool of state

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24. Briffault, *Our Localism: Part I*, *supra* note 16, at 8. See also Diller, *Intrastate Preemption*, *supra* note 20, at 1126 (noting that increased ability of local governments to regulate created “the potential for much greater overlap between state and local legislation”).

25. Richard Briffault, *Preemption: The Continuing Challenge*, 36 J. LAND USE & ENV'T L. 251, 254 (2021) [hereinafter Briffault, *The Continuing Challenge*].

26. Preemption is generally thought to fall into two categories: “express” preemption and “implied” preemption. Express preemption occurs when a state passes a law that explicitly prohibits localities from enacting certain regulations. See Simon, *supra* note 3, at 1444. Contrary local policies will be struck down as preempted if a state statute expressly bars local governments from regulating on an issue, so long as the state statute does not run afoul of state or federal constitutional principles. Briffault, *The Continuing Challenge*, *supra* note 25, at 259. The analysis for implied preemption is less straightforward, but the key question tends to be whether the legislature intended to displace local law through the enactment of the state statute. Simon, *supra* note 3, at 1444. For a thorough and interesting analysis on the approaches different jurisdictions take to determine whether the legislature intended to preempt local law, see Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM.L.REV. 2225, 2233 (2017). See also Briffault, *The Continuing Challenge*, *supra* note 25, at 256–57.

27. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) [hereinafter: Briffault, *The Challenge*]. See also Nestor M. Davidson & Laurie Reynolds, *The New State Preemption, The Future of Home Rule, and The Illinois Experience*, 4 ILL. MUNICIPAL POL'Y J. 19, 20 (2019).

28. Preemption is established at the federal level in the Supremacy Clause of the U.S. Constitution, which provides that the federal laws of the United States take precedence over state laws and state constitutions. U.S. CONST. art. VI, cl. 2.

29. This Note is concerned with state preemption of local laws, regulations, and ordinances rather than federal preemption of state or local law.

legislatures to resolve conflicts between state and local law when both levels of government adopt laws regulating the same subject matter.<sup>30</sup>

State legislatures use this traditional form of preemption to advance statewide uniformity of laws, to rein in local governments whose policy decisions have clear effects beyond their borders, or to establish statewide minimum standards that leave local governments with discretion to go beyond or supplement those minimums.<sup>31</sup> The purpose of this form of preemption is to “harmonize[] the efforts of different levels of government in areas in which both enjoy regulatory authority.”<sup>32</sup> Although traditional preemption is still used when there is a conflict between a state law and local law, state legislators have increasingly resorted to a new tactic to overcome conflicts between their policy priorities and those of local governments.

### C. The New Preemption

A crucial feature of traditional preemption was that state and local governments had both *enacted laws* on the same subject area. In other words, both the state and municipality had passed regulations on the same issue, creating a conflict between the two laws. Increasingly, however, state legislatures have enacted sweeping preemption laws that expressly bar local action across a wide range of areas, from anti-discrimination policies to environmental protection laws to labor and business regulations, even though there are not yet state laws on the books with which those local laws might conflict.<sup>33</sup>

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30. Davidson & Reynolds, *supra* note 27, at 19–21 (“For years, preemption has been used by state legislatures in two primary ways: either to displace local policy with a statewide regulatory framework; or to establish general statewide minimum standards that are subject to local discretion to go beyond, to enhance, or to supplement those minimums.”).

31. Preemption scholars widely accept these as legitimate uses of state preemption. See Richard Briffault et al., *Preemption: An Assault on Federalism*, AM. CONST. SOC’Y (Sept. 2017), [https://www.acslaw.org/wp-content/uploads/2017/09/ACS\\_Issue\\_Brief\\_-\\_Preemption\\_0.pdf](https://www.acslaw.org/wp-content/uploads/2017/09/ACS_Issue_Brief_-_Preemption_0.pdf) [<https://perma.cc/7ZL3-H3RQ>] (listing advancement of legitimate state interests in uniformity, limitation of local governments whose actions have definable negative effects beyond their borders, or local interference with state regulatory programs as the traditional justifications for state exercise of preemption oversight) [hereinafter *ACS Issue Brief*]. See also Davidson & Reynolds, *supra* note 27, at 19–20.

32. Briffault, *The Challenge*, *supra* note 27, at 1997.

33. Briffault, *The Continuing Challenge*, *supra* note 25, at 262. The new preemption is closely connected to the growing rift between policy preferences of urban and rural communities and increasing polarization between Democrats and Republicans. Briffault, *The Challenge*, *supra* note 27, at 1997. Although there are

Through this “new preemption,”<sup>34</sup> state legislatures displace local regulation of a policy area without instituting any overarching or guiding state law.<sup>35</sup> This deregulatory tactic leaves local governments unable to act on local issues even though there is no state regulation in place to address the subject.<sup>36</sup> The new preemption phenomenon

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some examples of Democratic states preempting liberal cities, the vast majority of these new preemption laws have been enacted by majority-Republican state legislatures that do not agree with the policy choices of Democratic cities. *Id.* at 1997–98 (“[T]he preponderance of the new preemption actions and proposals have been advanced by Republican-dominated state governments, embrace conservative economic and social causes, and respond to—and are designed to block—relatively progressive local regulations.”). *See also*, Phillips, *supra* note 26, at 2233. (“While preemption laws are not limited to Republican legislatures, the contemporary political structure in many states reflects a clear partisan divide: Republican state legislators typically seek to limit the power of Democrat-run cities.”) (footnotes omitted); *ACS Issue Brief*, *supra* note 31 (noting that “[t]he trend toward intrusive state oversight has been most notable in—but is by no means exclusive to—states with conservative state governments that are home to progressive cities, and these conflicts have been growing in recent years”). This is notable because in the past, Republicans have typically been the most vocal advocates for less national and more state and local governments. For example, Newt Gingrich, former Republican Speaker of the House of Representatives, once wrote: “‘Closer is better’ should be the rule of thumb for our decision making; less power in Washington and more back home, our consistent theme.” NEWT GINGRICH, *TO RENEW AMERICA* 9 (1995); *see also* *Republicans Intensify Their Assault on City Governments*, *ECONOMIST* (June 3, 2023), <https://www.economist.com/united-states/2023/06/03/republicans-intensify-their-assault-on-city-governments> (on file with the *Columbia Human Rights Law Review*) (noting that while “conservative dogma once taught that local government reigned supreme,” Republicans have taken a “Goldilocks” approach in recent years, whereby, as Bennett Sandlin, head of the Texas Municipal League, explains, “[t]he federal government is big and bad, cities are small and bad, and somehow state government gets it just right”).

34. This form of preemption was coined the “New Preemption” by Professor Richard Briffault. Briffault, *The Challenge*, *supra* note 27, at 87. This Note will adopt Professor Briffault’s language to refer to these new trends in preemption. However, scholars have also used different names, such as hyper-preemption or vindictive preemption, to describe preemption practices that go beyond traditional preemption. *See* Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 *GEO. L.J.* 1473 (2018) (using the term “hyper preemption” to describe statutes that seek not just to bar local government authority over a specific subject but to “broadly discourage local governments from exercising policy authority in the first place”).

35. Briffault, *The Continuing Challenge*, *supra* note 25, at 92; Davidson & Reynolds, *supra* note 27, at 20.

36. “In this new use of an old doctrine, preemption has acquired a new deregulatory purpose, leaving local governments unable to address local problems.” Davidson & Reynolds, *supra* note 27, at 20. Rather than targeting

has taken hold with particular force in the field of firearm regulation.<sup>37</sup>

#### D. Firearm Preemption Takes Hold

Firearm preemption grew in response to the gun control movement, which gained momentum during the 1970s and 1980s.<sup>38</sup> In the early 1980s, a Chicago suburb's ordinance banning the sale and possession of handguns survived a Second Amendment challenge in the Seventh Circuit.<sup>39</sup> In response, gun-rights advocates launched a nationwide campaign to restrict the power of municipal governments to enact gun restrictions.<sup>40</sup> A pro-gun magazine,

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specific local policy decisions, states are increasingly seeking to eradicate whole areas of authority that have traditionally belonged to local governments. *See also* Local Solutions Support Center, *The State Strikes Back: Death Star 2.0 Preemption* 1 (2023), <https://static1.squarespace.com/static/5ce4377caeblce00013a02fd/t/6551bfb1bbd4f391e4e22f513/1699856159185/LSSC-WhitePaper-DeathStar20.pdf> [<https://perma.cc/2DK2-6PUT>] (“[S]tates have begun to impair or eradicate whole realms of local authority entirely, specifically targeting policies that protect communities of color, immigrants, workers in low-wage industries, and other vulnerable residents.”); Davidson & Reynolds, *supra* note 27, at 20 (“Moving beyond the ‘strip one power at a time’ approach to dismantling home rule, legislatures are considering expansive blanket preemption bills, erasing broad swaths of local legislative powers with one stroke of the pen.”). In 2023, state lawmakers across the country proposed nearly seven hundred bills that would severely impinge on the power of cities. Laura Meckler, *Red States Seek Control Over Blue Cities Through Preemption*, WASH. POST (Nov. 27, 2023), <https://www.washingtonpost.com/nation/2023/11/27/red-states-blue-cities-preemption-control/> (on file with the *Columbia Human Rights Law Review*).

37. Simon, *supra* note 3, at 1445 (noting that “[f]irearm regulation . . . has proven to be the most popular target of express state-local preemption”).

38. Simon, *supra* note 3, at 1464–65. Gun control organizations at that time focused their efforts exclusively on implementing federal regulations, with little success. *See also* Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 *FORDHAM L. REV.* 681, 696 (2004) (“From the start, the gun control ‘movement’ was going to be oriented toward elite politics at the national level, rather than mass political or social change at the grassroots . . . their primary goal was to push a comprehensive gun control bill through Congress.”). As gun control organizations struggled to enact the nationwide gun control measures they envisioned, local governments began experimenting with their own regional gun safety measures. *Id.* at 705.

39. The ordinance was passed by Morton Grove. *See* *Quilici v. Village of Morton Grove*, 695 F.2d 261, 263–64, 269–71 (7th Cir. 1982).

40. Goss, *supra* note 38, at 704–08. Gun rights organizations, including the NRA, took the passage of these local ordinances to be a serious threat to their cause, declaring that they were “the first step towards banning all gun possession” throughout the country. *Id.* at 705. An National Rifle Association

*American Rifleman*, encouraged readers to monitor local legislation and contact the National Rifle Association (NRA) if they heard any whisper of proposed gun regulation.<sup>41</sup> But the NRA came up with a more efficient strategy for fighting local gun ordinances: preemption laws that would strip municipalities of their power to regulate firearms in the first place.<sup>42</sup> Rather than fight local ordinances after they were enacted, the NRA encouraged states to simply take away the power of local governments to pass ordinances on guns at all. In so doing, states used their inherent power over local governments to keep local gun regulations off the books and restrict local policymaking beyond what the Second Amendment requires.<sup>43</sup>

This strategy has been extraordinarily successful.<sup>44</sup> Today, forty-five states have enacted firearm preemption laws that to varying degrees prevent local governments from adopting popular gun measures.<sup>45</sup> These preemption laws run the gamut from specific preemption statutes, which prohibit local governments from enacting certain types of gun laws, to absolute preemption statutes, which prohibit any local firearm regulation, to punitive preemption statutes, which add penalties on local governments and government officials

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mailing alerted its supporters that “We must stop a possible domino effect . . . these fanatics must be stopped—NOW!” *Id.* at 704 (citing OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 133 (1993)).

41. Goss, *supra* note 38, at 705 (citing Action Alert: Will Your Hometown Be Next?, *Am. Rifleman*, Feb. 1982, at 57).

42. *Id.* (noting that the NRA’s preemption strategy “was deeply rooted in Dillon’s rule, the century-old principle that cities and towns are not autonomous entities but rather creatures of the state, with their lawmaking powers ultimately subject to nullification by this higher authority” and that “[t]he NRA turned this principle against gun control supporters”).

43. For a fuller discussion of how preemption laws are part of an expansion of gun rights taking place wholly outside of the Second Amendment, see *infra* Section I.F.

44. See, e.g., Michael P. O’Shea, *Why Firearm Federalism Beats Firearm Localism*, 123 YALE L.J. ONLINE 359 (2014) (noting that “states preempt municipal regulation on this subject more often than perhaps any other”).

45. Forty-three states have more fully preempted local regulation, while California and Colorado have expressly preempted only a few limited areas of local regulation. *Preemption of Local Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE [hereinafter Giffords, *Preemption*], <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws> [<https://perma.cc/2Q3B-UPH8>]; *State Firearm Preemption Laws*, EVERYTOWN FOR GUN SAFETY (Feb. 20, 2018) [hereinafter *Everytown, State Firearm Preemption Laws*], <https://everytownresearch.org/report/fact-sheet-preemption-laws/> [<https://perma.cc/FK5Z-NM5J>].



who attempt to enact firearm regulations.<sup>46</sup> There are only five states that have chosen not to enact a firearm preemption statute and allow local governments to retain their authority to regulate firearms.<sup>47</sup>

### 1. No Firearm Preemption Statute

The five states with no preemption statutes are Connecticut, Hawaii, Massachusetts, New Jersey, and New York.<sup>48</sup> In the absence of preemption laws broadly prohibiting municipal action on firearms, the traditional form of preemption alone applies.<sup>49</sup> This means that a local ordinance might be struck down as preempted if, and only if, there is already a state law on the books regulating that area.<sup>50</sup> So long as a local ordinance does not fail this traditional preemption test and is not challenged on other grounds, it will take effect in these states.

### 2. Partial Preemption of Local Law

Two states—California and Colorado<sup>51</sup>—allow municipalities to regulate most aspects of firearms, preempting very limited areas of regulation. California preempts local governments from passing laws regarding the registration and licensing of firearms, the possession and sale of imitation firearms, and the licensing or permitting of concealable firearms in the home or place of business.<sup>52</sup> This leaves

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46. Simon, *supra* note 3, at 1469–74.

47. *Id.* at 1468–69.

48. See Giffords, *Preemption*, *supra* note 45.

49. Courts will apply the traditional preemption analysis to determine whether the local law conflicts with state law. States take different approaches to traditional preemption analysis, but generally the question is whether the state legislature intended to displace local laws on a certain matter. See Phillips, *supra* note 26, at 2247.

50. See *supra* Section I.B.

51. In 2021, Colorado became the first state to repeal its broad firearm preemption law and return lawmaking power in the firearm space to local governments and institutions of higher education. COLO. REV. STAT. § 29-11.7-101(1)(d)(e), (2) (2021); Giffords, *Preemption*, *supra* note 45. The repeal of the preemption law was prompted by a mass shooting—a gunman killed 10 people in a Boulder supermarket, less than two weeks after a judge had struck down Boulder’s local ordinance that banned assault weapons, bump stocks, and high-capacity magazines because it violated the state’s firearm preemption law. Matt Vasilogambros, *Colorado Overturns Preemption Law; Other States May Follow*, GOVERNING (Nov. 29, 2023), <https://www.governing.com/community/colorado-overturns-preemption-law-other-states-may-follow> [<https://perma.cc/8RE3-5Z2Q>].

52. CAL. GOV’T CODE § 53071 (West 2024); CAL. GOV’T CODE § 53071.5 (West 2013); CAL. PENAL CODE § 25605(b) (West 2012).

Californian municipalities with the freedom to implement stricter regulations than the state over a wide range of topics, including where firearm dealers may be located<sup>53</sup> and when individuals may possess firearms on county-owned property.<sup>54</sup> Colorado leaves even more power in the hands of local governments, preempting only local laws that might restrict an individual's ability to travel with a firearm in a private vehicle.<sup>55</sup>

### 3. Near-Absolute Preemption of Local Laws

The remaining forty-three states have broad preemption laws that prohibit local governments from enacting any type of gun regulation that is more restrictive than the state's.<sup>56</sup> The exact statutes vary, but each state generally prohibits all local firearm and ammunition regulation, allowing for only a few narrow exceptions.<sup>57</sup>

For example, South Dakota's statute prohibits all local subdivisions from enacting any "ordinance that restricts or prohibits . . . the possession, storage, transportation, purchase, sale, transfer, ownership, manufacture, or repair of firearms or ammunition or their components."<sup>58</sup> There are no exceptions in South Dakota's statute—it fully preempts all local government regulation on firearms.<sup>59</sup> Like South Dakota, Maine's law also broadly preempts

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53. See *Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420, 425–27 (Cal. Ct. App. 1997) (upholding local ordinance regulating the location of firearms dealers against a state preemption challenge).

54. See *Nordyke v. King*, 44 P.3d 133, 138 (Cal. 2002) (upholding ordinance prohibiting the possession of firearms and ammunition on county-owned property).

55. COLO. REV. STAT. § 18-12-105.6(2)(b) (2024). Presumably, this exemption exists to avoid creating a patchwork of laws that could turn one's actions from legal to illegal as a person moves through the state. See generally, *Preemption of Local Laws in Colorado*, GIFFORDS L. CTR. FOR GUN VIOLENCE PREVENTION, <https://giffords.org/lawcenter/state-laws/preemption-of-local-laws-in-colorado/> [<https://perma.cc/D3HA-QT53>]. As such, it is in line with the traditional goals of preemption: to advance statewide uniformity of laws and rein in spillover effects of local governmental action. *ACS Issue Brief*, *supra* note 31.

56. Giffords, *Preemption*, *supra* note 45.

57. *Id.*; see also Simon, *supra* note 3, at 1471–72.

58. S.D. CODIFIED LAWS § 7-18A-36 (2019). The law requires that the attorney general bring a legal action against any local government that refuses to reverse an ordinance they believe violates the statute. *Id.*

59. *Id.* The statute does not apply to any "generally applicable zoning ordinance, building regulation, or fire code so long as the ordinance, regulation, or code is not used to circumvent the prohibition under this section." *Id.* It is unclear how such an ordinance, regulation, or code could impose limits on firearms or

local regulation of firearms.<sup>60</sup> The only exception in Maine’s wide-ranging preemption statute is that local governments may regulate the discharge of firearms within the municipality, but only after consulting with the Maine Department of Inland Fisheries and Wildlife to set “clearly defined physical boundaries” where the discharge of firearms is to be prohibited.<sup>61</sup> Similarly, Virginia’s preemption statute broadly bars local action regulating firearms.<sup>62</sup> However, it includes more exceptions. Municipalities may prohibit firearms in certain public places<sup>63</sup> and enact limited restrictions on the possession and storage of firearms at daycare facilities.<sup>64</sup> These three state statutes illustrate the range of substantive limitations that state legislatures have imposed on localities’ ability to regulate firearms.

#### E. Punitive Preemption Statutes

Some states have gone further and enacted punitive measures that seek not only to bar local regulation of firearms but also to impose punishing fees on municipalities and civil or criminal penalties on local lawmakers who try to pass ordinances that arguably conflict with the state preemption statute.<sup>65</sup> Seven states have made local officials personally liable for damages and/or attorney’s fees associated with litigating violations of the preemption statute.<sup>66</sup> Kentucky has taken the extraordinary step of imposing

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firearm sellers, however, without being deemed as circumventing the statute’s very broad prohibition on local regulation of firearms.

60. ME. STAT. tit. 25, § 2011 (2012).

61. *Id.*; ME. STAT. tit. 30, § 3007(5) (2024).

62. VA. CODE ANN. § 15.2-915 (2020).

63. VA. CODE ANN. § 15.2-915(E) (2020). Another exception allows cities to impose limits on possession of a loaded shotgun or firearm on public streets. VA. CODE ANN. § 15.2-915.2 (2020).

64. VA. CODE ANN. § 15.2-914 (2021).

65. See *ACS Issue Brief*, *supra* note 31, at 9–10; Briffault, *The Challenge*, *supra* note 27, at 1997. Many of these of these punitive preemption laws target local firearm regulations. See Briffault, *The Continuing Challenge*, *supra* note 25, at 260–61. However, there has been some use of punitive preemption outside of the firearm context. Texas, for example, has enacted an anti-sanctuary-city law that fines local governments up to \$25,500 for each day that they are in violation of the law. See TEX. GOV’T CODE ANN. § 752.056(a)-(b) (West 2021).

66. These states are Florida, Iowa, Kentucky, Minnesota, Mississippi, Oklahoma, and Tennessee; in Iowa and Minnesota, the liability is limited, only applying in certain scenarios if an official violates the prohibition on local firearm action during a state of emergency. See FLA. STAT. § 790.33(3)(f) (2021); IOWA CODE § 29C.25 (2022); KY. REV. STAT. ANN. § 65.870(4) (2012); MINN. STAT. §

criminal liability on local legislators who enact a measure that seeks to regulate guns in letter or spirit.<sup>67</sup> City council members and town mayors are among those who may be held criminally liable for trying to enact gun laws; they may be subjected to up to twelve months in jail or a fine of \$500 for this offense.<sup>68</sup>

Arizona and Florida also impose extreme penalties on local officials for “knowing and willful” violations of the preemption statute.<sup>69</sup> Arizona’s firearm preemption statute authorizes the removal of local legislators from office if they attempt to pass local gun regulations<sup>70</sup> and empowers state courts to impose fines of up to \$50,000 on political subdivisions that knowingly enact local firearm laws.<sup>71</sup> This firearm-specific statute works in conjunction with Arizona’s general preemption statute, S.B. 1487, which threatens municipalities with serious financial consequences for any violation of state law.<sup>72</sup> If the state attorney general determines that there is a violation, S.B. 1487 requires the state treasurer to withhold the state funding that is earmarked to go to that locality.<sup>73</sup> Moreover, even if the attorney general only determines that a local regulation “may” violate a provision of state law, the attorney general must then file an action so that the state supreme court can resolve the issue.<sup>74</sup> Pending resolution, the local government that “may” have violated the statute must post a bond equal to the amount of state aid it

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624.7192(e)(1) (2015); MISS. CODE ANN. § 45-9-53(5)(c) (2015); OKLA. STAT. ANN. tit. 21, § 1289.24(D) (West 2021); TENN. CODE ANN. § 39-17-1314(g)-(i) (West 2021); H.B. 902, 2021 Gen. Assemb., (Tenn. 2021). *See also* Giffords, *Preemption*, *supra* note 45, at n.28.

67. KY. REV. STAT. ANN. § 65.870(6) (2012). *See also* Simon, *supra* note 3, at 1473.

68. KY. REV. STAT. ANN. § 65.870(6) (2012); *see also* Jonathan Bullington, et al., *Miller Discusses Gun Preemption Laws: No Reason Why Values in a County of 1,000 Should Be the Same as Values in a County of 100,000*, DUKE L. (Sept. 29, 2021), <https://law.duke.edu/news/miller-discusses-gun-preemption-laws-no-reason-why-values-county-1000-should-be-same-values> [https://perma.cc/XU99-YRZB] (describing Kentucky’s punitive preemption statute, the harsh penalties associated with it, and the rise in gun violence and homicides in Louisville, which local officials can do nothing to combat—by September, twenty children had been killed by gunfire in Louisville and eighty-two more had been wounded in 2021).

69. ARIZ. REV. STAT. ANN. § 13-3108(I) (2017); FLA. STAT. ANN. § 790.33(3)(c) (West 2021) (authorizing fines up to \$5,000 per violation).

70. ARIZ. REV. STAT. ANN. § 13-3108(J) (2017).

71. ARIZ. REV. STAT. ANN. § 13-3108(I) (2017).

72. ARIZ. REV. STAT. ANN. § 41-194.01 (2021).

73. *Id.* § 41-194.01(B)(1). *See also* Simon, *supra* note 3, at 1466–67 (discussing S.B. 1487 as a punitive fiscal measure).

74. Ariz. Rev. Stat. Ann. § 41-194.01(B)(2).

received in the preceding six months.<sup>75</sup> In 2016, state lawmakers used S.B. 1487 to challenge a Tucson gun regulation, and the statute required the city to pay the state a bond that exceeded its reserve funds by \$5,000,000.<sup>76</sup> Tucson could not pay and repealed its statute.<sup>77</sup> With such high fiscal penalties, Arizona municipalities are left with no choice but to repeal the local ordinance that is being challenged, even if that ordinance has only been flagged by the attorney general as *possibly* violating the state preemption law.<sup>78</sup>

Under new preemption, local governments were at the very least still able to experiment, test the limits of the preemption statute, and use local funds to defend their laws if they become subject to a legal challenge.<sup>79</sup> Under punitive preemption, the personal risks to local legislators are too high for policy experimentation, and the fiscal consequences for cities that try to test the limits of preemption are often impossible to bear.<sup>80</sup>

#### F. Effects of Firearm Preemption Law on Local Gun Regulation

Through concerted effort to push states to adopt broad firearm preemption statutes, the NRA and similar pro-gun groups have succeeded in creating an additional layer of protection against gun laws.<sup>81</sup> Before these preemption statutes were on the books, a

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75. *Id.*

76. See Complaint at 9, *City of Tucson v. Arizona*, C20165733 (Ariz. Super. Ct. Dec. 12, 2016). See also Scharff, *supra* note 34, at 1496–97, 1512–1513 (discussing the S.B. 1487 complaint process and the statute’s bond requirement).

77. Scharff, *supra* note 34, at 1496. Associated Press, *Tucson Ends Policy on Destroying Guns After Court Ruling*, AZ CENT. (Sept. 7, 2017), <https://www.azcentral.com/story/news/local/arizona/2017/09/07/tucson-ends-policy-destroying-guns/643667001/> [<https://perma.cc/TRL9-YNF8>].

78. Scharff, *supra* note 34, at 1497 (“The message of S.B. 1487: don’t try any funny business in an area that *might* be preempted by the state.”).

79. Even if a local government knows its law will be struck down, it might still wish to pass the law to express its views on the subject and to keep the public debate surrounding the issue alive. RICHARD BRIFFAULT, LOCAL SOLS. SUPPORT CTR., PUNITIVE PREEMPTION: AN UNPRECEDENTED ATTACK ON LOCAL DEMOCRACY 2–3 (2018) (discussing that “[p]unitive preemption . . . is likely to chill local efforts to test the legality or scope of preemption or raise a dissenting opinion because if the city or county loses” a legal challenge, “not only is its law nullified but the government and local officials risk loss of state aid, fines, and, for officials, removal from office or criminal penalties”).

80. Simon, *supra* note 3, at 1477.

81. Professor Joseph Blocker, co-director of the Center for Firearms Law at Duke Law School and an expert on gun regulations, has noted that “[b]efore you even get to the Constitution, there’s a huge array of other laws super protecting

local regulation would be constrained only by the Second Amendment and any state laws that imposed conflicting regulations.<sup>82</sup> Now, in the forty-three states with some form of stringent firearm preemption, gun-related ordinances may be struck down not based on their substance, but simply because a state has decided to take the power to enact such a law away from its local governments.<sup>83</sup> Preemption

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the right to keep and bear arms . . . . This collection of laws is giving individuals lots of protection for gun-related activity that the Second Amendment would not necessarily require, and certainly, in almost all of these instances, that no lower court has said the Second Amendment would require.” Libby Cathey, *Why the Second Amendment May Be Losing Relevance in Gun Debate*, ABC NEWS (Oct. 28, 2021), <https://abcnews.go.com/US/amendment-losing-relevance-gun-debate/story?id=79474562> [<https://perma.cc/ZQ8S-FY3Q>]. See also Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 581 (2022) (noting that focusing the debate over gun rights on the Second Amendment “ignores a vast and expansive nonconstitutional legal regime privileging guns and their owners”).

82. Without a preemption statute in place, the traditional form of preemption would apply. The traditional form of preemption requires states to have a law on the books and argue that the local law at issue conflicts with it. See *supra* Section I.B.

83. A good example of the effects of this can be found in the recent gun control battles in Boulder, Colorado. The state of Colorado used to have a broad preemption law that prohibited local governments from enacting any gun regulation that stricter than state law. See C.R.S.A. § 29-11.7-103. In 2018, the City Council of Boulder unanimously passed an ordinance banning the sale and possession of assault weapons and prohibiting high-capacity magazines and bump stocks, which allow a semi-automatic weapon to fire like an automatic weapon. See Shay Castle, *Boulder City Council Unanimously Passes Ban on Assault Weapons*, DENVER POST (May 16, 2018), <https://www.denverpost.com/2018/05/15/boulder-city-council-assault-weapon-ban-passes> [<https://perma.cc/PM9B-72KG>]. That ordinance was struck down in March of 2021 on the grounds that it violated the state’s firearm preemption statute. Order Re: Pl.’s Mot. for Summ. J. and Def.’s Mot. for Summ. J., *Chambers v. City of Boulder*, (No. 18CV30581), 2021 Available at: <https://www.courthousenews.com/wp-content/uploads/2021/03/assaultweapons.pdf> [<https://perma.cc/QD5H-P6DW>]. Ten days later, a gunman entered a grocery store in Boulder with an assault weapon and killed ten people. Joseph Blocher, *The Biggest Legal Obstacle to Gun Regulation: State Preemption Laws, Not the Second Amendment*, 111 AM. J. PUB. HEALTH 1192 (2021); *Suspect Charged With 10 Counts of Murder in Boulder, Colo., Shooting*, N.Y. TIMES (Mar. 23, 2021), <https://www.nytimes.com/live/2021/03/23/us/boulder-colorado-shooting> (on file with the *Columbia Human Rights Law Review*). This incident led the Colorado state legislature to repeal the state’s broad preemption statute later in 2021. COLO. REV. STAT. § 29-11.7-101 (2021). In 2022, Boulder passed five gun regulations, one of which reinstated the ban on assault weapons, high-capacity magazines, and bump stocks that had been invalidated under the preemption law. *Gun Violence Prevention Ordinances*, BOULDER CNTY.,

laws have thus been a key part of an expansion of gun rights that is taking place wholly apart from the Second Amendment.<sup>84</sup> Not only have these laws extended protections to gun owners beyond what the Second Amendment guarantees,<sup>85</sup> but they have also given pro-gun states, organizations, and even private individuals<sup>86</sup> a mechanism to override democratically-enacted local ordinances, solely because they

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<https://bouldercounty.gov/departments/commissioners/gun-violence-prevention-ordinances> [<https://perma.cc/H8R8-YV2U>]. When the state preemption law was in place, all five of the local ordinances would have been easily struck down as violative of state law. Although at the time of writing, one of the ordinances—banning the sale of large magazines and automatic weapons—was being challenged in court, the other provisions have been enacted unchallenged. Olivia Prentzel, *Federal Judge Issues Temporary Restraining Order, Blocking Boulder County's Ban of Semi-Automatic Weapons*, COLO. SUN (Aug. 30, 2022), <https://coloradosun.com/2022/08/30/judge-blocks-boulder-countys-assault-weapon-ban> [<https://perma.cc/H8R8-YV2U>].

84. See, e.g., Blocher, *supra* note 83, at 1193 (noting that “practically speaking, [preemption laws] are a more important determinant of gun regulation than the Second Amendment itself”). See also, Charles, *supra* note 81, at 585 (“It is no exaggeration to say that widespread preemption laws likely prevent more gun regulation than the Second Amendment.”). *Bruen* has somewhat complicated this picture, as lower courts struggle to determine how exactly to apply its test. However, a study of post-*Bruen* cases between June 2022 and February 2023 shows that 88% of gun regulations that have been challenged under the Second Amendment after *Bruen* have been upheld. Jake Charles, *By the Numbers: How Disruptive Has Bruen Been?*, DUKE CTR. FOR FIREARMS L. (March 27, 2023), <https://firearmslaw.duke.edu/2023/03/by-the-numbers-how-disruptive-has-bruen-been> [<https://perma.cc/CZP8-FFV9>]. See also Billy Clark, *Second Amendment Challenges Following the Supreme Court's Bruen Decision*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, [https://giffords.org/memo/second-amendment-challenges-following-the-supreme-courts-bruen-decision/#footnote\\_2\\_71400](https://giffords.org/memo/second-amendment-challenges-following-the-supreme-courts-bruen-decision/#footnote_2_71400) [<https://perma.cc/A9XV-R9DN>] (finding that most courts have upheld many state and local gun regulations following *Bruen*).

85. See, e.g., IDAHO CODE § 18-3309 (Supp. 2020) (barring state colleges and universities from “regulating or prohibiting the otherwise lawful possession, carrying or transporting of firearms or ammunition by persons licensed” under state law, except in limited circumstances). See also, Charles, *supra* note 81, at 584–87 (“[S]ome of these [preemption] statutes are not just shields safeguarding gun rights but also swords thrusting them into places and spaces the formal Constitution would never grant them access.”); Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L. J. 15 (2018) (“[S]tate law is embracing such a robust, anti-regulatory view of the right to keep and bear arms that the Judicial Second Amendment, at least as currently construed, seems likely to have less and less to say about the shape of America’s gun laws.”).

86. Several states, including Florida, Kentucky, and Mississippi, have created a private right of action for their firearm statutes so that any private citizen who has been “affected” by the law may sue. See Simon, *supra* note 3, at 1474–75, n.203–06.

disagree with the choices those voters have made.<sup>87</sup> The enactment of state firearm preemption laws has resulted in the voiding of dozens of local ordinances that had been in place for years.<sup>88</sup> These local laws were not in conflict with the Second Amendment or any state laws regulating some element of firearm ownership or possession—they were only violative of the firearm preemption statute. As such, these preemption statutes take away local governments’ power to enact gun laws, regardless of the law’s substance or goal.

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87. An Ohio state legislator who supports the state firearm preemption law provides an example of this attitude: “The way I sum it up in one sentence is I’m all for local control, but I’m not for local out of control. Sometimes the locals get taken away with their own importance and pass things that are not in the general best interest of everybody.” John London, *Judge Rules Cincinnati’s Gun Reform Laws Unconstitutional*, WLWT (Aug. 31, 2022), <https://www.wlwt.com/article/cincinnati-gun-reform-laws-judge-ruling/45142184> [<https://perma.cc/3LCX-U4V8>].

88. See, e.g., FLA. STAT. ANN. § 790.33 (West 2021) (“Any such existing ordinances, rules, or regulations are hereby declared null and void.”). When the preemption law was enacted, it was used to strike down a Miami ordinance that required the use of locking devices to safely store firearms in the city and a university regulation prohibiting the carrying of firearms within cars parked on campus. See also, VA. CODE ANN. § 15.2-915 (West 2020). Virginia’s preemption statute originally only applied to the adoption of new ordinances, but in 2004 it was amended to prevent the enforcement of any local ordinances. This threw into doubt three decades-old ordinances that had previously been determined to be valid by the state Supreme Court or Attorney General. *Preemption of Local Laws in Virginia*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/state-laws/preemption-of-local-laws-in-virginia> [<https://perma.cc/5BQV-BPP3>]. In Mississippi, Madison city officials immediately amended a seven-year-old local ordinance prohibiting concealed weapons on public property after the state Attorney General office determined the law to be in violation of the preemption statute. The Attorney General’s office became aware of the ordinance after a private citizen filed a complaint. See MADISON, MISS., ORDINANCE PROHIBITING POSSESSION OF FIREARMS ON DESIGNATED CITY PROPERTY (Sept. 3, 2013), <http://www.madisonthecity.com/sites/default/files/MadisonFirearmsOrdinanceSigned.pdf> [<https://perma.cc/G3UQ-DP4F>]; Jimmie E. Gates, *AG’s Office Says Madison’s Ordinance May Violate Enhanced Gun Carry Permit Law*, CLARION LEDGER (Nov. 21, 2019), <https://www.clarionledger.com/story/news/politics/2019/11/21/man-files-agscomplaint-saying-city-madison-violating-gun-laws/4206145002> [<https://perma.cc/B8RN-SMYX>]. The same citizen who complained about Madison’s ordinance had filed thirty-four other complaints against local ordinances, all but three of which resulted in the localities amending their ordinances to comply with the state’s extreme preemption statute. *Id.*; MISS. CODE ANN. § 45-9-53.



Scholars have noted that in using the new form of preemption, states have shifted away from using preemption as a means of achieving legitimate state interests—such as ensuring uniformity or mitigating effects of local actions that spill beyond borders—and have shifted towards using preemption as a tool to block local initiatives in areas of local concern.<sup>89</sup> In the firearms space, states have used the new form of preemption as a deregulatory tactic, stripping local governments of their power to act on local issues even though there are no overarching state laws addressing those issues.<sup>90</sup> Although states might nominally cite the need for uniformity of laws as the justification for harsh firearm preemption laws,<sup>91</sup> the uniformity that they are often creating in the firearm context is a uniform field of *no laws* across the entire state.<sup>92</sup> And the result is that localities are left defenseless to combat gun violence within their borders. Even if every resident of a town or city desires gun control measures, and even if there are no state statutes regulating firearms, localities can do nothing.<sup>93</sup>

Moreover, under the threat of harsh penalties, local officials in states with punitive preemption have grown less willing to even

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89. See *ACS Issue Brief*, *supra* note 31, at 1 (noting that states are increasingly “expressing political differences through a legal tool originally designed to protect legitimate state interests in uniformity and to police against truly recalcitrant localities”); Schragger, *supra* note 14, at 1183 (describing how the new preemption statutes “function merely to deny localities certain regulatory powers, rather than to protect actual policies adopted at the state level”).

90. Simon, *supra* note 3, at 1448 (noting that the “goal often was, and remains, deregulatory”).

91. Many state preemption statutes include the need for “uniformity” as justification for the law. For example, Florida’s preemption statute states that “It is the intent of this section to provide uniform firearms laws in the state . . .” FLA. STAT. § 790.33.

92. See Davidson & Reynolds, *supra* note 27, at 20 (“State legislatures have passed laws expressly preempting local control—not for the purposes of adopting statewide policies or providing regulatory baselines, but merely to strip local governments of the power to act, leaving no regulatory structure in place.”). A firearm-specific example can be found in a recent case involving Columbus, Ohio. See *infra* note 241.

93. After six municipal police officers were wounded in a long standoff with a gunman in 2019, the Philadelphia mayor begged of state lawmakers, “[h]elp our police officers. Help our clergy. Help our children . . . [a]nd if you choose not to help us, then get out of the way—and allow cities like Philadelphia that struggle with gun violence to enact our own solutions.” Monica Davey & Adeel Hassan, *When Cities Try to Limit Guns, State Laws Bar the Way*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/us/philadelphia-shooting-gun-control.html> (on file with the *Columbia Human Rights Law Review*).

propose or discuss gun-related ordinances that might be construed as violating the state's preemption law.<sup>94</sup> This hesitance has had a chilling effect on local political debate and action surrounding firearm regulation.<sup>95</sup>

#### G. Challenges to Firearm Preemption Statutes

Several municipalities have fought to preserve their local regulations by challenging the legality of state firearm preemption laws. Many of these challenges have been made on state constitutional grounds, with municipalities arguing that firearm preemption laws take away the home rule authority granted to local governments in the state's constitution.<sup>96</sup> Thus far, they have been

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94. In Kentucky, for example, a gun-rights group threatened to sue the cities of Louisville, Danville, and Richmond under the state's harsh preemption law, which imposes criminal liability on local officials who defy the statute. *See* Simon, *supra* note 3, at 1484–85 (describing this and other examples in more detail). All three cities promptly repealed their local ordinances. *Id.* The city of Danville not only retracted its almost thirty-year-old ordinance banning firearms in public cemeteries, which was the law challenged by the gun-rights organization, but city commissioners also voted unanimously to strike down a ten-year-old rule that required firearms-safety training for citation officers out of fear of being subjected to the preemption statute's harsh penalties. *Id.*

95. *See supra* note 81; *see also infra* note 173 and accompanying text.

96. For example, in Arizona in 2017, the city of Tucson argued in *State ex rel. Brnovich v. City of Tucson* that the state's broad and punitive preemption statute violated Tucson's authority to regulate matters of local concern. 399 P.3d 663, 673 (Ariz. 2017). The state court rejected this argument and held that the gun regulations that Tucson had enacted involved police power, an authority that is usually left to the state. *Id.* at 675. Arizona's Supreme Court in this case embraced an extremely narrow view of home rule power under Arizona's constitution, holding that firearm-related issues do not qualify as matters of "local concern." *Id.* at 676. Pennsylvania's firearm preemption statute has similarly withstood challenges based on local home rule authority to regulate firearms. *See Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996) (finding that Pennsylvania has restricted home rule power to regulate firearms). The city of Philadelphia more recently put up another challenge to Pennsylvania's preemption law. *Crawford v. Commonwealth*, 277 A.3d 649 (Pa. Cmmw. Ct. 2022). Rather than contending that home rule should allow for cities to regulate firearms, Philadelphia argued that the preemption law violates a provision of the state constitution that guarantees Pennsylvania's right to "life and liberty" because it prevents cities from protecting the life and liberty of its residents through gun control laws. *Oral Argument at the Pa. Supreme Court Scheduled in Case Challenging State Firearm Preemption That Blocks Local Gun Safety Laws*, PUB. INT. L. CTR. (July 13, 2023), <https://pubintlaw.org/cases-and-projects/oral-argument-at-the-pa-supreme-court-scheduled-in-case-challenging-state-firearm-preemption-that-blocks-local-gun-safety-laws> [<https://perma.cc/7FFC-6CXS>]. Pennsylvania's Supreme Court

met with little success. State courts have adopted a narrow view of localities' home rule authority over firearms and have repeatedly upheld the power of the state to restrict local lawmaking in the field of firearms.<sup>97</sup> The unsuccessful challenges to date suggest that these preemption statutes rest on sound legal footing for now.<sup>98</sup> Absent a new judicial approach to interpreting home rule provisions,<sup>99</sup> firearm

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rejected this argument and once again upheld the state's firearm preemption law against a legal challenge. *Crawford v. Commonwealth*, 326 A.3d 850 (Pa. 2024) (finding the state constitution does not afford a right to local gun-safety ordinances).

97. See, e.g., *City of Cleveland v. Ohio*, 942 N.E.2d 370 (Ohio 2010) (upholding Ohio's firearm preemption law despite the extensive home rule protections in Article XVIII of the state's constitution). At the time of writing, the city of Columbus was engaged in another challenge to Ohio's preemption law. After a local law requiring safe storage of guns in homes and prohibiting magazines with thirty or more bullets was struck down, the city sought to defend its ordinances by arguing that the state preemption statute violates the Ohio constitution's home rule provision. Columbus faces an uphill battle since the Columbus Supreme Court upheld a similar challenge in 2010 in *City of Cleveland v. Ohio*. However, Columbus intends to argue that two changes since 2010 favor the city. First, Columbus contends that the preemption law was previously upheld because the state itself had a comprehensive firearm regulatory scheme, which has since been completely dismantled. See Laura A. Bischoff, *How Ohio Gun Laws Have Changed in 20 Years*, COLUMBUS DISPATCH (May 19, 2023), <https://www.dispatch.com/in-depth/news/politics/2023/05/19/how-ohio-gun-laws-have-changed-in-20-years/70195472007> (on file with the *Columbia Law Human Rights Review*) (showing a twenty-year timeline of the dismantling of Ohio's gun regulations). Second, Columbus will argue that recent supreme court rulings have adopted a new statute-by-statute approach to analyzing home rule violations, which the city believes will favor them. Nick Evans, *Columbus Fighting Ohio Firearm Regulation Preemptions in Court Again*, OHIO CAP. J. (Sept. 12, 2023), <https://ohiocapitaljournal.com/2023/09/12/columbus-fighting-ohio-firearm-regulation-preemptions-in-court-again> [https://perma.cc/7HN4-LR4P]. The Ohio state court has recently shown a willingness to protect municipalities' home rule authority against preemption challenges in other contexts. See *Dayton v. State*, 87 N.E.3d 176, 179 (holding that because state laws regulating traffic cameras were not targeted to an "overriding state interest," they were non-general laws that unconstitutionally infringed upon home rule of local governments). It is possible that the Ohio state court could return a favorable outcome for gun control advocates, especially because the state has pursued aggressive statewide deregulation of firearms since 2004, which weakens their argument that firearm preemption furthers an "overriding state interest."

98. See *ACS Issue Brief*, *supra* note 31, at 11–17; Briffault, *The Challenge*, *supra* note 27, at 2008–17.

99. See Andrew Willinger, *Litigation Highlight: Ohio Judge Grants Injunction of State Preemption Law in Suit Brought by the City of Columbus*, DUKE CTR. FOR FIREARMS L. (Dec. 5, 2022), <https://firearmslaw.duke.edu/2022/12/litigation-highlight-ohio-judge-grants->

preemption statutes will likely continue to shackle local governments and prevent democratically-supported gun measures from being enacted in towns across America, unless and until state legislators decide to repeal them.

## II. LOCAL PRO-GUN ACTION TOLERATED BY STATE LAW

As demonstrated in Part I, state legislatures in forty-three states have taken aggressive measures to ensure that local governments cannot regulate in the field of firearms.<sup>100</sup> They have stripped citizens of their power to enact local gun laws and, in some cases, have imposed civil or criminal penalties on local elected officials who attempt to regulate guns.<sup>101</sup> These preemption laws, however, are focused on preventing local measures that create gun regulations that are stricter than the state's. Yet, at the same time that states have used their power over local governments to impose and defend harsh preemption measures, state law and state lawmakers have tolerated the pro-gun local resistance movements that have taken hold in many states over recent decades in response to statewide gun reforms.<sup>102</sup>

Part II of this Note outlines the rise of the constitutional sheriffs movement and assesses how the movement undermines statewide gun laws. Section A describes the rise of the constitutional sheriffs movement. Using data on sheriffs' enforcement of Colorado's red flag law, Section B highlights how constitutional sheriffs are

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injunction-of-state-preemption-law-in-suit-brought-by-the-city-of-columbus [<https://perma.cc/3NXN-KZ9T>] ("So long as state courts continue to construe all gun regulation as a 'statewide' concern or interest and uphold most preemption laws under that theory, home-rule challenges to preemption laws are unlikely to make much headway.").

100. Recall that, since states create and enjoy plenary power over local governments, preempting whole fields of policy is within a state's power. *See supra*, Sections I.B, I.C. (describing the different kinds of preemption at the state level). This is true even if the motivations behind the decision to preempt appear to be pretextual or politically motivated. Recall further that state legislators and pro-gun interest groups often justify the need for firearm preemption laws on the need for uniform laws throughout a state. *Id.*

101. *See supra* Sections I.D, I.E.

102. One form of this local resistance has come in the form of "Second Amendment Sanctuaries." *See infra* note 105 (describing this form of pro-gun movement in more detail). Although the constitutional sheriffs movement and Second Amendment Sanctuaries both represent organized forms of local resistance to state gun laws and are in many ways intertwined, this Note and Part focuses specifically on the constitutional sheriffs movement.

effectuating local pro-gun resistance through their nonenforcement of firearm laws.

#### A. Pro-Gun Local Resistance

Despite the obstacles that gun-control advocates face, some of which are outlined in Part I,<sup>103</sup> several states have passed gun control measures in the past few years,<sup>104</sup> often in response to deadly shootings.<sup>105</sup> As more states have enacted protective gun measures,

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103. See *supra* Section I.F (explaining that, in order to be enacted, local firearm regulations must survive not only the Second Amendment and any conflicting state laws, but also the additional challenge of state preemption that entirely blocks local initiatives).

104. For example, as of November 2024, twenty-two states had adopted Extreme Risk Protection Orders (ERPOs), also known as red flag laws, which seek to “prevent a person in crisis from harming themselves or others by temporarily removing guns.” *Extreme Risk Laws*, BRADY, <https://www.bradyunited.org/factsheets/what-are-extreme-risk-laws> [https://perma.cc/EE6A-ZVCR]. Further, in 2023 alone, four states made it easier to sue irresponsible actors in the gun industry (Colorado, Hawaii, Illinois, and Washington), six states passed laws promoting secure firearm storage education or incentivizing safe firearm storage (Louisiana, Maryland, Utah, Vermont, Virginia, and Washington), three states took action to prohibit ghost guns (Colorado, Connecticut, and Oregon), and three states strengthened their gun permit systems and enacted regulations prohibiting guns from sensitive locations, in response to the Supreme Court’s *Bruen* decision (Delaware, Hawaii, and Maryland). *Historic Year for Gun Safety in the States: In 2023, State Legislatures Passed More Than 80 Gun Safety Policies So Far and Rejected 95% of the Gun Lobby’s Extreme Agenda*, EVERYTOWN FOR GUN SAFETY (Aug. 16, 2023), <https://www.everytown.org/press/historic-year-for-gun-safety-in-the-states-in-2023-state-legislatures-passed-more-than-80-gun-safety-policies-so-far-and-rejected-95-of-the-gun-lobbys-extreme-agenda> [https://perma.cc/W6DX-ZHU6]. Equally encouraging, fifteen Republican-led states failed to pass a single bill to weaken gun laws, despite aggressive lobbying by pro-gun groups. *Id.*

105. Unfortunately, state lawmakers have typically enacted these measures in response to deadly shootings that have occurred in their state. In Maine, for example, state lawmakers voted in 2024 to expand background checks, ban bump stocks, and institute a seventy-two-hour waiting period for certain firearm purchases after a mass shooting in Lewiston killed eighteen people. Annmarie Hilton, *Here’s the Final List of Gun Reforms Passed in the Aftermath of Maine’s Deadliest Mass Shooting*, ME. MORNING STAR (Apr. 18, 2024), <https://mainemorningstar.com/2024/04/18/heres-the-final-list-of-gun-reforms-passed-in-the-aftermath-of-maines-deadliest-mass-shooting/> [https://perma.cc/M2Q7-RQRN]. See also, Edward Simon Cruz, *Deadline Passes for Illinois Residents to Register Assault Weapons*, DAILY NW. (Jan. 2, 2024), <https://dailynorthwestern.com/2024/01/02/lateststories/deadline-passes-for-illinois-residents-to-register-assault-weapons/> [https://perma.cc/2N88-EN2G] (citing the 2022 mass shooting at a Fourth of July parade as an impetus for lawmakers to pass the Illinois gun safety bill in early 2023); Alex Sundby, *A Boy’s*

however, there has been a great deal of local resistance to these new state laws.<sup>106</sup> The pillar of this resistance has come in the form of the constitutional sheriffs movement.<sup>107</sup>

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*Killing Led New Mexico's Governor to Issue a Gun Ban. Arrests Have Been Made in the Case, Police Say*, CBS NEWS (Sept. 22, 2023), <https://www.cbsnews.com/news/new-mexico-gun-ban-froylan-villegas-suspects-arrested/> [<https://perma.cc/UB8Y-QGSK>] (noting that the shootings of an eleven-year-old boy, a five-year-old girl, and a thirteen-year-old girl prompted the Governor to implement a temporary ban on carrying of firearms in Bernalillo County, which includes Albuquerque). Joey Cappelletti, *Gun Bills Coming in Michigan after 2nd School Mass Shooting*, AP NEWS (Mar. 12, 2023), <https://apnews.com/article/gun-reform-democrats-michigan-state-shooting> [<https://perma.cc/G2K5-G3DB>] (stating that Democratic lawmakers introduced a bill that would establish safe storage laws, universal background checks, and red flag laws three days after a mass shooting on Michigan State University's campus).

106. See Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 453–55 (2020) (describing the return to “gun-rights localism” in response to firearm regulations). Simon Romero & Timothy Williams, *When Sheriffs Say No: Disputes Erupt over Enforcing New Gun Laws*, N.Y. TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/us/state-gun-laws.html> (on file with the *Columbia Human Rights Law Review*) (“As states have approved dozens of restrictive gun control measures . . . efforts to resist such laws have gathered strength around the nation as rural gun owners say their rights are being violated.”).

107. The other central thread of this resistance has come in the form of Second Amendment Sanctuaries. In recent years, over one thousand counties across the country have declared themselves to be Second Amendment Sanctuaries. *Tools to Take Action Against Gun Violence*, BRADY, <https://www.bradyunited.org/act/second-amendment-sanctuaries#:~:text=State%20and%20local%20%E2%80%9Csanctuary%E2%80%9D%20laws,and%20void%20in%20that%20state> (on file with the *Columbia Human Rights Law Review*) (“Today, approximately 60% of U.S. counties—about 1,200 counties [in] 42 states—have passed resolutions declaring themselves ‘Second Amendment Sanctuaries,’ and this number continues to rise.”). These resolutions typically express support for the right of an individual to keep and bear arms and purport to protect members of the communities from gun laws passed by federal and state lawmakers. Briffault, *The Continuing Challenge*, *supra* note 25, at 266–67. The resolutions that counties have enacted range from symbolic expressions of support for gun owners and gun rights to declarations of intent to defy state gun laws by refusing to use local funds to enforce them. *Id.* Often, constitutional sheriffs will encourage their counties to pass such a resolution, but not every county that has passed one is led by a sheriff that officially associates with the constitutional sheriffs movement. See, e.g., Mary Hudetz, *New Mexico Sheriffs’ Gun Laws Protest Follows Other States*, U.S. NEWS (Mar. 1, 2019), <https://www.usnews.com/news/best-states/new-mexico/articles/2019-03-01/new-mexico-sheriffs-gun-laws-protest-follows-other-states> (on file with the *Columbia Human Rights Law Review*) (stating that “[m]ore than 20 county commissions out of 33 in New Mexico have passed sheriff-backed resolutions expressing support for

### 1. The Constitutional Sheriffs Movement

The constitutional sheriffs are a coalition of sheriffs<sup>108</sup> who categorically refuse to enforce state-enacted gun laws due to their personal beliefs that the laws are unconstitutional.<sup>109</sup> They are loosely organized under an umbrella organization called the Constitutional Sheriffs and Peace Officers Association (CSPOA),<sup>110</sup> which was founded and initially led by former Arizona sheriff Richard Mack.<sup>111</sup>

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the law enforcement officials in deciding not to enforce gun laws” and that “[s]heriffs began presenting the draft resolutions for ‘Second Amendment Sanctuaries’ to their county commissioners more than two weeks ago”).

108. Because the constitutional sheriffs do not make public a list of sheriffs associated with the movement, it is difficult to track who exactly makes up the organization. Certainly, many sheriffs openly associate with the movement. *See* Martin Kaste, *When Sheriffs Won’t Enforce the Law*, NPR (Feb. 21, 2019), <https://www.npr.org/2019/02/21/696400737/when-sheriffs-wont-enforce-the-law> [<https://perma.cc/23JV-SJD9>] (naming specific sheriffs). It is estimated that around three hundred out of the three thousand sheriffs nationwide officially belong to the CSPOA, but it is unclear whether police officers or others informally subscribe to the movement. Kimberly Kindy, *Boosted by the Pandemic, ‘Constitutional Sheriffs’ Are a Political Force*, WASH. POST (Nov. 2, 2021), [https://www.washingtonpost.com/politics/constitutional-sheriffs-elections-trump-pandemic/2021/11/01/4c14c764-368b-11ec-91dc-551d44733e2d\\_story.html](https://www.washingtonpost.com/politics/constitutional-sheriffs-elections-trump-pandemic/2021/11/01/4c14c764-368b-11ec-91dc-551d44733e2d_story.html) (on file with the *Columbia Law Human Rights Review*). This Note will use “constitutional sheriff” to refer to any local law enforcement officer whose views align with the movement, in that they have decided not to enforce state gun laws due to their belief that those laws are unconstitutional or ineffective, even if they are not formally affiliated with the movement.

109. *See* Kaste, *supra* note 108 (telling the story of sheriffs in Washington state who refuse to enforce firearm restrictions due to their belief they violate the Constitution).

110. The name of the organization includes only sheriffs and peace officers, yet in other materials the organization references other law enforcement officers like police officers. *CSPOA Press Introduction*, CONST. SHERIFFS & PEACE OFFICERS ASS’N, <https://cspoa.org/cspoa-press-intro> [<https://perma.cc/J5A6-9V49>] [hereinafter *CSPOA Press Intro*].

111. *Id.* Mack rose to notoriety three decades ago when he challenged a federal gun control regulation called the Brady Handgun Violence Prevention Act that Congress passed in 1993. *Id.* The Brady Act required local law enforcement officials to administer background checks for all gun purchases or transfers. Brady Handgun Violence Prevention Act, 1993 Enacted H.R. 1025, 103 Enacted H.R. 1025, 107 Stat. 1536. Sheriff Mack and six other sheriffs challenged the law, contending that congressional action that compelled state officials to execute federal laws was unconstitutional. *See CSPOA Press Intro, supra* note 110. In *Printz v. United States*, the Supreme Court agreed, holding that the provisions of the law regarding state officials violated the constitutional principles of dual sovereignty and separation of powers; Congress could not compel states to enforce

The CSPOA movement has pushed a narrative that sheriffs can refuse to enforce any law they deem unconstitutional or simply “unjust.”<sup>112</sup> Mack, who often speaks on behalf of the movement he created, has stated that “[t]he safest way” to achieve the protection of citizens from an “out-of-control government” is “to have local law enforcement understand that they have no obligation to enforce such laws.”<sup>113</sup> CSPOA also promotes the belief that sheriffs have more inherent power to determine what laws are valid than any other government bodies or individuals in their counties.<sup>114</sup> As of June 2023, the CSPOA conducted training for sheriffs in at least thirteen states, and has hosted rallies, speeches, and meetings in at least thirty states for law enforcement officers, political figures, and the public.<sup>115</sup> In some states, over 50% of state county sheriffs have

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a federal regulatory program, since state officials would be administering the program without meaningful presidential oversight. 521 U.S. 898 (1997). CSPOA claims that this case established that “county Sheriffs have the authority and duty to enforce the constitution and to protect their citizens from the overreach of an out-of-control federal government.” *CSPOA Press Intro*, *supra* note 110. The constitutional sheriffs movement has been tied to fringe far-right ideologies, an association that they disclaim. *See* Kaste, *supra* note 108 (noting that scholars have linked the constitutional sheriffs movement to white supremacist groups and that Mack has dismissed those claims as “baloney”); TJ L’Heureux et al., *A Right-Wing Sheriffs Group that Challenges Federal Law Is Gaining Acceptance Around the Country*, AP NEWS (Aug. 21, 2023), <https://apnews.com/article/constitutional-sheriffs-5568cd0b6b27680a28de8a098ed14210> [<https://perma.cc/N69K-CRCT>] (noting that Mack was an early board member of the Oath Keepers—the group involved in the attack on the U.S. Capitol,—and that although he claimed he split with the group after it became a militia, he still speaks at Oath Keeper-affiliated rallies).

112. *Constitutional Sheriff Law Enforcement Training Spreads Nationwide*, ARIZ. CTR. FOR INVESTIGATIVE REPORTING (Aug. 21, 2023), <https://azcir.org/news/2023/08/21/constitutional-sheriff-law-enforcement-training-spreads-nationwide> [<https://perma.cc/PFT7-EUAC>] [hereinafter AZCIR].

113. *Id.* He went on to say that “they’re not laws at all anyway. If they’re unjust laws, they are laws of tyranny.” *Id.*

114. In a survey conducted by The Marshall Project, more than two hundred sheriffs responded that they agree with the proposition that “their own authority, within their counties, supersedes that of the state or federal government.” Maurice Chammah, *Does Your Sheriff Think He’s More Powerful Than the President?*, MARSHALL PROJECT (Oct. 18, 2022), <https://www.themarshallproject.org/2022/10/18/does-your-sheriff-think-he-s-more-powerful-than-the-president> [<https://perma.cc/FZ63-9FDP>].

115. AZCIR, *supra* note 112.



declared themselves to be constitutional sheriffs or aligned with the movement's pro-gun ideology.<sup>116</sup>

The CSPOA website states that “[s]heriffs have the authority and duty to enforce the constitution and to protect their citizens from the overreach of an out-of-control federal government.”<sup>117</sup> Although the CSPOA materials reference state law, the materials focus on resisting the overreach of the national government and the duty of law enforcement officials to uphold the principles of the federal constitution.<sup>118</sup> The website notes that “[t]he CSPOA was organized to teach [s]heriffs, the police, all public officials, and citizens as well, the authority and responsibility that exists under our U.S. Constitution which all public servants take an oath to protect and defend.”<sup>119</sup> Yet sheriffs also take an oath and have a duty to uphold *state* law.<sup>120</sup> The movement's focus on the U.S. Constitution as the heart of what sheriffs are meant to protect obscures their responsibilities to uphold state law.<sup>121</sup>

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116. In Washington, for example, at least twenty out of the state's thirty-nine county sheriffs declared that they would not enforce limits on assault weapons that were enacted by referendum in 2019. Jason Wilson, *Washington State County Sheriffs Refuse to Enforce Gun Laws*, GUARDIAN (Feb. 22, 2019), <https://www.theguardian.com/us-news/2019/feb/22/washington-state-county-sheriffs-refuse-to-enforce-gun-laws> [https://perma.cc/74KR-5DSV]. Similarly, after Illinois passed a ban on assault weapons in early 2023, roughly 90 of Illinois' 102 sheriffs stated their refusal to enforce the law. Jeremy Gorner, *Illinois 'Constitutional Sheriff' Movement Gains Momentum Amid Gun Law Debates*, CHICAGO TRIB. (Mar. 19, 2023), <https://www.chicagotribune.com/politics/ct-illinois-constitutional-sheriff-gun-law-20230319-47kcpqb43rgtrdxuponzmnympm-story.html> [https://perma.cc/H9S5-KQJY].

117. *CSPOA Press Intro*, *supra* note 110.

118. *Id.* (“Sheriffs and police departments have had to decide whether to obey the constitution or the tyrannical dictates of politicians drunk on power.”).

119. *Id.*

120. For example, the Texas Constitution requires all elected state officials, including sheriffs, to take the following oath of office before they begin their term of service: “I . . . do solemnly swear (or affirm), that I will faithfully execute the duties of the office of . . . the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States *and of this State*, so help me God.” TEX. CONST., art. XVI, § 1 (emphasis added). Similarly, the Florida Constitution mandates public officers swear the following oath: “I do solemnly swear (or affirm) that I will support, protect, and defend the Constitution and Government of the United States and of the State of Florida; that I am duly qualified to hold office under the Constitution of the state; and that I will well and faithfully perform the duties of (title of office) on which I am now about to enter. So help me God.” FLA. CONST., art. VI, § 3.

121. The name these sheriffs have chosen for themselves—constitutional sheriffs—is suggestive of the emphasis the movement places on the importance of

## 2. The Office of the Sheriff

State constitutions create the position of the county sheriff,<sup>122</sup> and sheriffs are typically elected.<sup>123</sup> These features differentiate sheriffs from police chiefs<sup>124</sup> and place them outside of the oversight of local entities such as city councils, mayors' offices, or special committees, which have the authority to hire and fire police chiefs and other appointed local officials.<sup>125</sup> One scholarly analysis of the

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upholding the U.S. Constitution. *See also*, *CSPOA Press Intro*, *supra* note 110 (“We as Americans need to know and understand the importance of our unique and God given constitution more than any time in the history of our country.”). This view of the Constitution is particularly ironic given the fact that one of the main concerns of the original U.S. Constitution was arguably to ensure that states retained the power to make and enforce state law. *See, e.g.*, THE FEDERALIST No. 45 (James Madison) (1788) (explaining the balance of powers between the federal and state governments under the new constitutional system and affirming that “[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”).

122. There are over three thousand sheriffs in the United States, making up one third of law enforcement officers in the country. Emily Farris & Mirya Holman, *Local Gun Safety Enforcement, Sheriffs, and Right-Wing Political Extremism*, 60 URB. AFFS. REV. 706, 709–10 (2024). In thirty-five out of fifty states, the state constitution creates the office of the sheriff. David N. Falcone & Edward L. Wells, *The County Sheriff as a Distinctive Policing Modality*, 24 AM. J. POLICE 123, 126 (1995). *See also* James Tomberlin, *Don't Elect Me: Sheriffs and the Need for Reform in County Law Enforcement*, 104 VIR. L. REV. 113, 124 (2018) (noting that “[t]he office of the sheriff is created by most state constitutions; police departments are authorized by state statutes but created at the local level”).

123. Sheriffs are elected in forty-six states. *FAQ*, NAT'L SHERIFFS' ASS'N, <https://www.sheriffs.org/about-nsa/faq> [<https://perma.cc/ZPB8-DZ8G>]. Alaska, Connecticut, Hawaii, and the District of Columbia do not have sheriffs, and Rhode Island appoints rather than elects its sheriffs. NAT'L SHERIFFS' ASS'N, ELECTED OFFICE OF THE SHERIFF: EXECUTIVE SUMMARY, [https://www.sheriffs.org/sites/default/files/tb/The\\_Elected\\_Office\\_of\\_Sheriff\\_-\\_An\\_Executive\\_Summary.pdf#:~:text=In%20Rhode%20Island%2C%20the%20governor%20appoints%20the,and%20returned%20to%20a%20system%20of%20elections](https://www.sheriffs.org/sites/default/files/tb/The_Elected_Office_of_Sheriff_-_An_Executive_Summary.pdf#:~:text=In%20Rhode%20Island%2C%20the%20governor%20appoints%20the,and%20returned%20to%20a%20system%20of%20elections) [<https://perma.cc/29N5-5FUK>].

124. NAT'L SHERIFFS' ASS'N, *supra* note 123. Police chiefs are appointed, whereas sheriffs are typically elected. *See also* Falcone & Wells, *supra* note 119, at 128 (noting that the “legal responsibility and authority of the sheriff are somewhat different from those of local police chiefs, being broader in the range of activities covered and the scope of legal authority.”).

125. Tomberlin, *supra* note 122, at 129–30. *See also* Falcone & Wells, *supra* note 122, at 126 (“Where the sheriff's office is constitutionally mandated, it cannot simply be abolished, have its powers and responsibilities reduced, or have its personnel decisions made by county boards or commissioners.”); Jonathon Thompson, *The Rise of the Sagebrush Sheriffs*, HIGH COUNTRY NEWS (Feb. 2,

sheriff's office notes that "[a]lthough they nominally may control the budget for the sheriff's office, county or state executives cannot dictate sheriff's office policy since they lack direct political authority over the sheriff."<sup>126</sup>

Sheriffs' responsibilities typically include patrolling, conducting investigations, operating county jails, performing background checks, and executing arrest warrants and other civil writs,<sup>127</sup> although the duties of the office of the sheriff vary state by state.<sup>128</sup> In most counties, sheriffs hold primary law enforcement responsibilities.<sup>129</sup> Cities might create their own police departments

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2016), <http://www.hcn.org/issues/48.2/the-rise-of-the-sagebrush-sheriffs> [https://perma.cc/SV8L-FTYB] (noting that in most states, "only the governor can remove a sheriff from office, and that is only in cases of extreme malfeasance"); Farris & Holman, *supra* note 122, at 710 ("While sheriffs' offices are funded by county governments, county governments have typically no or very limited input and oversight powers over sheriffs' offices.").

126. Falcone & Wells, *supra* note 122, at 126.

127. *Id.* at 128. Jessica Pishko, *The Power of Sheriffs: Explained*, APPEAL (Jan. 4, 2019) [hereinafter Pishko, *Power of Sheriffs: Explained*], <https://theappeal.org/the-power-of-sheriffs-an-explainer> [https://perma.cc/8HKW-V79D] (noting that most states give sheriffs duties similar to those of local police departments, including the power to arrest people, investigate crimes, and obtain and execute warrants, but with wider (county-level) jurisdiction). *See also* Farris & Holman, *supra* note 122, at 710 (describing the investigative, managerial, and other decision-making authority of sheriffs).

128. For example, Pennsylvania has taken away sheriffs' authority to conduct investigations while still allowing them to retain other common law powers of law enforcement. Jessica Pishko, *How Sheriffs' Power and Autonomy Make Them Central Players for Policing Reform*, APPEAL (Sep. 26, 2019) [hereinafter Pishko, *Sheriffs' Power and Autonomy*], <https://theappeal.org/politicalreport/sheriffs-and-policing-practices-the-badge> [https://perma.cc/Z7L6-5Z92]. Comparatively, a 2021 Idaho statute recently reaffirmed that in Idaho, sheriffs have the "primary duty of enforcing all the penal provisions of any and all statutes of this state." IDAHO CODE § 31-2227 (2021). Connecticut and Alaska are the only two states that do not have sheriffs. NAT'L SHERIFFS' ASS'N, *supra* note 123.

129. Farris & Holman, *supra* note 122, at 709–10 (stating that in two-thirds of U.S. counties, the sheriff's office is the largest law enforcement agency). The National Sheriffs Association notes that "[a] Sheriff is generally (but not always) the highest, usually elected, law-enforcement officer of a county. Chiefs of Police usually are municipal employees who owe their allegiance to a city." FAQ, NAT'L SHERIFFS' ASS'N, <https://www.sheriffs.org/about-nsa/faq> [https://perma.cc/ZPB8-DZ8G]. *See also* Michael Zoorob, *There's (Rarely) a New Sheriff in Town: The Incumbency Advantage for Local Law Enforcement*, 80 ELECTORAL STUD. 1, 1 (2022), (noting that "sheriffs play important roles in many urban communities, but are central to the policing of rural and suburban ones").

that have jurisdiction within the city limits.<sup>130</sup> In those cases, sheriffs may choose to coordinate with municipal police departments on enforcement matters within the city, where the jurisdiction of sheriffs and police overlap.<sup>131</sup> However, in many local subdivisions across the country, there is not a separate police department, making the sheriff's office the sole local law enforcement entity.<sup>132</sup>

By the nature of their office, local sheriffs are thus left with vast autonomy to enforce the law.<sup>133</sup> Gun safety enforcement, like many areas of law enforcement, is by its nature localized, and many of the most common gun safety measures rely on local law enforcement to effectuate their provisions.<sup>134</sup> Because so many state gun laws rely on local law enforcement for implementation, sheriffs

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130. For example, in Duval County, Florida, the county sheriff's department is responsible for policing Jacksonville (the largest municipality in the state), but several beach towns that lie within the county have created their own police departments, which patrol those towns even though residents still take part in electing the county sheriff. Pishko, *Sheriffs' Power and Autonomy*, *supra* note 128. Because Jacksonville did not create its own police force, the sheriff is the sole local law enforcement entity in that county. *Id.* Similarly, in Los Angeles County, the Sheriff's Department is responsible for patrolling 130 unincorporated communities as well as 42 smaller cities that it contracts with, including Compton and West Hollywood. The Los Angeles Police Department patrols only the city of Los Angeles. *Id.*; *Patrol Stations*, LOS ANGELES CNTY SHERIFF'S DEP'T, [http://shq.lasnews.net/shq/maps/patrol\\_stations.html](http://shq.lasnews.net/shq/maps/patrol_stations.html) [<https://perma.cc/WC38-X6BU>].

131. Falcone & Wells, *supra* note 122, at 129 (noting that the sheriff's office may provide additional police services to municipalities in the county when needed, either through formal or informal cooperative agreements or through contracts, and also noting that this practice is common in both metropolitan and nonmetropolitan counties). *See also* Pishko, *Sheriffs' Power and Autonomy*, *supra* note 128 (describing that "jurisdictional overlap can get messy" with "[c]ities and towns contract[ing] with the sheriff's office of their county, and sometimes even those of adjacent ones, to provide patrols or coverage").

132. *See* Michele Bisaccia Meitel et al., *Texas Sheriffs' Perceptions on Firearm Regulations and Mass Shootings*, 23 INT'L J. POLICE SCI. & MGMT. 3, 222–230 (2021) (noting that sheriffs "often serve as the only law enforcement body in rural areas"); Pishko, *Sheriffs' Power and Autonomy*, *supra* note 128 ("Sheriffs are typically the only policing force in rural and unincorporated areas."); Farhang Heydari, *The Sheriff's Constitution*, 113 GEO. L.J. 1041, 1052 (2025) ("For broad swaths of the country, the sheriff is the law.").

133. Farris & Holman, *supra* note 122, at 707 ("As independently elected local law enforcement officers, sheriffs occupy a unique institutional position in American local politics with significant and autonomous powers and play an important role in the implementation of gun safety measures.").

134. *Id.*

have significant power to effectuate or subvert gun safety measures.<sup>135</sup>

### 3. Pro-Gun Local Resistance and Constitutional Sheriffs’ Refusal to Enforce State Gun Laws

The constitutional sheriffs have not limited their resistance to firearms regulation. They have also resisted Covid-era laws, including mask mandates and mandatory lockdowns,<sup>136</sup> and have involved themselves in debates regarding federal immigration enforcement.<sup>137</sup> The movement’s ties to the far-right have been well documented.<sup>138</sup> But the movement was initially and is still particularly animated by gun rights.<sup>139</sup>

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135. *Id.* at 710 (“Given the localized nature of criminal justice policy broadly and the enforcement of gun safety policy more specifically, sheriffs’ distinct institutional position in the U.S. federal system means that sheriffs have been afforded great autonomous local decision-making with limited oversight.”).

136. Emily Farris & Mirya Holman, *Sheriffs, Right-Wing Extremism, and the Limits of U.S. Federalism During a Crisis*, 104 SOC. SCI. Q. 59, 62 (2023) (detailing sheriffs’ attitudes towards Covid-19 mask mandates, with one New Mexico sheriff commenting that “[t]he Sheriff is not a hireling of the State. We do not work for the Governor or the County”).

137. *CSPOA Press Intro*, *supra* note 110 (expressing CSPOA’s view that high levels of “illegal” immigration is a “threat”). Contradictorily, constitutional sheriffs are in favor of increasing federal immigration enforcement, despite their antipathy towards the federal government generally. See Emily Farris & Mirya Holman, *All Politics Is Local? County Sheriffs and Localized Policies of Immigration Enforcement*, 70 POL. RSCH. Q. 142 (2016) (describing sheriffs’ concern over federal nonenforcement of immigration policies).

138. See David Gilbert, *Far-Right Sheriffs Want a Citizen Army to Stop ‘Illegal Immigrant’ Voters*, WIRED (Apr. 10, 2024), <https://www.wired.com/story/constitutional-sheriffs-election-deniers-immigrants-voting> [<https://perma.cc/P3YW-NT8N>] (listing prominent far-right extremists who were in attendance at a CSPOA conference in Las Vegas); JESSICA PISHKO, *THE HIGHEST LAW IN THE LAND: HOW THE UNCHECKED POWER OF SHERIFFS THREATENS DEMOCRACY* 48–60 (2024) (describing how the development of recent far-right movements and the office of the sheriff have been intertwined, and noting that “Richard Mack and the CSPOA’s beliefs flowed directly from this history of the far right in America”).

139. See, e.g., Jason Wilson, *U.S. Sheriffs Rebel Against State Mask Orders Even as Covid-19 Spreads*, GUARDIAN (Jul. 31, 2020), <https://www.theguardian.com/us-news/2020/jul/31/us-sheriffs-mask-orders-covid-19-blm> [<https://perma.cc/6YNN-UJFT>] (stating that the CSPOA was founded to resist Obama-era firearms restrictions); Mirya Holman & Emily Farris, *Sheriffs Who See Themselves as Ultimate Defenders of the Constitution Are Especially Worried About Gun Rights*, PENNLIVE (Jan. 31, 2023) [hereinafter Holman & Farris, *Ultimate Defenders*], <https://www.pennlive.com/opinion/2023/01/sheriffs->

Sheriffs support gun regulations at a much lower rate than the general population.<sup>140</sup> In one study conducted by public health researchers in 2021, 75% of sheriffs surveyed believed our gun laws should be less strict than they currently are, compared with 14% of the general public.<sup>141</sup> Further, 60% of the public supports bans on assault weapons while only 10% of sheriffs do.<sup>142</sup>

In recent years, many states have passed popular gun regulations, and in response, sheriffs across the country have vowed not to enforce them.<sup>143</sup> For example, after Oregon enacted a ban on large-capacity magazines over ten rounds through popular

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who-see-themselves-as-ultimate-defenders-of-the-constitution-are-especially-worried-about-gun-rights-opinion.html [https://perma.cc/YLD2-7ENL] (noting that constitutional sheriffs are particularly concerned with protecting gun rights); Maurice Chammah, *Does Your Sheriff Think He's More Powerful Than the President?*, MARSHALL PROJECT (Oct. 18, 2022), https://www.themarshallproject.org/2022/10/18/does-your-sheriff-think-he-s-more-powerful-than-the-president [https://perma.cc/FZ63-9FDP] (suggesting that Mack had “hit the right issue for the right audience” in focusing on the Second Amendment); Holman & Farris, *Ultimate Defenders*, *supra* (explaining early efforts by the sheriffs movement to stifle national gun policy reform after the 2012 shooting at an elementary school in Sandy Hook, Connecticut).

140. Interestingly, there was a time when law enforcement officials (though not necessarily sheriffs) were in favor of gun control measures. Adam Serwer, *The One Group That Could Make a Difference on Gun Control*, ATL. (June 9, 2022), https://www.theatlantic.com/ideas/archive/2022/06/police-gun-control-ualde/661227 (on file with the *Columbia Human Rights Law Review*). In the late 1980s and throughout the 1990s, there was broad support among police officials for nationwide gun regulations. *Id.* In 1989, the Los Angeles police chief urged for a ban on assault rifles at a Senate Judiciary subcommittee hearing. *Id.* (quoting the testimony of Daryl Gates). Gun policy expert Jennifer Carlson posits that officials were motivated largely by their own safety. *Id.* They were fearful of being outgunned by civilians and believed that certain gun laws would be a crucial tool in fighting their “war on crime.” *Id.*

141. Farris & Holman, *supra* note 122, at 715. The same study found that over half of the public believed our gun laws should be stricter, compared with only 19% of sheriffs. *Id.*

142. *Id.* at 715–16.

143. See, e.g., Joey Cappelletti, *Michigan Nears Red Flag Gun Law, But Some Sheriffs Likely to Ignore*, AP NEWS (May 7, 2023), https://apnews.com/article/michigan-red-flag-law-guns-38805222d6192cc6170e81e79dc6596f [https://perma.cc/F3A5-7ANB] (describing that when Michigan was about to pass an Extreme Risk Protection Order (ERPO) law in 2023, sheriffs in the state declared that they would not enforce the law due to a belief that it lacks due process protections, rendering it unconstitutional). For further examples, see *infra* Section II.B.

referendum in 2022, several sheriffs vowed not to enforce the ban.<sup>144</sup> When declaring that his office would not enforce the law, one sheriff in the state said, “I believe Measure 114 is a violation of the United States Constitution and is contrary to current federal court precedent . . . . It is poorly written and does not actually address the current criminal crisis our state currently faces.”<sup>145</sup> After Michigan enacted a red flag law in 2023, one Michigan sheriff, Michael Murphy, stated to reporters, “I don’t believe my constituents want red flag laws enforced because they are unconstitutional,” and said that not enforcing the law was “the proper thing.”<sup>146</sup> Similarly, in New York, after state legislatures enacted a law banning the carrying of guns in “sensitive places,” including state parks, schools, religious centers, and health facilities, the sheriff of Wayne County reported that he received an “awful lot of calls” from residents confused by the law, many of whom were “very pro-Second Amendment.”<sup>147</sup> The sheriff, whose office oversees law enforcement for a community of 100,000 residents, stated that “[i]f anyone thinks we’re going to go out and take a proactive stance against [violations of the law], that’s not going to happen”<sup>148</sup>—likely contributing to people’s confusion about their legal obligations. Another New York sheriff, in Niagara County, explained more explicitly what his office’s policy would be: “We will take the complaint, but it will go to the bottom of my stack. . . . There will be

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144. Hannah Ray Lambert & Brianna Herlihy, *Oregon Sheriffs Won’t Enforce New Gun Law: ‘Infringes on Second Amendment,’* FOX NEWS (Nov. 15, 2022), <https://www.foxnews.com/politics/oregon-sheriffs-enforce-new-gun-law-infringes-second-amendment> [<https://perma.cc/WGY2-SWF7>].

145. Khaleda Rahman, *Oregon Sheriffs Defy Voters, Refuse to Enforce New Gun-Control Measure*, NEWSWEEK, <https://www.newsweek.com/oregon-sheriffs-defy-voters-refuse-enforce-gun-control-measure-1759954> [<https://perma.cc/7WVU-TPVN>] (Nov. 17, 2022). Several other Oregon sheriffs told Fox News they would not be enforcing the new state gun laws in part because the law was the result of “pure anti-gun politics” and because the law “does absolutely nothing to address the problem.” Lambert & Herlihy, *supra* note 144.

146. Tim Skubick and David Komer, *Livingston County Sheriff Says He Won’t Enforce ‘Red Flag’ Laws*, FOX2 DETROIT (April 21, 2023), <https://www.fox2detroit.com/news/livingston-county-sheriff-says-he-wont-enforce-red-flag-laws> [<https://perma.cc/3UDY-3VG6>].

147. Jesse McKinley & Cole Louison, *Another Challenge to New York’s Gun Law: Sheriffs Who Won’t Enforce It*, N.Y. TIMES (Oct. 9, 2022), <https://www.nytimes.com/2022/10/09/nyregion/ny-gun-law-sheriffs.html> (on file with the *Columbia Law Human Rights Review*).

148. *Id.*

no arrests made without my authorization and it's a very, very low priority for me."<sup>149</sup>

#### B. The Harm Caused by Sheriffs' Underenforcement of Gun Laws

Sheriffs' expressions of disagreement with state firearm laws are troubling in themselves. When sheriffs claim that the laws are "unconstitutional," it can create confusion about the legality of state firearm laws. Further, when sheriffs state that they will not enforce a law, it could encourage individual non-compliance with the law, thus rendering the law ineffective. Beyond the statements themselves, however, available data suggest that sheriffs are not merely expressing disapproval of gun laws but are actually acting on their promises not to enforce these laws. Data from Colorado show wide disparities in sheriffs' use of the state's red flag law, providing useful insight into the effects of sheriffs' refusal to enforce state gun laws.

In 2019, Colorado passed an Extreme Risk Protection Order (ERPO) law, allowing a court to temporarily or permanently bar individuals from possessing and buying firearms if the individual poses a threat to themselves or others.<sup>150</sup> After this law was enacted, dozens of county sheriffs expressed their intention to defy the law.<sup>151</sup> Colorado Public Radio (CPR) conducted a study that analyzed all red

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149. *Id.*

150. The Deputy Zackari Parrish, III, Violence Prevention Act, H.B. 19-1177, Gen. Assemb., Reg. Sess. (Colo. 2019). Colorado's law allows a judge to issue an ERPO that bars someone from possessing or buying firearms for up to 364 days. *Id.* Such laws are commonly known as red flag laws. Only law enforcement, a family member, or a household member may file a red flag petition against an individual. The Deputy Zackari Parrish, III, Violence Prevention Act, H.B. 19-1177, Gen. Assemb., Reg. Sess. (Colo. 2019). The petitioner must establish by a preponderance of the evidence that a person poses a significant risk of hurting themselves or others for a judge to grant an order to remove firearms from that individual. *Id.* One study of the effectiveness of Connecticut's red flag law, which is the oldest in the nation, determined that the law prevented one suicide for every ten to twenty guns that were removed. Jeffrey W. Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does it Prevent Suicides?*, 80 LAW & CONTEMP. PROBS. 179, 202-03 (2017).

151. *Several Colorado Sheriffs Say They Won't Enforce Red Flag Gun Law*, CBS NEWS (Nov. 15, 2019), <https://www.cbsnews.com/news/several-colorado-sheriffs-say-they-wont-enforce-red-flag-gun-law-60-minutes-2019-11-15> [https://perma.cc/PLC5-WFBB]. The sheriff of Weld County told reporters that his first duty was to the constitution and seemed prepared to go to jail over his defiance of this law, expressing confidence that if it came to that, he would simply file a lawsuit and "determine at that point if this Red Flag law is constitutional." *Id.*



flag petitions filed from the time of the law's enactment in 2020 through mid-November of 2022.<sup>152</sup> The study provides county-by-county data on the use of red flag orders during that period, which show vast discrepancies in the degree to which counties are using the law. Colorado is a large state with a few big cities and large swaths of rural areas, meaning that the population of different counties differs greatly.<sup>153</sup> This diversity could account for some of the variance in red flag petitions filed per county.<sup>154</sup> However, the data indicate that there is a correlation between counties with constitutional sheriffs and lower rates of red flag petitions initiated by law enforcement.<sup>155</sup>

Denver County and El Paso County have similar populations and thus demonstrate this divergence in red flag law usage. In Denver County, law enforcement officials filed eighty-seven red flag petitions during the two-year period of the study.<sup>156</sup> In El Paso County, law enforcement officials filed only two petitions,<sup>157</sup> despite El Paso having a slightly larger population than Denver County and

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152. Andrew Kenney, *ERPO in 8 Charts: What We Learned From Reading Hundreds of "Red Flag" Cases in Colorado*, COLO. PUBL. RADIO NEWS (Jan. 30, 2023) [hereinafter *CPR Red Flag Study*], <https://www.cpr.org/2023/01/30/erpo-red-flag-cases-in-colorado> [<https://perma.cc/SB5Z-7YQE>] (finding, for example, that red flags are used much less often in Colorado, and that even within Colorado, "people seeking a red flag may have a dramatically different experience in different regions—or even between neighboring cities"). An earlier study conducted by public health researchers had found that in the first year of the red flag law in Colorado, non-Second Amendment counties had filed 2.05 petitions per 100,000 residents, compared with 1.52 petitions filed per 100,000 residents in Second Amendment counties. Leslie M. Barnard et. al., *Colorado's First Year of Extreme Risk Protection Orders*, 8 INJ. EPIDEMIOL. 1, 1 (2021).

153. There are sixty-four counties in Colorado. El Paso County is the most populous, with an estimated population of around 735,000 as of the 2020 Census. San Juan County is the least populous, with an estimated 2020 population of 705. America Counts Staff, *Colorado Among Fastest-Growing States Last Decade*, U.S. CENSUS BUREAU (Aug. 25, 2021) [hereinafter 2020 Census], <https://www.census.gov/library/stories/state-by-state/colorado-population-change-between-census-decade.html> [<https://perma.cc/M73X-2YCP>].

154. In forty out of Colorado's sixty-four counties, law enforcement officials had filed zero petitions. *CPR Red Flag Study*, *supra* note 152. However, twenty-seven of Colorado's counties have a population of fewer than ten thousand people, and fourteen of these counties have a population of five thousand or fewer people. 2020 Census, *supra* note 153. These counties are stretched across large geographic areas, which may account for some of the variance in red flag usage. *Id.*

155. *CPR Red Flag Study*, *supra* note 152.

156. *Id.*

157. *Id.*

the largest population of any county in the state.<sup>158</sup> When the law was passed, the El Paso Sheriff's Office released a statement explaining that "member[s] of the El Paso County Sheriff's Office will not petition for an ERPO or TRPO unless exigent circumstances exist, and probable cause can be established . . . that a crime is being or has been committed."<sup>159</sup> With this statement the sheriff's office created its own, stricter legal standard, declaring that it will not act without "probable cause" that a crime is being committed rather than a "preponderance of the evidence" that a person poses a danger—despite the latter being the standard laid out by the statute.<sup>160</sup> Moreover, acting only with proof that a crime "is being or has been committed" defeats the very purpose of a red flag order, which is to remove guns from individuals before the commission of a crime.

Unlike some ERPO laws, Colorado's law allows not just law enforcement officials but also family or household members to petition for red flag orders.<sup>161</sup> This option provides individuals with a

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158. El Paso County is the largest county in Colorado. 2020 Census, *supra* note 153. Yet, of those counties that filed at least one petition, it had filed the fewest red flag petitions filed by law enforcement officials. *CPR Red Flag Study*, *supra* note 152. cement officials. *CPR Red Flag Study*, *supra* note 150. As of 2020, El Paso County had an estimated population of 735,000, and Denver County had an estimated population of 715,000. *See* 2020 Census, *supra* note 153.

159. *El Paso County Sheriff's Office Red Flag Statement*, EL PASO CNTY. SHERIFF'S OFF., <https://www.epcsheriffsoffice.com/red-flag-bill> [https://perma.cc/SCV6-DRRZ]. Following the lead of then-Sheriff Bill Elder, El Paso County also expressed strong opposition to the red flag bill after the law was passed in 2019. The Board of the County Commissioners quickly passed a resolution pledging "not to appropriate funds, resources, employees, or agencies to initiate unconstitutional seizures in unincorporated El Paso County and also affirm[ing] its support for the duly elected Sheriff of El Paso County, Colorado and decisions he or she makes to refuse to initiate unconstitutional actions against citizens." El Paso Cnty. Bd. of Cnty. Comm'rs, *A Resolution by the El Paso County Board of County Commissioners, El Paso County, Colorado, Declaring El Paso County to be a Second Amendment Preservation County*, EL PASO CNTY. COLO. (March 12, 2019), <https://admin.elpasoco.com/commissioners-approve-pro-second-amendment-resolution> [https://perma.cc/9RWA-4KDB]. In the same resolution, the Board resolved "that in coordination with the El Paso County Sheriff, the Board commits to actively resist the bill in its current and subsequent forms, including leading the charge in legal action if warranted . . ." *Id.*

160. Andrew Kenney, *Gun Violence Expert Says 'Red Flag' Law Met with Unusual Resistance from Some Colorado Law-enforcement*, COLO. PUB. RADIO (Nov. 22, 2022), <https://www.cpr.org/2022/11/22/gun-violence-expert-says-red-flag-law-colorado-law-enforcement/> [https://perma.cc/Y3M5-RBP5]. *See also* EL PASO CNTY. SHERIFF'S OFF., *supra* note 159.

161. H.B. 19-1177 (Colo. 2019), *supra* note 149. Fourteen of the twenty-one states that have ERPO laws allow family or household members to petition for an

mechanism to sidestep defiant law enforcement officials in counties like El Paso. Indeed, the CPR data show that individuals in that county have been petitioning at a much higher rate than individuals in counties where law enforcement officials are implementing the law.<sup>162</sup> There were fifty-one red flag petitions filed by individuals in El Paso County over the study period, compared with just seventeen in Denver County, where the Colorado law is used by law enforcement officials.<sup>163</sup>

Although individuals in Colorado have a mechanism to overcome inaction by law enforcement officials, the data suggest that courts are much more likely to grant petitions filed by law enforcement than by individuals. Across Colorado, 80% of the petitions filed by law enforcement resulted in year-long firearm suspensions versus just 17% of the petitions filed by individuals.<sup>164</sup> Thus, even if individuals can file on their own, it is evidently much less likely that their petition will be granted than if a law enforcement official files on their behalf. And in one-third of the states with ERPO statutes, only law enforcement officials or the state attorney's office can file for petitions—individuals may not.<sup>165</sup> Accordingly, if someone in these states fears their family member might pose a threat to themselves or another, and they live in a county headed by a sheriff who categorically refuses to enforce the ERPO law, that person has no way to access the benefits of the ERPO law.

Colorado's ERPO statistics highlight how sheriffs' refusal to enforce state gun laws affects the people that those laws are designed to protect.<sup>166</sup> Acting on personal determinations regarding the

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ERPO. Inst. for Firearm Injury Prevention, *ERPO Laws by State*, UNIV. OF MICH., <https://firearminjury.umich.edu/erpo-by-state> [https://perma.cc/2JC2-QH79]. Washington, D.C. also has an ERPO law and allows for family or household members to petition for an ERPO. *Id.*

162. *CPR Red Flag Study*, *supra* note 152.

163. *Id.*

164. *Id.*

165. Connecticut, Florida, Indiana, New Mexico, Rhode Island, Vermont, and Virginia only allow law enforcement officials or state attorneys to petition for ERPOs. Inst. for Firearm Injury Prevention, *supra* note 161.

166. Beyond just statistics, Colorado provides examples of the risks to public safety that can arise from sheriffs' refusal to enforce public safety laws. The resistance of the El Paso Sheriff's Office to the red flag law came under sharp scrutiny after the November 2022 mass shooting at Club Q, which occurred in Colorado Springs—a city in El Paso County. Andrew Kenney, *Why the El Paso County Sheriff Says He Couldn't Use Colorado's 'Red Flag' Law to Stop the Club Q Shooting*, COLO. PUB. RADIO (Dec. 8, 2022), <https://www.cpr.org/2022/12/08/club-q->

constitutionality of certain laws and egged on by CSPOA messaging that sheriffs must uphold the Constitution above all,<sup>167</sup> sheriffs are denying citizens the protection of the state gun laws that they have sworn to uphold.

### III. SELECTIVE STATE ACTION AGAINST LOCAL RESISTANCE AND ITS ANTI-DEMOCRATIC IMPLICATIONS

As described in Part I, states have enacted broad preemption laws that make it illegal for local governments to enact gun regulations. Part II assessed the rise of the constitutional sheriffs movement and their advancement of pro-gun local resistance to state gun laws. This Part discusses these two phenomena together and highlights the untenable situation that results from selective state

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shooting-el-paso-county-sheriff-red-flag-gun-law/ [https://perma.cc/65QP-6RSH]. In 2021, the El Paso Sheriff's Office had arrested the perpetrator of Club Q shooting for allegedly threatening to detonate a bomb and harm their mother with "multiple weapons." *Id.* No charges were filed, but the sheriff's office removed the individual's firearms at the time. *Id.* The sheriff's office did not, however, file for a red flag petition against the individual, which would have imposed additional restrictions such as disallowing the individual to purchase firearms. *Id.* In this case, the perpetrator used a firearm purchased by their mother in the tragic shooting at Club Q, which a red flag petition could not have prevented. *Id.* Still, the incident brought sharp focus on the El Paso County Sheriff's Office's categorical refusal to enforce red flag orders. See Jesse Paul & John Ingold, *El Paso County Sheriff's Office, Which Arrested Alleged Club Q Shooter in 2021, Has Never Initiated a Red Flag Gun Seizure*, COLO. SUN (Nov. 24, 2022), <https://coloradosun.com/2022/11/24/el-paso-county-sheriff-club-q-red-flag-law/> [https://perma.cc/49F3-UZX2] (noting that "[t]o critics, it's a clear example of partisan intransigence getting in the way of public safety"). Then-Sheriff Bill Elder had stated of the red flag orders: "We're not going to pursue these on our own . . . meaning the Sheriff's Office is not going to run over and try to get a court order." Chip Brownlee, *In Colorado Springs, Local Officials Resisted the State's Red Flag Law*, TRACE (Nov. 21, 2022), <https://www.thetrace.org/2022/11/colorado-springs-mass-shooting-red-flag/> [https://perma.cc/3S4S-CVZS]. The El Paso Sheriff's Office issued a lengthy statement defending its decision not to file a red flag petition against this individual at the time of the bomb threat arrest, claiming such an order would be "redundant." Press Release, El Paso Cnty. Sheriff's Off., Sheriff's Office Statement Regarding Previous Arrest and Charging of Alleged Club Q Shooter, <https://www.epcsheriffsoffice.com/news-releases/sheriffs-office-statement-regarding-previous-arrest-and-charging-of-alleged-club-q> [https://perma.cc/3NS4-P9NG]. This episode highlights the serious and potentially deadly consequences that sheriffs risk when they refuse to enforce gun laws.

167. A South Dakota sheriff stated that "[w]hen I took an oath 17 years ago as sheriff, I took the oath to uphold the Constitution, not overstep it." AZCIR, *supra* note 112.

action against local resistance, using Florida and Washington as examples.

When municipalities try to defy state preemption laws by passing local ordinances that regulate firearms, the preemption laws make it easy to swiftly strike these local frameworks down. Yet, at the same time, state legislatures have implemented no mechanism to curb local resistance to statewide gun laws by sheriffs. This form of local pro-gun resistance to state law has flourished, while state preemption laws have simultaneously suppressed and punished local anti-gun debate and action. States shrug at the local resistance of counties that do not wish to follow state gun laws, allowing these counties to undermine the very justification that states attach to local preemption in the first place: uniformity. Thus, in states with preemption laws, nonenforcement by constitutional sheriffs creates a situation that undermines the democratic choices of state residents in favor of gun control on two levels: state law prohibits them from having a say in gun regulations within their local jurisdictions, even though other local residents retain this power, and any laws enacted at the state level are diluted through sheriffs' nonenforcement.

#### A. Florida

In 2011, Florida enacted a punitive preemption bill that not only strips local governments of their powers to regulate firearms but also imposes harsh penalties on local officials who enact or enforce a preempted law.<sup>168</sup> The law preempts local action on firearms absolutely, with only narrow carveouts for local law enforcement agencies to enact firearm regulations for their peace officers<sup>169</sup> and for employers to prohibit the carrying of firearms by employees in the course of their official duties.<sup>170</sup> Interestingly, the law states that its purpose is both “to provide uniform firearms laws in the state” and “to require local jurisdictions to enforce state firearms laws.”<sup>171</sup> Yet, a “person, county, agency, municipality, district, or other entity” only violates the legislature’s occupation of the field “by enacting or causing to be enforced any local ordinance or administrative rule or

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168. FLA. STAT. ANN. § 790.33. An individual who “knowingly and willingly” violates the statutes can be fined up to \$5,000, may not use public funds to defend themselves, and may be removed from office by the governor. *Id.*

169. *Id.*

170. *Id.* Yet, within this narrow exception, Florida has adopted a law disallowing employers to prohibit an employee from possessing a firearm locked inside a parking lot, even at work. § 790.251(4)(a).

171. FLA. STAT. ANN. § 790.33.

regulation impinging upon such exclusive occupation of the field.”<sup>172</sup> In other words, the law and its harsh penalties<sup>173</sup> may therefore only be used against local officials and localities that threaten “uniformity” by enacting or enforcing gun laws that are stricter than the state’s and not against constitutional sheriffs who “impinge” on the “occupation of the field”<sup>174</sup> by not enforcing statewide firearm laws, the statute cannot be enforced against them.<sup>175</sup>

Florida has not been shy about using its preemption statute to strike down local gun regulations.<sup>176</sup> Because it is a punitive preemption law,<sup>177</sup> Florida’s firearm preemption statute has also had a chilling effect on local policy-making and public debate<sup>178</sup> and has

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172. *Id.*

173. Under Florida’s punitive preemption law, if a local government attempts to regulate firearms, those regulations will not only be struck down as null and void, but the “elected or appointed local government official or officials . . . under whose jurisdiction the violation occurred” will also be fined \$5,000, if the court finds the violation was knowing and willful. *Id.* No public funds may be used to defend a statute that is determined to be unlawful, meaning that localities cannot try to defend a local ordinance or resolution as lawful if the state claims it is unlawful and must be struck down, unless a private funder is willing to front the costly litigation expenses that would be required. *Id.* Further, the statute states that a knowing and willing violation by a local official “shall be cause for termination of employment . . . or removal from office by the Governor.” *Id.*

174. *Id.*

175. For a discussion of these harsh penalties, see *supra* Section I.E.

176. Florida’s gun preemption statute has been used to strike down a state university regulation banning the carrying of firearms in cars parked on university campus, a Miami ordinance requiring the use of locking devices on firearms stored within the city, and an attempt by Miami-Dade County to sue firearms manufacturers on charges regarding defective products and public nuisance. *Florida Carry, Inc. v. Univ. of North Florida*, 133 So. 3d 966 (Fla. Dist. Ct. App. 2013); *Nat’l Rifle Ass’n of Am., Inc. v. City of South Miami*, 812 So.2d 504, 505-06 (Fla. Dist. Ct. App. 2002); *Penelas v. Arms Technology, Inc.*, 778 So.2d 1042 (Fla. Dist. Ct. App. 2001) (adopting a very expansive view of the preemption statute and holding that local governments cannot use the judiciary to attempt “to ‘enact’ regulatory measures in the guise of injunctive relief”). The Florida Attorney General has also determined that the preemption statute bars counties from regulating the discharge of firearms near people or property, even when implemented for public safety reasons. Op. Att’y Gen. Fla. 2005-40 (Fla. 2005).

177. See *supra*, note 173, for a discussion of the penalties that threaten localities and local officials under Florida’s preemption law specifically, and see *supra* Section I.F for a discussion of the chilling effects of punitive preemption laws generally.

178. For example, after a mass shooting at a night club in Orlando, a St. Petersburg councilwoman asked local leaders to support a nonbinding resolution calling for a special legislative session on gun violence. However, she pulled this discussion from the local agenda after a city attorney warned that this nonbinding

discouraged municipalities from both enacting local firearm laws and entering debates over gun laws in the first instance.<sup>179</sup> For example, after a mass shooting at an Orlando night club killed forty-nine people in 2016, Sarasota's City Commission considered passing a resolution calling on state and federal officials to institute stricter gun control measures on military-grade assault weapons.<sup>180</sup> However, despite voicing personal support for stricter gun control, the Commission voted 4-1 against the measure, concluding that the potential for a lawsuit against the city for violating the preemption statute made it too risky to enact the resolution.<sup>181</sup> The preemption statute thus operates to intimidate municipal officials and stifle local debate and action on firearms.

At the state level, Florida has successfully enacted some gun control measures in recent years. After a school shooting at a high school in 2018, state lawmakers passed legislation that raised the minimum purchase age for firearms to twenty-one, instituted a mandatory three-day waiting period before someone may buy a gun, and implemented a red flag system for removing firearms from dangerous individuals.<sup>182</sup> Sheriffs have expressed resistance to enforcing the red flag law,<sup>183</sup> and several vowed not to enforce a

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gesture could trigger fines and penalties under the preemption law. On advice from the City Attorney, the councilwoman determined that even opening a discussion on the topic might lead to expensive litigation, so she removed the discussion from the agenda. Simon, *supra* note 3, at 1488; John Romano, *Should We Really Diminish the First Amendment to Stifle Talk of the Second Amendment?*, TAMPA BAY TIMES (Jul. 20, 2016), <https://www.tampabay.com/news/localgovernment/romano-should-we-really-diminish-the-first-amendment-to-stifle-talk-of-the/2286182/> (on file with the *Columbia Human Rights Law Review*). The councilwoman, who is herself a gun owner, stated, "I just wanted a deeper conversation about sensible regulations that might stop all of this violence. It's sad that we can't even talk about it. As an elected official, I feel like my hands are tied." Romano, *supra*.

179. Zach Murdock, *City Balks at Resolution Calling for Stricter Gun Controls*, HERALD-TRIB. (Jan. 5, 2025), <https://www.heraldtribune.com/news/20160620/city-balks-at-resolution-calling-for-stricter-gun-controls> (on file with the *Columbia Human Rights Law Review*).

180. *Id.* (noting also that Sarasota's mayor expressed dismay about the City Commission's inability to take action, stating "[i]f we can't speak up as an elected body on the very issues that pertain your health, your welfare and your safety, then why are we here?").

181. *Id.*

182. S.B. 7026, Reg. Sess. (Fla. 2018).

183. See Dara Kam, *Gualtieri Defends Florida's 'Red-Flag' Law Despite Pushback from Second Amendment Advocates*, WGCU (June 6, 2022, 8:00 AM), <https://news.wgcu.org/2022-06-06/gualtieri-defends-floridas-red-flag-law-despite->

proposed assault weapons ban or weapons registration law if either was enacted.<sup>184</sup> A local newspaper has uncovered that at least five sheriffs with leadership positions in the Florida Sheriffs Association, an organization that bills itself as the “voice of Florida’s sheriffs,” have ties to the nationwide constitutional sheriffs movement.<sup>185</sup>

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pushback-from-second-amendment-advocates [https://perma.cc/7MZZ-JNFK] (analyzing a Florida red flag law that “allows authorities to take guns from people found to pose a ‘significant danger’ to themselves or others”). One sheriff who supports the red flag law said of his counterparts in other counties, “I’ll tell you unequivocally some sheriffs philosophically may be against it, so they’re not going to encourage the use of it.” *Id.* Unlike Colorado’s red flag law, discussed *supra* Section II.B, Florida’s law requires a law enforcement official to file a red flag petition to remove an individual’s firearm. This means that concerned individuals, such as family members or mental health professionals, cannot themselves file to have an individual’s firearm temporarily removed. There is thus no way for individuals to obtain the red flag law’s protections if their law enforcement officials refuse to petition, making categorical nonenforcement by sheriffs even more consequential and troubling. FLA. STAT. ANN. § 790.401 (2024). Data from the first four years of Florida’s red flag law show scattered, uneven uses of the red flag law that varied greatly from county to county, suggesting that law enforcement officials might be enforcing the law in accordance with their beliefs about its effectiveness and constitutionality. However, the population of each county undoubtedly also affected the number of petitions filed there. See *Summary Reporting System Risk Protection Orders by County, March 2018 Through June 2022*, FLA. BULLDOG, <https://www.floridabulldog.org/wp-content/uploads/2023/01/20220816-Risk-Protection-Orders-March-2018-through-June-2022.pdf> [https://perma.cc/VQ3U-DE52] (compiling county-level data on risk protection orders filed in each county over a four-year period); see also Noreen Marcus, *Florida’s Red Flag Gun Law Enforced Haphazardly Five Years After Parkland Massacre Inspired Legislation, Research Shows*, FLA. BULLDOG (Jan. 31, 2023) <https://www.floridabulldog.org/2023/01/floridas-red-flag-gun-law-enforced-haphazardly-research-shows> [https://perma.cc/6XJ8-TR59] (“And numbers show that application of the red flag law is wildly inconsistent in Florida’s 67 counties.”).

184. Steven Lemongello, *Seminole Sheriff Dennis Lemma: I Won’t Enforce Assault Weapons Registry If Amendment Passes*, ORLANDO SENTINEL (Feb. 5, 2022), <https://www.orlandosentinel.com/2020/01/15/seminole-sheriff-dennis-lemma-i-wont-enforce-assault-weapons-registry-if-amendment-passes> [https://perma.cc/5WL7-BBNH] (“Seminole County Sheriff Dennis Lemma told gun activists he wouldn’t enforce a proposed amendment to the state constitution that would require owners of semiautomatic weapons to register them with the state.”). Sheriff Lemma of Seminole County declared at a town hall, “It’s not only that I wouldn’t, the majority of sheriffs across the state would not do it . . . . It’s up to the sheriffs what they’re willing to enforce. . . .” *Id.*

185. Alessandro Marazzi Sassoon, *‘Constitutional Sheriff’ Wayne Ivey Says He’s a Patriot. Others See Something More Menacing*, FLA. TODAY (July 22, 2021), <https://www.floridatoday.com/story/news/local/2021/07/22/constitutional-sheriff-wayne-ivey-right-wing-law-enforcement-ideology/5093231001>



In 2013, Florida's then-governor, Rick Scott, suspended a sheriff for not enforcing a concealed carry law against an individual accused of violating it.<sup>186</sup> Since this single incident, Florida has not paid much attention to sheriffs who are against enforcing gun laws. Yet, current governor Ron DeSantis has taken action against other local officials who promise to defy state law. In 2022, DeSantis suspended a local prosecutor who vowed not to bring criminal charges against seekers or providers of abortion.<sup>187</sup> Prior to removing the prosecutor, DeSantis had ordered a statewide review of state attorneys and their policies out of concern that prosecutors were selectively enforcing the law based on their political beliefs.<sup>188</sup> Yet, he and other state officials have not conducted a similar review of constitutional sheriffs or any other local officials who might be

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[<https://perma.cc/R6EL-L9QE>]. One of these sheriffs, Wayne Ivey, said at a Second Amendment Rights rally in 2020 that “[i]f we don’t succeed [at preventing gun laws from being enacted], we’ll be standing ready[.] the sheriff’s office is the first line of defense for our citizens.” Alessandro Marazzi Sassoon, *Florida Red Flag Laws Unconstitutional Say Gun Rights Advocates, Though Repeal Unlikely*, FLA. TODAY (Jan. 7, 2020), <https://www.floridatoday.com/story/news/2020/01/07/second-amendment-forum-brevard-county-critical-post-stoneman-douglas-gun-laws/2832103001> [<https://perma.cc/NU9X-GDS2>].

186. David Neiwert, *Florida Sheriff Who ‘Nullified’ Concealed Gun Arrest is Acquitted, Reinstated*, S. POVERTY L. CTR. (Nov. 1, 2013), <https://www.splcenter.org/hatewatch/2013/11/01/florida-sheriff-who-%E2%80%98nullified%E2%80%99-concealed-gun-arrest-acquitted-reinstated> [<https://perma.cc/S7SK-CF85>]. He was ultimately reinstated after an investigation of his conduct. *Id.*

187. The prosecutor, Andrew H. Warren, signed onto a joint statement by prosecutors who stated they would not prosecute people seeking abortions after *Dobbs* if their states passed laws criminalizing the procedure. *See Joint Statement from Elected Prosecutors*, FAIR A& JUST PROSECUTION (June 24, 2022), <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> [<https://perma.cc/KP4H-9A2X>] (highlighting the elected prosecutors’ refusal to employ their resources to criminalize reproductive health decisions). Article IV Section 7(a) of the Florida constitution gives the governor the power to suspend “any state . . . or any county officer . . . for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties . . .” FLA. CONST. art. IV, § 7(a).

188. DeSantis stated of the review, “[w]e are not going to allow this pathogen that’s been around the country of ignoring the law . . . . We are not going to let that get a foothold here in the state of Florida.” Skyler Swisher, *‘Constitutional’ Sheriff Movement Escapes DeSantis’ Scrutiny*, ORLANDO SENTINEL (Aug. 8, 2022), <https://www.orlandosentinel.com/2022/08/08/constitutional-sheriff-movement-escapes-desantis-scrutiny/> [<https://perma.cc/JWN8-W2NR>].

selectively enforcing laws based on their personal beliefs.<sup>189</sup> Although DeSantis claimed that he “simply wanted to ensure state law would be enforced,” and was not “seeking political retaliation” when he removed the prosecutor,<sup>190</sup> his lack of attention to vows of nonenforcement of other laws calls this purported motive into question. Sheriffs who oppose state gun laws have continued on unchecked. Meanwhile, the punitive preemption law continues to loom over local residents and officials who long for discussion, debate, and action on gun control.

### B. Washington

Washington has a preemption law that “fully preempts” most local action on firearms outside of particular regulatory decisions.<sup>191</sup> The statute permits municipalities to enact ordinances restricting the discharge of firearms, possession of certain firearms in stadiums, and the location of businesses selling firearms.<sup>192</sup> The state attorney

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189. *Id.* After he removed Warren, DeSantis stated, “I have to do this. That’s my job to ensure that the laws are faithfully executed.” Justin Schecker, *Andrew Warren Pushes Back Against Florida Sheriffs’ Support of Suspension*, WFLA (Sept. 8, 2022), <https://www.wfla.com/news/hillsborough-county/andrew-warren-pushes-back-against-florida-sheriffs-support-of-suspension> [https://perma.cc/9URU-5P4D]. Yet, DeSantis’ lack of concern about ensuring other laws are being faithfully executed suggests political bias on his part.

190. Brendan Farrington, *Trial over DeSantis Removal of Prosecutor on Abortion Ends*, AP NEWS (Dec. 1, 2022), <https://apnews.com/article/abortion-ron-desantis-crime-tampa-florida-38fbe61688b3380901c2f3b6478de517> [https://perma.cc/3G3S-HGDK]. Interestingly, the Florida Sheriffs Association expressed support for DeSantis, releasing this statement: “The FSA (Florida Sheriffs Association) is supportive of the removal . . . . Rather than exercising prosecutorial discretion by reviewing arrests on a case-by-case basis, the state attorney has issued blanket policies that in effect declared that his office will not prosecute certain criminal activity . . . .” *Florida Sheriffs Support Ron DeSantis in His Legal Fight with Andrew Warren*, WMNF (Mar. 30, 2023), <https://www.wmnf.org/florida-sheriffs-support-ron-desantis-in-his-legal-fight-with-andrew-warren> [https://perma.cc/J8C9-Z4GQ].

191. WASH. REV. CODE ANN. § 9.41.290 (2024).

192. WASH. REV. CODE ANN. § 9.41.300(3) (2024). The statute gives localities the authority to regulate the location of businesses selling firearms only insofar as those business are not treated more restrictively than other businesses in the same zone. *Id.* The Washington Supreme Court has upheld a couple of local restrictions on guns beyond the narrow exceptions listed in the statute, including a local law regulating permit restrictions on private party gun sales at gun shows in a city convention center and a city ordinance that imposed a tax on firearms and ammunition sales. *Pacific Nw. Shooting Park Ass’n v. City of Sequim*, 144 P.3d 276, 282–83 (Wash. 2006); *Watson v. City of Seattle*, 401 P.3d 1, 12–14 (Wash. 2017). Washington has a notably strong home rule provision in its

general and private interest groups have used the preemption statute to knock down a variety of local laws, including a Seattle ordinance that regulated the possession of firearms at public park areas and facilities<sup>193</sup> and a city ordinance requiring safe storage of firearms.<sup>194</sup> Because the preemption law discourages local experimentation, there is no way to fully account for the localities that *would* enact stricter gun laws but do not do so because they do not want to waste public resources fighting a preemption challenge in court.<sup>195</sup> In the past 10 years, Washington voters have enacted a slate of statewide gun laws through popular referendum,<sup>196</sup> which suggests that there would be

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constitution, which could contribute to why its Supreme Court has been willing to uphold some local ordinances against challenges. The home rule provision of the constitution states that “[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” WASH. CONST. art. XI, § 11 (1889). *See* ASS’N OF WASH. CITIES, YOU HAVE IT, USE IT: HOME RULE IN WASHINGTON (Sep. 10, 2021), [https://wacities.org/docs/default-source/resources/sochomerulereport2021.pdf?sfvrsn=f1b8244f\\_21](https://wacities.org/docs/default-source/resources/sochomerulereport2021.pdf?sfvrsn=f1b8244f_21) [https://perma.cc/4NHC-M7KQ] (explaining how the Washington state constitution grants cities strong home rule powers); *see also* Hugh Spitzer, “*Home Rule*” vs. “*Dillon’s Rule*” for Washington Cities, 38 SEATTLE UNIV. L. REV. 809, 809 (2015) (explaining that the Washington constitution grants cities all the police powers possessed by the state government, as long as the regulations do not conflict with statewide “general laws”).

193. *Chan v. City of Seattle*, 265 P.3d 169 (Wash. 2011).

194. *Bass v. City of Edmonds*, 508 P.3d 172 (Wash. 2022) (finding that the state legislature clearly meant to occupy the entire field of firearms regulation).

195. After striking down the Edmondson ordinance under the state’s preemption statute in 2022, the founder of the Second Amendment Foundation, which participated in the legal challenge, stated, “[t]his should send a signal to other municipal governments—especially the City of Seattle against which we have a nearly identical pending lawsuit—that they cannot enact their own gun restrictions in violation of state law or the state constitution.” Joseph O’Sullivan, *WA State Supreme Court Rules Against Edmonds Gun Storage Law*, SEATTLE TIMES (Apr. 21, 2022), <https://www.seattletimes.com/seattle-news/politics/wa-state-supreme-court-rules-against-edmonds-gun-storage-law> [https://perma.cc/UNN3-7Y7X]. Presumably, when cities see local ordinances get struck down, they do take away the message that it is better not to try, because it will just be a waste of valuable time and resources. *See supra*, note 95 and accompanying text for a description of the chilling effect that preemption has on local action.

196. In 2016 and 2017, Washingtonians voted to enact universal background checks and an extreme risk protection law, and in 2018, state voters raised the minimum age to buy guns and approved a child access prevention law. *Washington Gun Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/states/washington> [https://perma.cc/2KKY-37KB]. They approved additional gun regulations by popular referendum in 2022.

an appetite for more local laws throughout the state if municipalities were allowed to enact them.

In 2023, Washington passed a law that restricts the manufacture, sale, and import of assault weapons.<sup>197</sup> The law does not ban possession of assault weapons.<sup>198</sup> Pro-gun organizations immediately filed lawsuits challenging the law.<sup>199</sup> The chances of success for the pro-gun groups appear dim,<sup>200</sup> especially since similar laws in other states have repeatedly been upheld against Second Amendment challenges.<sup>201</sup> Despite this, many sheriffs in Washington

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Alexandra de Leon, *Breaking Down New 2022 Washington Firearm Laws*, HARBORVIEW INJURY PREVENTION & RSCH. CTR. (Apr. 5, 2022), <https://hiprc.org/blog/breaking-down-new-2022-washington-firearm-laws> [<https://perma.cc/Y34V-H6RY>].

197. Substitute H.B. 1240, 68th Leg., Reg. Sess. (Wash. 2023) (noting that “[a]n analysis of mass shootings that result in four or more deaths found that 85 percent of those fatalities were caused by an assault weapon”).

198. *Id.*

199. *Guardian Arms v. Inslee*, No. 23-2-01761-34 (Wash. Super. Ct. 2024); *Hartford, v. Ferguson*, No. 3:2023cv05364 (W.D. Wash. 2023). Legal challenges to the law began on April 25, 2023, the same day that the law took effect. Press Release, Wash. State Off. of the Att’y Gen., AG Ferguson Defeats Second Attempt to Block Washington’s Ban on the Sale of Assault Weapons (Jun. 23, 2023), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-defeats-second-attempt-block-washington-s-ban-sale-assault-weapons> [<https://perma.cc/HCD3-A6N8>].

200. In denying the groups’ request for a preliminary injunction, the court noted that “[c]onsidering the exceptional dangerousness of these weapons, the public interest in their regulation by the State outweighs the Plaintiffs’ desire to purchase more assault weapons.” *Hartford*, No. 3:2023cv05364, at 13. The law remains in effect as the challenges move through the courts. Wash. State Off. of the Att’y Gen., *supra* note 199. The law has also already survived an appeal to the state Superior Court. *Id.*

201. See, e.g., *Kolbe v. Hogan* 849 F.3d 114 (4th Cir. 2017) (en banc) (holding that Maryland’s assault weapons ban does not violate the Second Amendment); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (holding New York and Connecticut laws barring possession of semiautomatic assault weapons and high-capacity magazines do not violate the Second Amendment); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015) (upholding local ordinance banning assault weapons and large capacity ammunition magazines); *Heller v. District of Columbia (“Heller II”)*, 670 F.3d 1244, 1260–64 (D.C. Cir. 2011) (upholding Washington, D.C.’s prohibition on assault weapons and high-capacity magazines). Further, the Supreme Court reaffirmed in *Bruen* that it has always been understood that the Second Amendment never guaranteed a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose” and that there is an established historical tradition of prohibiting “dangerous and unusual weapons.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 21, 21 (2022) (citing *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008)).

believe the law to be unconstitutional. Franklin County Sheriff Jim Raymond, who serves on the executive board of the Washington State Sheriffs Association (WSSA), stated of the law, “I want my grandkids to go to a safe school, and I’m willing to do pretty much whatever it takes—minus give up my constitutional rights and guarantees—to keep them safe.”<sup>202</sup> Days before the bill was officially signed into law, the WSSA issued a statement opposing the regulation. Thirty-seven of the state’s thirty-nine sheriffs signed onto the letter.<sup>203</sup> In the letter, they declared that “[w]e oppose gun bans because they fail to meet the standards of our state and federal constitutions.”<sup>204</sup>

Instead of promising to implement the new law, the sheriffs in the letter promised to focus on the “core” of the problem, which they identified as mental health issues and the “desire to kill” of some in our society.<sup>205</sup> A local newspaper reported that the Vice President of the WSSA, Mark Crider, stated that the document was drafted to assure citizens that the elected sheriffs of Washington will stand by their oath to uphold the constitutions of the United States and the state of Washington.<sup>206</sup> In other words, they do not intend to uphold the state law.

This messaging is much more veiled than it once was. In 2019, Washington passed a series of gun regulations by popular referendum, which included raising the minimum age to buy some firearms to twenty-one and requiring local law enforcement to perform background checks for the purchase of certain guns.<sup>207</sup> At the time, more than half of the state’s sheriffs openly stated that they

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202. Emily Goodell, *It’s Not Going to Stop’: Washington State Sheriffs Oppose Assault Weapon Ban*, APPLE VALLEY NEWS (Apr. 10, 2023), [https://www.applevalleynewsnow.com/news/its-not-going-to-stop-washington-state-sheriffs-oppose-assault-weapon-ban/article\\_a3b5cce4-d7fb-11ed-8489-d3e979fdfe29.html](https://www.applevalleynewsnow.com/news/its-not-going-to-stop-washington-state-sheriffs-oppose-assault-weapon-ban/article_a3b5cce4-d7fb-11ed-8489-d3e979fdfe29.html) [https://perma.cc/N7KS-MAPY].

203. Jedidiah Maynes, *Walla Walla, Columbia County Sheriffs Sign Letter Affirming ‘Commitment to the Second Amendment’*, WALLA WALLA BULL. (Jul. 23, 2021), [https://www.union-bulletin.com/news/walla-walla-columbia-county-sheriffs-sign-letter-affirming-commitment-to-the-second-amendment/article\\_b2dfcf50-eb06-11eb-aa77-03b8d67171ba.html](https://www.union-bulletin.com/news/walla-walla-columbia-county-sheriffs-sign-letter-affirming-commitment-to-the-second-amendment/article_b2dfcf50-eb06-11eb-aa77-03b8d67171ba.html) [https://perma.cc/9J75-VZSR].

204. Letter from Clay Myers, President, Wash. State Sheriffs’ Ass’n, *Confronting Mass Murder* (Apr. 8, 2023), <https://www.spokanecounty.org/DocumentCenter/View/48177/WSSA-ASSAULT-WEAPONS-BAN-STATEMENT> [https://perma.cc/22CR-GSAD].

205. *Id.*

206. Maynes, *supra* note 203.

207. Off. of Att’y Gen., *Washington Initiative 1639*, WASH. STATE, <https://www.atg.wa.gov/initiative-1639> [https://perma.cc/EH6Y-JGFL].

opposed the new laws and declared their intentions to defy them.<sup>208</sup> For example, Klickitat County Sheriff Bob Songer, who remains the sheriff in that county today, asserted bluntly at the time, “[m]y plan is not to enforce it,” citing his belief that it violated the U.S. and Washington state constitutions as justification.<sup>209</sup>

In response to sheriffs’ defiant statements regarding the newly enacted 2019 gun laws, Washington’s Attorney General, Bob Ferguson, sent an open letter to the sheriffs who claimed that they would refuse to enforce the law.<sup>210</sup> The letter expressed Ferguson’s confidence that the new laws would withstand court challenges and contained a vague warning that law enforcement officials “could be held liable” if they refused to perform a background check and the

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208. Jason Wilson, *Washington State: At Least 20 County Sheriffs Refuse to Enforce New Gun Laws*, GUARDIAN (Feb. 22, 2019), <https://www.theguardian.com/us-news/2019/feb/22/washington-state-county-sheriffs-refuse-to-enforce-gun-laws> [<https://perma.cc/SZX7-U3KM>].

209. Kaste, *supra* note 108.

210. Ryan Prior, *Washington’s Attorney General Says He’ll Defend Gun Law Some Sheriffs Call Unconstitutional*, CNN (Feb. 13, 2019), <https://www.cnn.com/2019/02/13/us/ferguson-washington-gun-law-trnd/index.html> [<https://perma.cc/5WNF-PQYY>]. This action represents the extent of action that state officials in many states have taken against defiant local sheriffs. For example, after more than twenty Virginia localities enacted Second Amendment Sanctuary resolutions in 2019 vowing to defy any gun control regulations that the newly-elected Democratic legislature might enact, the Virginia Attorney General responded with an “official position.” Mark R. Herring, Commonwealth of Va. Off. of Att’y Gen., Official Opinion, Recent Actions Taken by More than Twenty Localities Across the Commonwealth to Declare Themselves Exempt from Any New Gun Safety Laws That the General Assembly May Enact in the Future, (Dec. 20, 2019), <https://www.oag.state.va.us/files/Opinions/2019/19-059-Jones-issued.pdf> [<https://perma.cc/ZXZ6-CP5U>]. In that opinion, he declared that Second Amendment Sanctuaries had “no legal effect” and noted that “localities and local constitutional officers cannot nullify state laws and must comply with gun violence prevention measures that the General Assembly may enact.” *Id.* at 3–4. Although the Attorney General noted that “local officials are obligated to follow duly enacted state laws,” no further action was taken. *Id.* at 3. Similarly, in Illinois in 2023, after nine out of ten sheriffs declared their intention not to enforce Illinois’ recently enacted ban on semiautomatic weapons, the governor of Illinois spoke out against them, stating simply that: “They took an oath of office to enforce the laws of the state of Illinois, and they will do so.” John O’Connor, *Illinois Governor, Sheriffs Spar over Semiautomatic Gun Law*, AP NEWS (Jan. 13 2023), <https://apnews.com/article/law-enforcement-illinois-fires-0ee1207b1937612055b19dbe68e60c49> [<https://perma.cc/3YZL-JY59>]. State officials in Washington, Virginia, and Illinois have not taken any documented action beyond these letters to challenge local sheriffs who vow not to enforce gun laws.

firearm involved in that transaction was later used to do harm.<sup>211</sup> Ferguson wrote that “[a]s public officers, our duty is to abide by the will of the people we serve, and implement and enforce the laws they adopt. I encourage you to do so.”<sup>212</sup> This tepid letter from Ferguson was the extent of action taken by Washington against the sheriffs. While local governments remained barred from enacting stricter regulations, sheriffs that defied state gun laws due to their personal beliefs were met with a slap on the wrist.<sup>213</sup> Ferguson has not responded to the sheriffs’ 2023 letter.

### C. Sheriffs’ Discretion and the Democratic Implications of Underenforcement

Florida and Washington exemplify how states have selectively blocked local anti-gun resistance while allowing local pro-gun resistance to flourish. It is important to note, however, that the two types of resistance differ in a key respect. When a locality enacts an ordinance regulating guns, that action is visible as a violation of the state preemption statute. This type of local defiance is thus easy to identify and address. But the sheriffs’ resistance comes in the form of *non-action*.<sup>214</sup> It is more difficult to monitor and take action against

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211. Press Release, Wash. State Off. of the Att’y Gen., AG Ferguson Issues Open Letter to Law Enforcement on I-1639 (Feb. 12, 2019), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-issues-open-letter-law-enforcement-i-1639> [<https://perma.cc/2N7S-U8XP>].

212. *Id.* In the letter, Ferguson also noted that the sheriffs had a “legal obligation to perform the background checks.” While he acknowledged that the officers have discretion to “prioritize . . . resources,” he stated that “enforcement discretion . . . cannot subvert the rule of law. All Washingtonians, including those of us in government, are equally subject to the law.” *Id.*

213. Perhaps this pushback to sheriffs’ refusal to enforce state laws that they disagree with has caused the sheriffs to take the more cautious, implicit approach to resistance that is reflected in the 2023 letter opposing the new gun laws. Wash. State Sheriffs’ Ass’n, *supra* note 204. Still, thirty-seven out of the state’s thirty-nine sheriffs signed onto the 2023 letter, indicating that they did not take Ferguson’s message to heart but rather have decided to be more covert about their resistance. *Id.*

214. Faris & Holman, *supra* note 122, at 710 (noting that sheriffs enjoy a significant amount of autonomy with “wide discretionary authority in the enforcement of laws,” including in the decisions to arrest someone and keep someone in jail). Recall the Washington sheriff, Bob Songer, who stated, “[m]y plan is not to enforce it,” after Washington voters enacted a law requiring background checks. Kaste, *supra* note 108. Similarly, after New York passed new gun laws in 2022, one sheriff in Niagara County stated, “[w]e will take the complaint, but it will go to the bottom of my stack. . . . There will be no arrests made without my authorization and it’s a very, very low priority for me.” Jesse

sheriffs who are choosing not to do something. And sheriffs have the power to decide not to act—their role enables them to use discretion, as is true of most law enforcement officials.<sup>215</sup>

It is generally accepted that case-by-case enforcement decisions fall within the bounds of law enforcement officials' discretion.<sup>216</sup> However, the question of whether categorical nonenforcement of laws is a legitimate use of that discretion is a live debate.<sup>217</sup> Certainly, in some contexts, categorical nonenforcement has been and can be used in liberty-enhancing ways.<sup>218</sup> However, in

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McKinley & Cole Louison, *Another Challenge to New York's Gun Law: Sheriffs Who Won't Enforce It*, N.Y. TIMES (Oct. 9, 2022), <https://www.nytimes.com/2022/10/09/nyregion/ny-gun-law-sheriffs.html> (on file with the *Columbia Law Human Rights Review*). A sheriff in Illinois' largest county similarly expressed an intention to use discretion not to enforce recently enacted state gun laws, stating, "as the custodian of the jail and chief law enforcement official for DuPage County . . . neither myself nor my office will be checking to ensure that lawful gun owners register their weapons with the State, nor will we be arresting or housing law-abiding individuals that have been charged solely with non-compliance of this Act." *74 Illinois Sheriff's Departments Vow to Defy New State Gun Legislation*, ABC NEWS (Oct. 2, 2021), <https://abcnews.go.com/US/74-illinois-sheriffs-departments-vow-defy-new-state/> [<https://perma.cc/Z5CJ-NNGJ>].

215. Tomberlin, *supra* note 122, at 143 (describing that the actions of sheriffs involve one-off decisions made in the course of duty, which are not as visible or easily reviewable as policy decisions made by legislators). *See also* Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, 15 CRIME & JUST. 51, 73–75 (1992) (noting the opacity of discretionary policing decisions).

216. Heydari, *The Sheriff's Constitution*, *supra* note 132, at 1046–1047 (noting that "[s]cholars of the presidency and of prosecutorial authority differ on whether enforcement discretion permits categorical nonenforcement . . . but none challenge enforcement discretion on a case-by-case basis").

217. For a defense of categorical nonenforcement as legitimate, at least in the prosecutorial context, see W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021). For an argument that categorical nonenforcement is illegitimate in the prosecutorial context, see Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011). For an interesting analysis of the proper balance between local discretion and state oversight in the prosecutorial context, see Tyler Q. Yeargain, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L. J. 95 (2018).

218. *See* Heydari, *The Sheriff's Constitution*, *supra* note 132, at 1060 (noting a range of nonenforcement decisions that are defensible as liberty-enhancing, including jury nullification and prosecutorial decisions not to charge for certain crimes, which offer avenues of relief from our overly-punitive system of criminal prosecution).



other contexts<sup>219</sup> and the context of this Note—which is focused on enforcement of gun laws by sheriffs specifically<sup>220</sup>—such nonenforcement has an anti-democratic impact and is a cause for concern.<sup>221</sup>

First, sheriffs have far less oversight than other law enforcement officials,<sup>222</sup> making their exercise of discretion more suspect. Many sheriffs cite their elected status as justification for their nonenforcement decisions, claiming that they are promoting democracy by carrying out the preferences of their constituents.<sup>223</sup> While it is true in theory that elections should serve as a check on their power,<sup>224</sup> sheriff elections, more so than elections of other local

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219. *Id.* at 1061 (highlighting “many circumstances in which nonenforcement creates real threats to liberty,” including Jim Crow-era sheriffs who ignored racialized violence, sheriffs who choose not to charge crimes of domestic violence, and sheriffs who ignore potential hate crimes). Heydari also notes other concerning aspects of nonenforcement, including that it can leave victims feeling vulnerable and without recourse, create cycles of victimization by emboldening law-breakers, create a misleading picture about the frequency of crime, and “create an impression that certain types of victimization are unworthy of government intervention.” *Id.* at 1061–62. Heydari highlights underenforcement of domestic violence cases and the underreporting of sexual assaults (due to the high chance that reporting will be met with a non-response by authorities) as exemplifying these nonenforcement concerns. *Id.*

220. See *id.* at 1062, 1063 (arguing that “[s]heriffs, in particular, are a poor bet to exercise enforcement discretion in a decarceral manner,” since sheriffs’ budgets are substantially linked to the jails they operate, giving sheriffs a financial incentive to incarcerate people).

221. *Id.* at 1063 (“Although the democracy and liberty calculus of sheriff nullification is contestable, what is less contestable is the risk created by leaving enforcement decisions to the sole discretion of the sheriff.”).

222. For a more complete discussion of how the nature of the office of the sheriff results in more autonomy and less oversight—since sheriffs do not fall under the authority of the mayor’s office and other local institutions that often regulate police departments—see *supra* Section II.A.2.

223. Washington Sheriff Bob Songer, who is a member of the CSPOA, has stated that “[a]s a sheriff, your only boss is the people that put you in office. It’s not the county commissioners, it’s not the governor, it’s not the state attorney general.” *Constitutional Counties Adopt ‘Constitutional Sheriff’ Ideology*, ARIZ. CTR. FOR INVESTIGATIVE REPORTING (Aug. 21, 2023) [hereinafter Arizona Center Report], <https://azcir.org/news/2023/08/21/constitutional-counties-adopt-constitutional-sheriff-ideology/> [https://perma.cc/2N7S-U8XP]. Similarly, when a constituent asked Los Angeles Sheriff Lee Baca how to hold him accountable for misconduct by his office, including mistreatment of inmates, the sheriff simply responded: “Don’t elect me.” Tomberlin, *supra* note 122, at 143.

224. See Falcone & Wells, *supra* note 122, at 127 (arguing that sheriffs’ election by popular vote subjects them directly to the approval of the community and the “power of public opinion,” making them “less insulated” than a police chief

officials,<sup>225</sup> provide a weak accountability check on sheriffs' power and make sheriffs inadequately responsive to the people they represent. Sheriffs enjoy a significant incumbency advantage,<sup>226</sup> and, on average, 60% of sheriffs run for re-election unopposed.<sup>227</sup> In rural counties especially, there are often very few people who are even qualified to run for county sheriff.<sup>228</sup> Additionally, turnout in local elections is usually dismal.<sup>229</sup> And once elected, sheriffs often remain in office for decades.<sup>230</sup> Further, sheriffs' actions often happen behind

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because they must maintain "good relationships with the voting members of the community who may remove him/her from office at the next available election").

225. See Zoorob, *supra* note 129 (noting from the results of an empirical study that sheriffs have an incumbency advantage that greatly exceeds other local offices and causes them to hold office for more than twice as long as appointed police chiefs).

226. See also Editorial, *Don't Run Again, Sheriff Baca*, L.A. TIMES (Aug. 4, 2013) <https://www.latimes.com/opinion/editorials/la-xpm-2013-aug-04-la-ed-adv-sheriff-20130804-story.html> (on file with the *Columbia Human Rights Law Review*) (noting that no incumbent Los Angeles sheriff has lost an election since 1932). The average tenure for a sheriff is eleven years, whereas for a police chief it is three years. Kindy, *supra* note 108.

227. All Things Considered, *Do Elected Sheriffs Have Outsized Power in the U.S.?*, NPR (July 25, 2020), <https://www.npr.org/2020/07/25/895423249/do-elected-sheriffs-have-outsized-power-in-the-u-s> [<https://perma.cc/5CEL-9P6D>].

228. Tomberlin, *supra* note 122, at 143 ("Particularly in rural counties, there is the problem that those most qualified to replace a sitting sheriff are likely to be subordinates of that sheriff and therefore unlikely to be willing to break rank and run against their boss."). In Florida, a sheriff's deputy was fired for "lack of loyalty" after declaring his intention to run against the incumbent sheriff—his boss. Florida has a law requiring deputies to quit if they want to run for sheriff, which creates a disincentive for qualified deputies to enter the race. David Harris, *Deputy Fired a Day After Filing to Run Against Sheriff*, ORLANDO SENTINEL (May 23, 2019), <https://www.theledger.com/story/news/politics/2019/05/23/deputy-fired-day-after-filing-to-run-against-sheriff/5073579007/> [<https://perma.cc/L623-TJMN>].

229. See generally Tomberlin, *supra* note 122, at 142–44 (describing how voter turnout is low in local elections and appears to be diminishing in recent years, and this is one of many reasons why sheriffs lack electoral accountability to the public).

230. Harry Lee—a former sheriff for Jefferson Parish, Louisiana for nearly thirty years—famously used to say that he was "the closest thing there is to being a king in the U.S." Kindy, *supra* note 108. Further, sheriffs often have term limits that are set by the state constitution, making them extremely difficult to modify. In 2004, a sheriff sued when Los Angeles County residents voted to impose term limits on the sheriff's office. The court ruled that since the sheriff's office was governed by the state constitution, county voters had no say over the sheriff's term, and he succeeded in overturning this term limit ballot result. Jack Leonard, *Baca Wins His Battle Against Term Limits*, L.A. TIMES (Nov. 11, 2004), <https://www.latimes.com/archives/la-xpm-2004-nov-11-me-limits11-story.html> (on file with the *Columbia Human Rights Law Review*).

the scenes, which obscures them from the view of the public, unlike other elected decision-makers like local mayors whose actions are more widely scrutinized.<sup>231</sup> Combined, these factors make sheriffs' elected status a weak check on their authority.<sup>232</sup> Thus, categorical nonenforcement by sheriffs specifically should be viewed with greater skepticism than nonenforcement by other local public officials.

Second, categorical nonenforcement of gun laws in particular has more severe anti-democratic implications than nonenforcement of other laws because guns are mobile and deadly. A sheriff's decision not to enforce a gun law in one area can have significant ramifications for people in other parts of the state—people who did not elect that sheriff.<sup>233</sup> Compare this with, for example, the decision of a prosecutor not to press charges against an individual who has had an abortion. The effects of that decision will be largely confined within the borders of the locality that elected the prosecutor who is making that decision.<sup>234</sup> The impacts of such underenforcement do

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231. Tomberlin, *supra* note 122, at 143. Emily Farris, an expert political scientist who studies sheriffs, lamented that it was unfortunate most people do not think of sheriffs as politicians, “given sheriffs are elected with responsibilities that touch on the everyday of people’s lives.” Pishko, *Sheriffs’ Power and Autonomy*, *supra* note 128.

232. There is also a problem of campaign finance, with tons of money often flooding into contested sheriffs’ races from out of state. Tomberlin, *supra* note 122, at 144. Sheriffs seem to understand their unique position as elected officials who often face no electoral competition. One sheriff noted: “You pretty much have no authority above you government-wise; you answer to the voters.” Kindy, *supra* note 108.

233. Data show that guns move from areas with weak gun laws to areas with stronger gun laws, which makes underenforcement of gun laws specifically dangerous. For a discussion on the collateral impacts of nonenforcement and the importance of uniform laws in the gun law context, see *infra* Section III.D.

234. Although people might travel to obtain a medical procedure, once the medical procedure has occurred, nonenforcement will have no effect beyond the fact of the underenforcement itself. One might still make the argument that this is undemocratic, as it involves an executive official undermining a law enacted by voters through nonenforcement. However, the impact of the nonenforcement ends there—it is the nonenforcement itself that is arguably anti-democratic. When nonenforcement of gun laws allows guns to travel from an area of weak enforcement to an area with stronger enforcement, however, serious and sometimes deadly consequences—consequences other than the fact of the underenforcement itself—tend to flow from that decision not to enforce. Due to the well-documented movement of guns from areas of weak gun laws to areas of stronger gun laws, the effects of a nonenforcement decision in the gun context can extend to other localities and to individuals who had no say in the election of the official making the nonenforcement decision. See *infra* Section III.D. The effects on nonenforcement are thus more significant in the gun context than in other

not travel in the same way that they do in the gun context.<sup>235</sup> Thus, the decision of sheriffs not to enforce gun laws in particular deserves greater attention and concern than other forms of nonenforcement.<sup>236</sup>

Because local elections do not provide an adequate accountability check on sheriffs, and because of the particular gravity of the consequences of nonenforcement of gun laws, unfettered discretion by sheriffs to not enforce gun laws is troubling.<sup>237</sup> This is true in all the states where the sheriffs are active. Yet, in the states that are the subject of this Note—where there are constitutional sheriffs and a firearm preemption law—the democratic impacts of sheriffs' categorical nonenforcement of gun laws are even larger. The next section details how the combination of the sheriffs' movement and preemption laws together exacerbates the anti-democratic implications of sheriffs' underenforcement of gun laws.

#### D. The Constitutional Sheriff's Undermining of Uniformity of State Firearm Law

In addition to the democratic implications of nonenforcement described above, the constitutional sheriffs movement also undercuts the uniformity of state law, casting doubt on the legitimacy of states'

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contexts, and these effects are exacerbated in states that also have preemption laws.

235. See *infra* Section III.D (explaining that weak gun laws in one area often affect neighboring areas, even if those neighboring areas themselves have strong gun laws).

236. Yet, interestingly, many state leaders have been silent on the topic of defiance of democratically-enacted firearm laws by sheriffs, even as they have publicly called out or taken legal action against prosecutors pursuing progressive policy goals. For example, in Orlando, Florida, a progressive prosecutor, Aramis Ayala, pledged not to bring any death sentence cases. Richard A. Oppel Jr., *These Prosecutors Promised Change. Their Power is Being Stripped Away*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/us/prosecutors-criminal-justice.html> (on file with the *Columbia Human Rights Law Review*). Then-Governor, Republican Rick Scott, responded by removing thirty cases from the prosecutor's local docket, and the state legislature responded by slashing her budget by \$1.3 million. *Id.* Republican lawmakers' concern about local nonenforcement seems to disappear when that nonenforcement aligns with their personal policy goals, even though the nonenforcement they are ignoring have more significant consequences than the nonenforcement they are trying to suppress.

237. See Heydari, *The Sheriff's Constitution*, *supra* note 132, at 1064 ("When government is not required to justify its choices, there is the risk that it will act in ways that favor groups in power and disadvantage marginalized ones.").

purported justification for broad firearm preemption laws and highlighting states' selective treatment of different forms of local resistance to firearm laws. Recall that preemption traditionally has been considered a legitimate use of state power when used to advance statewide uniformity of laws, rein in local governments whose policy decisions have clear effects beyond their borders, or establish statewide minimum standards that leave local governments with discretion to go beyond or supplement those minimums.<sup>238</sup> In enacting and defending preemption laws, state officials have typically invoked the first of these justifications, claiming that preemption is necessary to avoid a patchwork of local laws.<sup>239</sup> The NRA and other pro-gun groups frequently echo and promote this argument.<sup>240</sup> The

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238. See *supra* notes 31–32 and accompanying text.

239. After the Ohio Attorney General successfully defended the state's preemption law from a local challenge in 2023, he stated that, "[t]he issue here is that the legislature has said, 'We're going to have a uniform law for the entire state so that citizens don't have to guess whether they're breaking the law because they passed a municipal boundary'—and that law needs to be enforced." Press Release, Ohio Att'y Gen.'s Off., Judge Sides with Yost in Temporarily Halting Implementation of Columbus' New Gun Ordinances (Dec. 15, 2022), <https://www.ohioattorneygeneral.gov/Media/News-Releases/December-2022/Judge-Sides-with-Yost-in-Temporarily-Halting-Imple> [https://perma.cc/G8H7-8VHB]. Similarly, in announcing an intention to propose an amendment to strengthen Pennsylvania's preemption law, a state legislator wrote that the legislation was needed because "[w]here no uniform state laws are in place, the result can be chaotic as restrictions change from one local jurisdiction to another. Where so many different ordinances are allowed to exist, citizens with no criminal intent are placed in danger of breaking restrictions where they don't know they exist." Memorandum from Pennsylvania Representative Abby Major on Preemption Legislation (Former HB 979) to All House Members (Jan. 9, 2023), <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20230&cosponId=3917> [https://perma.cc/3V4Z-HA2F]. She also noted that "it is unreasonable to require residents of Pennsylvania and citizens passing through from other states to memorize every firearm ordinance as they pass through each local jurisdiction." *Id.*

240. *Illinois: Senate Attempts to Repeal Preemption Law*, NRA-ILA (Mar. 14, 2018), <https://www.nraila.org/articles/20180314/illinois-senate-attempts-to-repeal-preemption-law> [https://perma.cc/QY6F-CUAK] ("Firearm preemption laws ensure that fundamental Second Amendment rights are not diluted or distorted through controversial local policies and help prevent a confusing patchwork of gun control laws which make it difficult for gun owners to ensure that they are following the law."). See also *Firearm Preemption Laws*, NRA-ILA, <https://www.nraila.org/get-the-facts/preemption-laws> [https://perma.cc/7H4N-XPQL] ("It also creates confusion when laws vary widely within a state, potentially placing otherwise law-abiding citizens at risk of violating an ordinance of which they were not previously aware, as they travel within their states, and more so when they travel outside their state of residence."). An Ohio gun-rights

types of local laws that pro-gun advocates choose to attack and the types of arguments they make to strike down those laws also demonstrate how avoiding a patchwork of local laws has become a common refrain for those against local gun regulation.<sup>241</sup> Yet, despite states' insistence that preemption laws are necessary to avoid confusing patchworks of local firearm laws,<sup>242</sup> state actors have made

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advocate recently echoed this argument in support of the Ohio state court striking down a local gun regulation that the city of Columbus had enacted, stating, "a person who leaves their house has to drive all the way into downtown Cleveland, they're gonna go through several jurisdictions . . . [d]o we really expect every single person to know the firearm law from seven or eight different political subdivisions, the townships, the villages and the cities?" Morgan Trau, *Ohio Court Shoots Down Columbus Gun Safety Regulations*, OHIO CAP. J. (Dec. 4, 2023), <https://ohiocapitaljournal.com/2023/12/04/ohio-court-shoots-down-columbus-gun-safety-regulations/> [<https://perma.cc/P5U6-27WJ>]. Yet, there are federal laws in place that protect individuals who are transporting a firearm from one place where they can legally possess and carry the firearm to another, even if they must pass through areas where that possession or carrying is banned. 18 U.S.C. § 926A (granting safe harbor for transport of a lawful firearm between two places, so long as the firearm is unloaded and neither the firearm nor the ammunition being transported is readily accessible). The Ohio law was really struck down because it created a patchwork of local laws, in violation of the preemption statute. The Court found this persuasive in its decision to uphold the state preemption law as valid, which meant the city's law could not stand. *City of Columbus v. State*, No. 22AP-676, 2023 WL 371787, at \*6 (Ohio Ct. App. Jan. 24, 2023) (stating that the local ordinance "displaces a longstanding statute, which had the stated purpose of promoting clarity and uniformity of regulation of firearms throughout the state, and replaces it with uncertainty and a patchwork of laws").

241. To continue exploring recent examples from Ohio, in 2022 the city of Columbus enacted two local ordinances that banned magazines with thirty or more bullets and required safe storage of firearms in homes. Columbus, Ohio, Ordinance 3176-2022 (Dec. 7, 2022); Columbus, Ohio, Ordinance 3175-2022 (2022). Both were struck down under Ohio's preemption statute. *City of Columbus v. State*, 223 N.E.3d 540, at ¶ 27 (Ohio 10th Dist. 2023). Yet, the effects of these laws would have been limited exclusively to people living within the city limits. The safe storage law would not even have impacted people traveling to or through the city, since it pertains to storing guns at a residence. It thus had no spillover effects, and it did not interfere with any state regulatory scheme on the same subject, since Ohio has few statewide gun laws. *See Gun Laws in Ohio*, Everytown Gun Law Rankings (2024), <https://everytownresearch.org/rankings/state/ohio/> [<https://perma.cc/GCW6-ZHCV>] (describing Ohio's "weak gun safety laws" and state legislators' attempts to remove those already weak laws).

242. *See, e.g.*, OHIO REV. CODE ANN. §9.68 (West 2022). The Ohio preemption statute is commonly known as the "Firearm Uniformity Law" and it "finds the need to provide uniform laws throughout the state . . . ." *Id.* The firearm preemption laws of many states include uniformity of laws as the justification for instituting a preemption law. *See supra* note 91 (citing Florida's law); IND. CODE § 35-47-11.1-2 (2023) (relying on uniformity as a basis in Indiana); MICH. COMP.

no substantial effort to counteract constitutional sheriffs who contravene that goal.

Still, uniformity is an important goal for effective firearm regulations. State legislators and pro-gun activists claim that uniformity is needed to prevent a patchwork of local laws, but this is essentially arguing that uniformity is important for uniformity's sake—in other words, uniformity is needed to avoid non-uniformity. However, in the firearm context, uniformity actually is important, albeit for another reason: weak gun laws in one place have serious negative spillover effects.<sup>243</sup> Guns are easily transportable, and it is well documented that guns tend to flow from areas with weaker gun laws to areas with stronger gun laws.<sup>244</sup> A recent study found that

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LAWS §123.1102 (2024) (relying on uniformity as a basis in Michigan); ALA. CODE § 13A-11-61.3 (2023) (“The purpose of this section is to establish within the Legislature complete control over regulation and policy pertaining to firearms . . . in order to ensure that such regulation and policy is applied uniformly throughout this state . . .”).

243. See Tessa Collins, et al., *State Firearm Laws and Interstate Transfer of Guns in the USA, 2006–2016*, 95 J. URB. HEALTH 322–36 (2018); *Trafficking and Straw Purchases*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, [https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/#footnote\\_1\\_5599](https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/#footnote_1_5599) [<https://perma.cc/6A2K-46CT>].

244. One study of national data found that of 390,154 guns that crossed state lines, 74% originated in states without background check laws, and 60% of those guns ended up in a state with background laws. *Five Things To Know About Crime Guns, Gun Trafficking, and Background Checks*, EVERYTOWN FOR GUN SAFETY (October 10, 2022), <https://everytownresearch.org/report/five-things-to-know-about-crime-guns> [<https://perma.cc/F786-MKWS>]. The data establishing this tendency are largely focused on mobility between states, likely because preemption laws mean that there is little variation of gun laws within most states. Yet, there is little reason to think that this trend would not apply to the same extent at the local level—it likely applies to a greater extent at the local level since the distance between the two areas would be closer, making it easier to avoid stronger gun laws if one wished. Further, there is some data supporting this claim that intrastate gun movement works in the same way. In a recent gun trace conducted by the Bureau of Alcohol, Tobacco, and Firearms, 16,500 guns used in crimes in Chicago from 2017 to 2021 came from other parts of Illinois. This number represented over 40% of the guns recovered in Chicago that were traced in this study. NAT’L TRACING CTR. DIV., BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, CRIME GUN TRACE REPORTS: VOLUME II - PART III: CRIME GUNS RECOVERED AND TRACED IN THE UNITED STATES AND TERRITORIES 53 (2024), <https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download> [<https://perma.cc/F9G4-HUXG>]. This Chicago gun trace is significant because nine out of ten Illinois sheriffs have declared that they would not enforce the ban on assault weapons and high-capacity magazines that took effect in early 2024. See O’Connor, *supra* note 210. The same study found that 78.7% of the crime guns that were traced in Detroit,

almost two-thirds of crime guns recovered in states with strict gun regulations were originally sold in states with less stringent regulations.<sup>245</sup> Similarly, a gun tracing study conducted by the New York Attorney General's office found that of the 39,491 handguns that law enforcement recovered between 2010 and 2015, 86% were purchased out-of-state before being used in a crime in New York,<sup>246</sup> a state with some of the strictest gun laws in the nation.<sup>247</sup>

These studies show that when it comes to gun regulations, neighbors matter.<sup>248</sup> For this reason, states' selective action against only those local governments that pass stricter gun laws, and not against sheriffs that defy the law, is doubly problematic. When a local government passes an ordinance that imposes gun regulations that are stricter than the state's, the effects of that gun law will be limited

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Michigan had a source from another part of Michigan, and 90.1% of the crime guns recovered in Richmond, Virginia had a source from another part of Virginia. *Id.* Michigan and Virginia are two other states with constitutional sheriffs that have vowed not to enforce certain gun laws. See Cappelletti, *supra* note 143 (highlighting Michigan sheriffs' statements that they would have "trouble enforcing" state ERPO laws due to their beliefs that the law is unconstitutional); Editorial, *Virginia's Second Amendment 'sanctuaries' can't ignore new gun control laws*, WASH. POST (Feb. 28, 2020), [https://www.washingtonpost.com/opinions/virginias-second-amendment-sanctuaries-cant-ignore-new-gun-control-laws/2020/02/28/dc57a870-58eb-11ea-9b35-def5a027d470\\_story.html](https://www.washingtonpost.com/opinions/virginias-second-amendment-sanctuaries-cant-ignore-new-gun-control-laws/2020/02/28/dc57a870-58eb-11ea-9b35-def5a027d470_story.html) 9on file with the *Columbia Law Human Rights Review*). This data from Illinois, Michigan, and Virginia are important because it shows that guns move within states, and underenforcement in one part of a state can subvert gun safety efforts in other areas.

245. Erik J. Olson, *American Firearm Homicides: The Impact of Your Neighbors*, 86 J. TRAUMA & ACUTE CARE SURG. 797 (2019). A crime gun is a gun that is recovered after being connected with a crime. EVERYTOWN FOR GUN SAFETY, *supra* note 244.

246. N.Y. STATE OFF. OF THE ATT'Y GEN., TARGET ON TRAFFICKING: NEW YORK CRIME GUN ANALYSIS 12 (2016), <https://targettrafficking.ag.ny.gov/#part1> [https://perma.cc/X28R-45CS].

247. As of November 2024, the gun policy think tank Everytown for Gun Safety determined that New York has the second strongest gun laws out of the fifty states, with one of the lowest rates of gun violence and gun ownership. Everytown Research & Policy, *Gun Laws in New York*, EVERYTOWN FOR GUN SAFETY, <https://everytownresearch.org/rankings/state/new-york/> [https://perma.cc/46TX-MQ5N]. The rankings are determined based on metrics regarding the quantity and types of gun laws that each state has in place. *Id.*

248. It is for this reason that the ideal solutions to gun law would involve action at the federal level. Given the infeasibility of that possibility at the time of writing, however, this Note is focused on state and local gun dynamics.



to the borders of that locality.<sup>249</sup> But when sheriffs' lax enforcement of gun laws makes it easier to buy, transfer, or carry a gun in one part of the state, the effects of those decisions will inevitably carry over the borders of that municipality<sup>250</sup> and have consequences for people in other towns that desire stricter gun laws. Thus, nonenforcement by sheriffs not only creates a patchwork of enforcement across the state—threatening the nominal uniformity that pro-gun state legislators and advocates use to justify preemption laws—but also lessens the effectiveness of gun laws everywhere.

Therefore, when states preempt local governments from passing local firearm laws but allow sheriffs to undermine state gun laws, states are denying individuals who want stronger gun laws the power to enact those laws at both the local and the state level. At the local level, the state prohibits them from enacting their own gun laws, even though the effects of those gun laws will be largely contained within the border of that town. And at the state level, their choices are diluted by sheriffs who decide that they will not enforce

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249. For example, if a city were to ban the sale of assault weapons, that has no effect on other parts of the state—everyone everywhere else is still free to sell assault weapons, and only if someone is within the bounds of the city will they be affected by the law. Interestingly, one study has found that stricter gun laws in one state has the effect of actually reducing homicides in neighboring states, creating a kind of “halo effect.” Elinore J. Kaufman et al., *State Firearm Laws and Interstate Firearm Deaths From Homicide and Suicide in the United States: A Cross-sectional Analysis of Data by County*, 178 JAMA INTERNAL MED. 692 (2018); Jo Craven McGinty, *The Spillover Effects of State Gun Laws*, WALL ST. J. (May 18, 2018), <https://www.wsj.com/articles/the-spillover-effects-of-state-gun-laws-1526648401> (on file with the *Columbia Human Rights Law Review*). Not only do stricter gun laws not have the same negative spillover effects as weak gun laws, but they also could actually be *beneficial* to neighbors with weaker gun laws.

250. A recent study found that, from 2014 to 2020, six small gun shops near Philadelphia sold over eleven thousand guns later used in crimes. BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, PENNSYLVANIA CRIME GUNS TRACE REPORT 23 (2021), <https://brady-static.s3.amazonaws.com/Pennsylvania-Crime-Guns-Trace-Report.pdf> [<https://perma.cc/LEN7-CKQ7>]. Similarly, in Georgia, one gun shop sold over six thousand crime guns from 2014 to 2019, making the shop responsible for more than half of the reported guns later recovered at crime scenes. Carolyn B. Maloney, Chairwoman, Comm. On Oversight and Reform, 117th Cong., Letter to Gary M. Restaino, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives 1 (Apr. 28, 2022) <https://int.nyt.com/data/documenttools/house-committee-atf-guns/bcb0abe2fc89407f/full.pdf> (on file with the *Columbia Human Rights Law Review*). Troublingly, these six thousand recovered crime guns accounted for only 10% of the guns sold by that dealer. *Id.* When one single dealer is responsible for thousands of guns later used in crime throughout the state, the enforcement of laws everywhere becomes critical to public safety.

those laws. When states select who may influence the gun regulatory landscape, they exacerbate the anti-democratic effects of underemployment and subvert democratic choice and power.

#### IV. STRATEGIES FOR CHANGE

Firearm preemption laws and the constitutional sheriffs movement are each problematic in their own right. This Note has attempted to highlight that, when these two forces combine, the anti-democratic impacts of both are amplified. States allow these anti-democratic conditions to thrive when they prohibit local anti-gun initiatives while tolerating pro-gun local resistance to state law.

There are several factors that make this a complicated issue to address. First, gun control is a divisive topic,<sup>251</sup> rendering many possible solutions to this issue politically infeasible.<sup>252</sup> Second, there is a wide range of gun laws that a state or locality might pass, each

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251. *Amid a Series of Mass Shootings in the U.S., Gun Policy Remains Deeply Divisive*, PEW RSCH. CTR. (Apr. 20, 2021), <https://www.pewresearch.org/politics/2021/04/20/amid-a-series-of-mass-shootings-in-the-u-s-gun-policy-remains-deeply-divisive/> [<https://perma.cc/48NH-NVW6>]. In a survey of over five thousand adults, 73% of Democrats consider gun violence to be a “very big problem” compared with only 18% of Republicans who say the same. *Id.* 53% of respondents said that gun laws should be stricter than they are today, 32% say they are currently about right, and 14% they should be less strict than they are today. *Id.* At the same time, however, there is broad support for certain firearm measures, such as background checks for private gun sales (which 81% of survey respondents supported). *Id.* See also Simon, *supra* note 3, at 5 (“Satisfying diverse attitudes has proven particularly challenging in the context of firearm policy, a subject on which Americans often hold sharply conflicting opinions.”); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1292 (2003) (“Few issues divide the American polity as dramatically as gun control . . .”).

252. This is especially true at the federal level. See, e.g., Colleen Long & Linley Sanders, *GOP Support for Gun Restrictions Slips a Year After Congress Passed Firearms Law*, AP NEWS (Aug. 25, 2023), <https://apnews.com/article/guns-mass-shooting-schools-ualde-biden-83c7ece4a3ffb6ff033a07737303d772> [<https://perma.cc/D9FZ-PZBR>] (noting that the divide between Republicans and Democrats on guns remains); David Morgan, *Republican Walks Out on U.S. Gun Legislation Talks, Democrat Remains Hopeful*, REUTERS (June 17, 2022), <https://www.reuters.com/world/us/top-republican-negotiator-walks-out-us-senate-gun-talks-2022-06-16/> [<https://perma.cc/858J-U8RH>] (describing how a key Republican Senator walked out of gun discussions, closing the door on further gun control measures).

with different aims and collateral effects.<sup>253</sup> Third, the sheriffs' defiance of state law comes in the form of non-action, which makes it difficult to monitor and challenge. This Part addresses these challenges and attempts to balance feasibility concerns with the need for individual voters and local and state actors to address the gun violence that plagues this country. Because the central issue addressed in this Note stems from the tension between preemption laws and constitutional sheriffs, states could improve the situation by either repealing their preemption laws or by counteracting the defiance of the sheriffs. However, to more fully address the democratic concerns that arise when localities are preempted from enacting gun policy reforms and sheriffs are undermining any state gun laws that are passed, states ideally would take action on both fronts. For this reason, this Part assesses the potential benefits and drawbacks to strategies for reform of both preemption laws and sheriffs' underenforcement.

Ultimately, this Part argues that, because uniformity is an important goal in the firearm context, state actors should focus reform efforts on mitigating the negative spillover effects of weak gun laws and uneven enforcement.<sup>254</sup> Such reform efforts would ideally include modifying preemption laws, so that some authority to regulate firearms is returned to local governments. But, importantly, a new legislative focus on minimizing the collateral effects of local gun policy decisions would require that state actors rein in nonenforcement by local officials, since nonenforcement of gun laws can have serious collateral impact. This Part offers various strategies states might adopt to increase oversight and accountability of sheriffs.

#### A. Returning Regulatory Authority to Localities

Several preemption scholars have argued that municipalities should be left with more authority to address issues of local import.<sup>255</sup>

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253. *Compare State Gun Laws*, EVERYTOWN FOR GUN SAFETY (2024), <https://everytownresearch.org/rankings/compare/> [https://perma.cc/PZB6-FM9Y] (providing examples of various types of gun laws).

254. See *supra* Section III.D for a discussion of the importance of uniformity in the gun regulatory context.

255. See, e.g., Briffault, *The Challenge*, *supra* note 27, at 1998–99 (“[O]ur system ought to maintain some legal space for local self-determination concerning problems that arise at the local level.”); Schragger, *supra* note 14 (adopting the assumption that local self-government is valuable and proposing potential legal and political defenses for cities against state preemption).

A few scholars have advanced this argument in the context of firearm regulation specifically.<sup>256</sup> There are many strengths to the argument that firearm preemption laws should be repealed. Local authority to regulate enables opportunities for public participation and the specific tailoring of policies to local needs in ways that are not available at the state or federal level.<sup>257</sup> This type of localized tailoring is especially salient in the firearm context, since the stark differences in attitudes towards guns in this country tend to be geographically bound.<sup>258</sup> Although certain gun regulations are widely supported across geographical or political divides,<sup>259</sup> it is generally true that there is stronger support for gun control in cities, where

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256. See Simon, *supra* note 3, at 1441 (arguing that state preemption is “a severe constraint on opportunities for addressing many firearm-related challenges”); Blocher, *Firearm Localism*, *supra* note 12. Several local lawmakers, frustrated by their inability to act in the face of deadly gun violence within their jurisdictions as well as the lack of statewide gun regulation, have also called for the repeal of firearm preemption laws. For example, after six municipal police officers were wounded in a long standoff with a gunman in 2019, the Philadelphia mayor begged of state lawmakers to: “Help our police officers. Help our clergy. Help our children . . . [a]nd if you choose not to help us, then get out of the way—and allow cities like Philadelphia that struggle with gun violence to enact our own solutions.” Davey & Hassan, *supra* note 93. It is important to note again that in other contexts, where the issue being regulated does not have the same spillover effects on neighboring communities, the arguments advanced here hold less weight. For example, a local plastic bag ban or minimum wage law do not have the same life or death consequences as gun laws, and such local laws have no impact on neighboring areas. It is difficult to argue preempting these fields is necessary—uniformity in plastic bag usage does not really matter, and it is therefore hard to justify preemption laws over such areas as anything other than politically-motivated. See *supra* note 10.

257. Scharff, *supra* note 34, at 1491. Simon, *supra* note 3, at 1449. Briffault, *The Challenge*, *supra* note 27, at 2027.

258. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 14 (2011) (noting that guns are associated with a “cultural heritage of hunting” and recreational use in rural areas); Deborah Azrael et al., *State and Local Prevalence of Firearms Ownership Measurement, Structure, and Trends*, 20 J. QUANTITATIVE CRIMINOLOGY 43, 52 (2004) (“[T]he determinants of gun prevalence have more to do with tradition, culture and childhood experience than with concern about crime or other relatively volatile matters.”).

259. *Gun Policy Remains Divisive, But Several Proposals Still Draw Bipartisan Support*, PEW RSCH. CTR. (Oct. 18, 2018), <https://www.pewresearch.org/politics/2018/10/18/gun-policy-remains-divisive-but-several-proposals-still-draw-bipartisan-support/> [https://perma.cc/8MB6-U5N6] (finding that “overwhelming majorities” of Republicans and Democrats—79% or higher—support restricting gun sales to people suffering from mental illness, barring gun purchases to people on federal watch lists, and instituting background checks for private gun sales and sales at gun shows).

Democratic voters tend to cluster, and stronger resistance to gun control in rural areas, which tend to be Republican-leaning.<sup>260</sup>

A total repeal of preemption laws would remedy one layer of the democratic concerns identified in this Note; if all localities are able to regulate, then the disparity in different groups' power over local gun regulation would be resolved. Unfortunately, however, this is likely a politically infeasible option. Gun control advocates have challenged preemption laws in several states with no success.<sup>261</sup> States have vigorously defended their preemption laws, and courts hearing these challenges have shown a willingness to interpret home rule narrowly and uphold the preemption laws.<sup>262</sup> State legislators have ignored the pleadings of local officials who beg for the ability to take local action on firearms.<sup>263</sup> All of this suggests a fierce unwillingness on the part of state legislators to overturn preemption laws.<sup>264</sup>

Additionally, beyond the political difficulties, this solution is insufficient because it fails to account for the importance of uniformity in successful firearm regulations. Uniformity is important for firearm regulations not for the reason typically advanced in defense of preemption statutes—avoiding a patchwork of local laws—but rather because weak gun laws in one area dilute stronger gun laws in any nearby areas.<sup>265</sup> The mobility of guns means that, for many gun laws, a locality-by-locality approach to gun regulations won't be that effective. For example, if one county enacts a ban on the sale of assault weapons, and another one nearby does not, it will be very easy for someone to avoid the county's regulations and obtain the gun they want to buy.

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260. Simon, *supra* note 3, at 1454 (“The utility of localism in this arena arises from the realities of political geography: within individual states, residents who share similar gun-related preferences tend to congregate together.”); KIM PARKER ET AL., PEW RSCH. CTR., AMERICA’S COMPLEX RELATIONSHIP WITH GUNS 61 (2017) (finding that rural residents are almost twice as likely to own a gun as urban residents).

261. See *supra* notes 94–97 and accompanying text.

262. See *supra*, notes 97 and accompanying text.

263. See *supra*, note 256.

264. Colorado was the first state to repeal a firearm preemption law, but it took a mass shooting to prompt state legislators to act. State legislators initiated the repeal after a gunman killed ten people who were shopping for groceries at a supermarket. Two weeks before the shooting, a judge had struck down a local ordinance in the town where the shooting occurred under the preemption statute. This caused Colorado legislators to repeal the preemption statute. See *supra* notes 51, 83. To date, no other states have repealed their firearm preemption statute.

265. See *supra* Section III.D.

It could be argued, then, that returning local authority to regulate guns will not make a huge difference, since any gun law a locality might choose to enact can be undermined by a neighbor who chooses not to enact the same law. Yet, there are some gun laws whose effects do not stretch beyond the borders of the place that enacts them. Safe storage laws<sup>266</sup> or bans on where guns can be sold (i.e., no gun stores near schools) or carried (i.e., no guns on public property) are examples of laws that would fall into this category. If one town has a law requiring individuals to store their guns in a locked safe, this can be enforced effectively within the limits of one town. It would not affect residents of other cities, and if a neighboring town does not have the same law in place, the absence will not affect the town that does—residents would still benefit from a safe storage requirement regardless of what laws its neighboring towns choose to enact or enforce. Such firearm laws differ from laws requiring background checks, banning sale or purchase of weapons, or banning high-capacity magazines, which can all be easily subverted if a neighboring town has a weaker regulation, making a locality-by-

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266. A recent example from Ohio demonstrates how nonsensical striking down such laws under a theory of uniformity is. The city of Columbus enacted a local ordinance requiring safe storage of firearms. Ohio sued the city, arguing the ordinance was preempted under the firearm preemption statute, and Columbus challenged the state preemption law. *City of Columbus v. State*, 2023-Ohio-2858, 223 N.E.3d 540 (Ohio 2023). The State Court of Appeals upheld the preemption law. *Id.* In response to the decision, the Ohio Attorney General released a statement, declaring that “[t]he court’s ruling assures that all Ohioans must abide by the same law, *state law*, when it comes to firearms . . . [j]ust like we argued in court, firearms owners statewide *should* have to follow the same rules. We applaud the decision.” Press Release, Ohio Att’y Gen.’s Off., Appeals Court Upholds Ohio Law in a Victory for Firearms Uniformity (July 22, 2022), <https://www.ohioattorneygeneral.gov/Media/News-Releases/August-2023/Appeals-Court-Upholds-Ohio-Law-in-a-Victory-for-Fi> [<https://perma.cc/H2P8-9HMC>]. But the state law that he was referring to was simply the firearm preemption law, which says cities cannot pass regulations. There is no Ohio regulation on the topic of safe storage; in other words, the Attorney General wants all Ohioans to abide by the same state law of no safe storage law, even though no one would be affected by Columbus’ safe storage law except for the people who live in Columbus and voted to enact it. Columbus is thus left with no means to address its gun violence issue. Ohio has been consistently deregulating firearms since 2004. Jenna Watters, *How Ohio Gun Laws Have Changed in 20 Years*, COLUMBUS DISPATCH (May 19, 2023), <https://www.dispatch.com/in-depth/news/politics/2023/05/19/how-ohio-gun-laws-have-changed-in-20-years/70195472007/> (on file with the *Columbia Human Rights Law Review*) (showing a twenty-year timeline of the dismantling of Ohio’s gun regulations).

locality approach ineffective. Under this approach, any laws with substantial spillover effects would remain preempted.

Accordingly, state legislators should modify preemption statutes to allow localities to enact gun laws that have no spillover effects. It would be easy to adopt this approach and return some authority over some gun regulations to localities. Currently, many states' preemption statutes create exceptions, carving out areas over which it will allow local governments to retain regulatory authority.<sup>267</sup> States thus could identify the types of laws that have minimal spillover effects and create more carve-outs to allow local governments to implement them.<sup>268</sup> Laws that could be undermined by a lack of uniformity and laws that have collateral effects on neighboring localities would remain preempted at the local level, since they are better suited to a statewide regulatory regime.<sup>269</sup> This approach would preserve the goal of uniformity while also returning at least some local authority to regulate firearms.<sup>270</sup> It would thus

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267. For example, Virginia's preemption statute broadly bars local action regulating firearms, but it includes exceptions allowing municipalities to retain the authority to prohibit firearms in certain public places, impose limits on possession of a loaded shotgun or rifle on public streets, and enact limited restrictions on the possession and storage of firearms at daycare facilities. VA. CODE ANN. § 15.2-915 (West 2020).

268. State legislatures could simply add carve-outs to their preemption statutes by explicitly listing the types of laws that localities may enact (i.e., "[t]his statute does not apply to local regulations regarding safe storage laws or minimum purchasing age requirements").

269. Essentially, this argument boils down to a return to the traditional form of preemption. *See supra* Section I.C. Under the traditional form of preemption, a state would only step in to preempt a local policy if that policy conflicted in some way with the statewide regulatory scheme or if it was having serious spillover effects on a neighboring town. *See supra* Section I.B. The approach advanced here would effectively encourage states to return to traditional preemption, where state law sets a regulatory floor, and cities are free to impose regulations more stringent than that floor if constituents so desire, so long as those requirements do not interfere with a statewide regulatory program or negatively affect neighboring towns.

270. One argument against this approach might be that if people are content with the laws they can enact at the local level, it might dissuade them from pushing for broader-reaching regulations at the state level. Colorado serves as a counter-example against this argument, however. After Colorado repealed its preemption statute in 2021, the state has gone on to enact a slate of gun laws, including banning guns in schools and voting sites and requiring gun sellers to obtain state permits to sell guns. Jesse Paul, *The 9 Gun Bills Passed by Colorado's Legislature This Year and Signed into Law by the Governor*, COLO. SUN (June 12, 2024), <https://coloradosun.com/2024/06/12/new-colorado-gun-laws-2024> [https://perma.cc/KE57-3WJ3]. This provides some support for the contention

alleviate some of the democratic tensions identified in this Note, since it would lessen the power gap that currently exists between local pro-gun and local anti-gun movements and individuals. Refocusing preemption efforts on preventing negative spillover effects of local gun policy should lead states to return power to local governments. Localities should have the authority to create gun laws whose effects will be felt only by the people who voted to enact them.

## B. Oversight Mechanisms to Check Extremist Sheriffs

If states choose to modify their preemption laws, part of the democratic issues identified by this Note will be alleviated—all citizens will be able to have some say in their local gun laws, regardless of whether they support more or less gun control. However, returning local authority to preempted cities will not address the concern that constitutional sheriffs' underenforcement undermines the gun laws that citizens have voted to enact at the state level. To fully address the problem, states should take action to ensure that local sheriffs are not creating spillover effects through their underenforcement of state law. This Section highlights various strategies state actors might take to equalize enforcement and presents some advantages and disadvantages for each proposal.

### 1. States Should Create a Mechanism to Check Extremist Sheriffs

The best approach to reducing gun violence would of course be to devote more resources to addressing root causes of gun violence,<sup>271</sup>

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that, even if cities are allowed to enact their own gun laws at the local level, this will not prevent them from pushing for gun regulations at the state level.

271. For example, the National Education Association has identified factors such as addressing childhood stress and trauma and building trust and community at schools as important to reducing gun violence in school settings. *Part One: Gun Violence Prevention*, EVERYTOWN FOR GUN SAFETY (August 26, 2024), <https://everytownresearch.org/report/school-gun-violence-prevention-response-guide-part-one-gun-violence-prevention/> [https://perma.cc/6YXZ-9CMV]. Additionally, raising awareness of how access to guns increases the risk of suicide could lead to individuals taking affirmative steps, such as safely storing one's firearms, that help mitigate that risk. See *Fact Sheet: Firearm Suicide in the United States*, EVERYTOWN FOR GUN SAFETY (November 8, 2024), <https://everytownresearch.org/report/firearm-suicide/> [https://perma.cc/XV5D-6TSF]. Further, increased funding for violence prevention programs could help to reduce gun violence in cities. *Solutions: Violence Intervention Programs*, EVERYTOWN FOR GUN SAFETY, <https://www.everytown.org/solutions/violence-intervention-programs/> [https://perma.cc/94TN-PEUK].



rather than relying on the system of law enforcement, with its many inherent problems,<sup>272</sup> to intervene. However, the reaction to recent efforts to move away from our current law enforcement system suggests that such a change will have to be achieved over time. Still, many states, local governments, and civic groups have begun focusing on addressing the root causes of gun violence and should continue to prioritize this goal.

In the meantime, many gun regulations, such as red flag laws and firearm permitting systems, rely on law enforcement to be effective. There are several options available to states to ensure that gun laws are being enforced more evenly. First, states could choose to take a firearm-specific approach rather than attempt to reform the sheriff's office itself. This approach would involve creating mechanisms within state gun laws that take the power to enforce those laws largely out of the hands of local sheriffs. For example, state officials could provide funding to increase the enforcement of gun regulations by state law enforcement officials, who could exercise concurrent jurisdiction with sheriffs and step in to enforce laws that sheriffs are not enforcing.<sup>273</sup> Alternatively, states could expand ERPO laws so that medical professionals, teachers, and roommates could also petition for a red flag on someone's behalf.<sup>274</sup> These mechanisms

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272. See, e.g., Barry Friedman, *Disaggregating the Police Function*, 169 U. PA. L. REV. 925, 926 ("Harm is not collateral to policing, it is innate to it.").

273. New York Governor Kathy Hochul recently took such action to bolster enforcement of the state's ERPO law. In 2022, after a mass shooting at a Buffalo supermarket, Governor Hochul issued an executive order *requiring* that state officials file a red flag order whenever there is "probable cause" that an individual is likely to engage in conduct harmful to themselves or others. Governor Kathy Hochul, Exec. Order No. 19, Directing the State Police to File Extreme Risk Protection Orders (May 18, 2022), <https://www.governor.ny.gov/executive-order/no-19-directing-state-police-file-extreme-risk-protection-orders> [<https://perma.cc/L5UF-HS9N>]. The order also required state police offices to provide training on the ERPO law. *Id.* This requirement resulted in a dramatic increase in use of the law throughout the state. Eleonora Francica, *Red Flag Laws: Cases Soared in New York, but Constitutionality Questioned*, POLITICO (May 18, 2023), <https://www.politico.com/news/2023/05/18/red-flag-law-cases-soar-new-york-00097405> (on file with the *Columbia Human Rights Law Review*) (noting that red flag orders more than quadrupled after the governor issued her order). This example provides a model for how state officials and resources might be used to fill in gaps in local enforcement of state gun laws.

274. In 2023, Colorado made this change to its red flag law, expanding the list of people who can petition for an ERPO to include healthcare providers, mental health providers, district attorneys and teachers. S.B. 23-170 74th Gen. Assemb., Reg. Sess. (Colo. 2023). This is a positive development as it provides more channels through which someone might petition against an individual who poses

would provide a go-around that would allow firearm-related public safety measures to be effectuated by others.

This solution has the advantage of political feasibility. It is less likely to cause political backlash than a proposal to make changes to the office of the sheriff itself. It also would address the tension caused by the state preempting some localities from regulating firearms and not others—the state would be taking steps to block localities that were in favor of creating both stricter and less strict regulatory regimes than the state's, rather than only punishing localities trying to enact stricter gun laws. However, this approach has a couple of disadvantages. First, in many counties sheriffs are the only source of local law enforcement, and sending in state officials to enforce laws when local sheriffs refuse to do so could create resentment and further resistance from local sheriffs.<sup>275</sup> Second, this solution does not mitigate the harmful consequences of sheriffs' statements against gun laws, which risk causing confusion and encouraging people not to comply with the law.<sup>276</sup> Despite these difficulties, shuffling power away from sheriffs in the gun context specifically is a strong solution for increasing compliance with gun laws and would alleviate some of the nonenforcement challenges discussed in this Note.<sup>277</sup>

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a danger to themselves or others. Yet, in Colorado, judges rarely granted an ERPO filed by individual petitioners even though they almost always granted an ERPO filed by a law enforcement petitioner. *See* Section II.A.4. This trend in judicial approval of ERPOs lessens the impact of this change. Still, it is a positive change, and perhaps the red flag education program that is required by the law might help judges better understand them.

275. *See supra* note 132 and accompanying text. While states could divert state troopers towards enforcement, such an action risks creating a confusing web of overlapping jurisdiction. *See* Falcone & Wells, *supra* note 122, at 129 (describing the complexities of overlapping jurisdiction and the fact that these complexities create “clear potential for political conflicts and legal ambiguities”).

276. Simply diverting power away from the sheriffs does nothing to address the harm that is caused when a local official contends that a state law is unconstitutional and refuses to enforce it. Even if enforcement power is diluted away, people might still decide that the law does not apply to them because a local elected official is declaring that it infringes on their rights. *See supra* note 147 and accompanying text (highlighting how sheriffs' statement might lead to confusion about whether a law is legitimate, potentially contributing to individual noncompliance).

277. Of course, this approach would leave unaddressed the other challenges posed by the constitutional sheriffs movement, such as the movement's association with the far-right, and the office of the sheriff generally, including the lack of accountability inherent to the position. *See, e.g.*, JESSICA PISHKO, THE HIGHEST LAW IN THE LAND: HOW THE UNCHECKED POWER OF SHERIFFS

Another approach that states could take would be to change the office of the sheriff from an elected office to an appointed office.<sup>278</sup> This would provide much-needed oversight and checks on sheriffs, who currently enjoy wide autonomy as local officials whose office exists outside of the oversight of local county governing boards.<sup>279</sup> Appointing sheriffs would provide a degree of accountability that is currently lacking in the sheriff electoral system.<sup>280</sup> Of course, there will be political difficulties in pursuing this path—because sheriffs are creatures of state constitutions, making this change will likely involve updating the state constitution, which in many states requires a supermajority of support to achieve. Further, one might question why placing sheriffs under the power of local county officials would have any appreciable effect on their behavior—after all, police chiefs are currently appointed, and there remain serious issues with police accountability and oversight.<sup>281</sup> While it might not solve entrenched issues with law enforcement generally, allowing county officials to fire and hire sheriffs and have greater control over the budget of the sheriff's office might at the very least provide an oversight mechanism that could serve as a check on sheriffs' most extreme tendencies.<sup>282</sup>

Another approach available to states could be to establish a commission or oversight committee that is responsible for overseeing sheriffs and that has the power to remove them. Like the previous

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THREATENS DEMOCRACY (2024) (describing sheriffs' far-right bent and assessing how their current operation undermines democracy); Tomberlin, *supra* note 122, at 156–57 (arguing that increasing oversight of the sheriff's office is an urgently-needed reform).

278. Recall that sheriffs are elected in forty-six states. NAT'L SHERIFFS' ASS'N, *supra* note 123. Alaska, Connecticut, Hawaii, and the District of Columbia do not have sheriffs. *Id.*

279. See *supra* Section II.A.2

280. See generally Tomberlin, *supra* note 122, at 118–19 (describing how in England, where the concept of the American sheriff originates, it was gradually recognized that election of sheriffs did not provide enough accountability, and the country moved over time to a system of appointments). See also *supra* notes 224–236 and accompanying text.

281. Addressing the many problems inherent in our system of policing is beyond the scope of this Note. For a discussion on a path forward for reducing the harm inherent to America's current system of policing, see Friedman, *Disaggregating the Policing Function*, *supra* note 272.

282. Pishko, *Sheriffs' Power and Autonomy*, *supra* note 128 (quoting Clooe Cooper, a research analyst who studies sheriffs. She notes that sheriffs are currently subject to far less oversight than most law enforcement and states that “[a]lthough all law enforcement have some discretion over which laws to enforce and how to enforce them, sheriffs do so with far less immediate repercussions”).

solution, this would enable counties to monitor and respond to extreme and anti-democratic actions of sheriffs. Such a commission could prescribe specific circumstances under which removal might be appropriate. The main challenge to this approach would be political backlash<sup>283</sup> and cost.<sup>284</sup> Yet, a commission would achieve the goal of overseeing sheriffs and establishing a mechanism to remove sheriffs if they are enforcing laws in a biased manner.

Another solution could be removal of local sheriffs who categorically refuse to enforce state law. Some states have a provision in their constitution regarding the power to remove public officials, including sheriffs.<sup>285</sup> This power typically sits with the state's governor, and exerting this power is another option available to states with defiant sheriffs. However, this would likely result in significant political backlash, with claims that the state is imposing

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283. In 2023, state legislators in Washington introduced a bill proposing this very solution. The bill would allow a state commissioner, appointed by the governor, to recall sheriffs. H.B. 2027 Reg. Sess. (Wash. 2024). The Washington State Sheriff's Association has raised alarms about the bill, claiming that it is unconstitutional and "politically dangerous." John Webb, *Washington State Bill Deemed 'Unconstitutional' by Sheriffs*, NBC NONSTOP LOCAL (Jan. 16, 2024) [https://www.nbcrightnow.com/regional/washington-state-bill-deemed-unconstitutional-by-sheriffs/article\\_b2a9d34a-7e89-549b-b8ce-a90febf5253.html](https://www.nbcrightnow.com/regional/washington-state-bill-deemed-unconstitutional-by-sheriffs/article_b2a9d34a-7e89-549b-b8ce-a90febf5253.html) [https://perma.cc/TX2F-HDQD]. They have threatened to sue if the bill should become law, contending that the bill is unconstitutional and an affront to what the founding fathers envisioned. One sheriff noted, "[i]t is 100% an attempt to control what goes on in local government." *Id.* Yet, at least in the area of firearm regulations, Washington state already controls what goes on in local government through its preemption statute. If enacted, the proposed legislation would create the type of mechanism which could help. However, the sheriffs' reaction offers insight into the backlash state might anticipate if they decide to use such a mechanism to check sheriffs' power.

284. This solution would require potentially significant state resources to set up and maintain to achieve effective oversight of sheriffs. Compare this solution to that of changing the office of the sheriff to an appointed office. Under that solution, sheriffs would be brought under the power of the county board or some other existing local body, which would make it less costly (although there would likely still be costs involved to dedicate resources for effective oversight).

285. FLA. CONST. art. IV, § 7(a); N.Y. CONST. art. XIII, § 13 (requiring a public hearing); MICH. CONST. art. V, § 10; ME. CONST. art. IX, § 10. Virginia and Minnesota allow for removal of the sheriff by a voter petition process that then must go through a court review. See VA. CODE ANN. § 24.2-233 (West 2022) (requiring signatures equal in number to 10% of voters in the last election and requiring court to decide if qualifications for removal are met); MINN. STAT. §§ 351.14-351.23 (2021) (requiring 25% of voters in the last election to sign a petition and specifying that court will decide if there is cause for a recall election).

its will on localities.<sup>286</sup> Sheriffs would likely be able to stir up controversy over their removal, and it might spur even more defiance of state law in response.

Finally, states could move to abolish the office of the sheriff and restructure law enforcement systems entirely.<sup>287</sup> Abolishing the sheriff's office would remedy not only the challenges discussed in this Note, but also a host of other well-documented issues posed by the office of the sheriff generally.<sup>288</sup> This option, however, would be an extreme reform that is likely to prompt much backlash.

There are many possible approaches states might take to increase enforcement of state gun laws, and each state will be best suited to weigh the advantages and disadvantages of these solutions based on state-specific considerations. Because elections are not an adequate check on sheriffs, and because of the importance of uniform enforcement of gun laws specifically for effective regulation, it is crucial that states implement some form of oversight or check on sheriffs' unfettered authority to subvert gun laws. This is particularly true in states with firearm preemption laws, where citizens seeking solutions to gun violence are already limited in how they may participate in this important debate.

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286. DeSantis' removal of the prosecutor who stated he would refuse to bring criminal charges against individuals obtaining abortions offered a glimpse into the type and extent of the backlash that would likely follow any removal of an elected official. See Rosemary Nidiry & Lauren-Brooke Eisen, *DeSantis's Suspension of Orlando-Area Prosecutor is Counterproductive Justice Policy*, BRENNAN CTR. FOR JUST. (Aug. 14, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/desantis-suspension-orlando-area-prosecutor-counterproductive-justice> [https://perma.cc/Y3PY-VMNB] (noting that "political disagreements are not a proper basis for removing a duly elected prosecutor"). As discussed above, there is reason to believe that sheriffs are less accountable to the public than other local officials, since their actions are less visible and since sheriffs often run unopposed. See *supra* Section III.C. This, along with the different roles sheriffs and prosecutors play in our justice system, might make removal of sheriffs less controversial. However, supporters of sheriffs or people who benefit politically from sheriffs' nonenforcement of gun laws would likely still raise alarms about their removal by state officials.

287. See Tomberlin, *supra* note 122, at 156 (arguing for abolishing the sheriff's office and noting that what made the sheriff "attractive during westward expansion" makes it "obsolete at best and dangerously anachronistic at worst today by preventing local governments from acting as a meaningful check on the office's powers"). Tomberlin discusses how Connecticut and one county in Kansas abolished their sheriffs' offices. *Id.* at 145, 151.

288. See *supra* note 123–127.

## CONCLUSION

Any policy proposal relating to the regulation of firearms is likely to leave many people dissatisfied. But every year, tens of thousands of Americans lose their lives to gun violence. There are few places in our society that have not been touched by this violence. This is an unfortunate state of affairs that does not have to continue. State legislatures and executive officials should recalibrate away from the nominal uniformity they are pursuing and focus instead on enacting gun regulations that work to protect people. This type of government action should include returning at least some lawmaking authority to localities and building a mechanism to more effectively implement state gun regulations. Although more far-reaching and systemic changes are needed to address the root causes of gun violence, and regulations and law enforcement alone are never a perfect solution to any problem, addressing the issues posed by preemption laws and constitutional sheriffs can help move the needle towards achieving an America free of gun violence.