If there is one image that encapsulates the bitter clashes over COVID-19 policy in the US, it is surely the face mask.1,2 Schools have become ground zero in ongoing battles over whether the US public must mask up.

Less than a month into the pandemic, the Centers for Disease Control and Prevention recommended wearing masks to reduce transmission. At the time, evidence of their effectiveness was modest; it has since become stronger.3-5 Local and state public health orders have required masks in indoor and in some cases outdoor public spaces.

Early challenges to these mandates were brought by individuals and businesses claiming incursions on their liberty. Courts rejected the claim that freedom from face covering was a fundamental constitutional right, applied light judicial scrutiny, and easily rebuffed these challenges. Arguments that masks violated freedom of speech or religion, interfered with students’ educational development, abridged parents’ rights to make educational choices for their children, and constituted unwanted medical treatment also have not found traction.

In recent months, litigation over mask requirements took a bizarre turn after political leaders in 8 Republican-led states introduced bans on mask mandates. Some state bans apply only to mandates adopted by school districts; others are broader. Now plaintiffs—chiefly school districts and parents of disabled children—are fighting not for the right to avoid face coverings but for the right to insist on them.

Challenges to the bans on mask mandates rest on 4 types of arguments. First, the bans violate the federal and state civil rights of students with disabilities by making in-person learning available to them only under dangerous conditions. Second, the bans constitute state intrusions on the authority of local officials, violating state constitutional and statutory rules governing division of power. Third, state officials have misused their authority under state emergency-powers laws. Finally, the particular legal mechanism used to impose the ban (for instance, a budget bill) was faulty.

This litigation remains at an early stage, and courts in most states have temporarily blocked the state bans. However, some bans—such as those in Florida and Texas—are currently in force. In Florida, a trial court blocked Governor Ron DeSantis’s ban, only to have it temporarily reinstated by an appeals court judge based on procedural concerns. In a separate lawsuit brought by parents of students with disabilities, a Florida district court judge refused to block the state’s ban, saying that the parents first had to seek an administrative remedy. In the meantime, Florida has moved forward with plans to withhold some funding from school districts that require masks.

Lawsuits brought by Texas school districts have produced a complicated set of injunctions and reversals, and the state’s supreme court is sending confusing messages about how it will ultimately rule. After a short hiatus on enforcement, the Texas Education Agency issued guidance in September clarifying that schools cannot require staff or students to wear a mask. The state’s attorney general has sued more than a dozen districts for flouting Governor Greg Abbott’s ban and sent warning letters to many others.

Disputes between different levels of government over uses of public health powers are not new. States have, for example, tried to override or “preempt” activist public health measures by cities, such as with gun control ordinances and sugary beverage taxes.6 It is highly unusual, however, to have such disputes in the realm of communicable disease control, where there has long been broad ideological agreement fostered by substantial deference to scientific expertise.
The political rhetoric justifying bans on mask mandates has emphasized communities’ autonomy to express their values, an ideal that has long undergirded states’ strong role in public health law. But by denying local officials the right to impose their own rules to protect their local populations, Republican governors have flipped this ideal on its head.

To many observers, the situation highlights the feebleness of federal authority during epidemics and the need to strengthen it. President Biden’s executive orders requiring face coverings have been limited to areas of federal jurisdiction (eg, federal properties and employees) and instrumentalities of interstate commerce (eg, airports and trains). It is doubtful that the federal government has the legal authority to go much further, even if it could overcome the inevitable opposition.

A federal mask mandate for schools could be implemented by conditioning some federal funding for schools on districts requiring masks. However, the nation’s bruising experience with Medicaid expansion under the Patient Protection and Affordable Care Act suggests that many governors are willing to forgo substantial federal dollars in service of ideological opposition to particular health policies. Given the educational losses that schoolchildren have experienced during COVID-19, the prospect of school funding cuts is unpalatable. That problem also affects federal efforts to wield civil rights laws to combat bans on school mask mandates. In August, the US Department of Education announced that it would investigate 5 states to determine whether their bans violate the rights of children with disabilities. Although such investigations can yield productive settlements, the government’s main source of negotiating leverage is the power to withhold school funding, which the Secretary of Education appears to have ruled out.

The federal government has intervened in other ways to support those resisting mask mandate bans. The US Department of Justice has filed briefs in lawsuits arguing that federal disability laws have been violated. The Biden administration has also established a program to restore lost funding to school districts penalized by their state for adopting COVID-19 safety measures.

The lawsuits raise broad questions about how state leaders may wield their public health powers. It is a bitter irony that governors have used their emergency powers to disrupt effective responses to the pandemic when legislatures’ intent in passing emergency-powers statutes was to empower officials to impose measures to combat emergencies. Further, in the case of Texas, one of the explicit purposes of the state’s Disaster Act was to strengthen the authority of both state and local officials—yet it is being used to curtail local authority.

In a similar vein, can states’ broad constitutional power to promote public health and safety (the “police power”) form the legal bedrock for actions that undermine public health? Although federal and state courts historically have given states wide discretion, they draw the line at exercises of the police power that are not rationally related to advancing a legitimate state interest in public health. For example, when San Francisco erected a fence around Chinatown during a bubonic plague outbreak in 1900, heightening the risk of disease transmission by quarantining the healthy and sick together, a court struck down the move for being irrational—and therefore unconstitutional. When states ban the use of proven public health interventions during a pandemic, their actions invite a similar judicial finding.

As the lawsuits over mask mandates move forward, we believe courts should hold that states’ public health legal powers cannot be wielded to impose mask mandate bans and other orders that are flatly contrary to the available evidence on emergency measures best able to protect public health. Such orders are arbitrary and capricious, not to mention a disturbing abdication of the oath their authors took to safeguard the people.

Prevailing in the litigation over mask mandate bans is critically important for schools struggling to provide safe, in-person instruction—especially in areas with high COVID-19 prevalence. As the winter months approach, with the weather increasingly forcing students indoors and epidemiologists worried about further COVID-19 surges, the stakes are high. The potential for the litigation to set precedents concerning how courts check (or countenance) misuses of public health powers raises the stakes even higher.
REFERENCES
8. Jew Ho v Williamson, 103 F 10 (CCND Cal 1900).