

Recent State Legislative Attempts to Restructure Public Health Authority: The Good, The Bad, and The Way Forward

Darlene Huang Briggs, Elizabeth Platt, and Leslie Zellers

Keywords: Public Health Authority, COVID-19, Vaccines, Equity, Legislation

Abstract: The COVID-19 pandemic spurred legal and policy attacks against foundational public health authorities. Act for Public Health — a partnership of public health law organizations — has tracked legislative activity since January 2021. This article describes that activity, highlighting 2023 bills primarily related to vaccine requirements and policy innovations undertaken in the wake of the pandemic. Finally, we preview a legal framework for more equitable and effective public health authority.

Public health officials and practitioners worked tirelessly during the COVID-19 pandemic to protect the health of their communities. Yet the implementation of evidence-based mitigation measures to protect public health varied widely.¹ A vocal minority fervently opposed to pandemic protective measures provided grassroots cover for well-organized, nationwide campaigns² to curtail emergency powers and public health authority more generally.³

Against this backdrop, Act for Public Health (A4PH) — a national partnership of public health law orga-

nizations — began tracking COVID-era attempts in state legislatures and the courts to limit governmental public health powers. Guided by a transdisciplinary approach to public health law,⁴ A4PH supports health departments and public health advocates as they navigate the evolving challenges to public health authority. We share legislative tracking findings in this article, which, along with the litigation findings reported separately in this issue,⁵ we intend to translate into a framework for equitable and effective public health authority that will guide future A4PH work.

Early Legislative Tracking

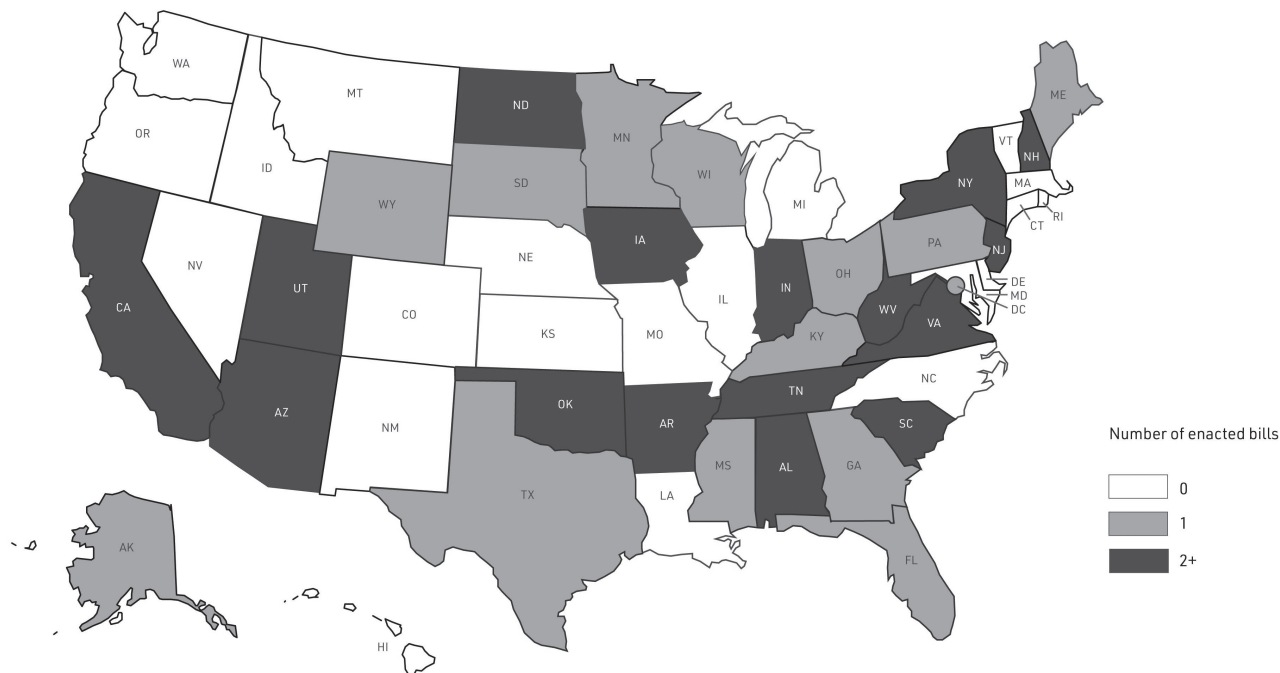
The U.S. death toll from COVID-19 surpassed 400,000 in January 2021.⁶ Act for Public Health tracked state legislation over the next 17 months addressing public health emergency authority across 6 domains: bills (1) seeking to limit the public health authority of the governor, state health officials, or local health officials; (2) reallocating the public health authority of those same officials to another entity, like the state legislature; (3) limiting the enforcement of federal law; (4) regulating public health measures, like restrictions on vaccine or mask mandates; (5) preempting those same public health measures; and (6) strengthening public health emergency authority.

In total, state legislatures introduced 1,531 bills addressing emergency public health authority between January 2021 and May 2022, most of which sought to limit or preempt public health measures. By May 20, 2022, 191 of those bills (12.5%) were enacted into law in 43 states and the District of Columbia (DC). Most enacted bills (163 out of 191) regulated the use of public health measures,⁷ including 66 laws focused on vaccines in 29 states and DC (see figure 1).⁸ Detailed

Darlene Huang Briggs, J.D., M.P.H., is the Deputy Director of Special Projects at the Network for Public Health Law in Edina, MN. Elizabeth Platt, J.D., M.A., is the Director of Research and Operations at the Center for Public Health Law Research at the Temple University Beasley School of Law in Philadelphia, PA. Leslie Zellers, J.D., is a Consultant to Act for Public Health in Oakland, CA.

Figure 1

Enacted public health measures restricting vaccination, Jan. 1, 2021–May 20, 2022



methods and additional findings can be found in the American Journal of Public Health article, *Trends in US State Public Health Emergency Laws, 2021-2022*.⁹

More Recent Legislative Tracking

Since May 2022, A4PH has narrowed its focus to *enacted* bills addressing the same six public health emergency authority domains from our legislative tracking above. For this installment, the public health measures category further distinguishes between laws seeking to *limit* measures (e.g., prohibiting vaccine mandates) and those seeking to *expand or support* public health measures (e.g., expanding provider scope-of-practice laws to administer vaccines). We also identify whether a law applies only to the COVID-19 pandemic, indicating whether enacted legislation has the potential to impact future non-COVID-19 public health activities.

Between May 2022 and October 2023, 42 bills were enacted in 21 states and DC. Vaccine bills were the most common, especially those seeking to *limit* vaccine-related measures (see table 1).¹⁰ While laws limiting state-level vaccine measures and preempting local governments from issuing vaccine-related orders continued to dominate, laws supporting vaccine measures, typically by expanding provider scope-of-practice laws allowing different types of providers to administer vaccines, were also enacted in some states.

Vaccine Bills Tracking

The prevalence of vaccine-related bills in early legislative tracking led A4PH to track specific categories of vaccine bills from 2023 state legislative sessions. Specifically, we tracked bills (1) adding or prohibiting school-entry vaccination requirements; (2) expanding or limiting non-medical exemptions for school-entry vaccination requirements; (3) reallocating the determination of vaccination requirements away from health agencies to another entity, like the legislature; or (4) expanding provider scope-of-practice laws to allow more providers to administer vaccinations, increasing vaccine access to more communities.

Between January 1 and May 22, 2023, 196 bills were introduced relating to school-entry vaccination requirements and provider scope-of-practice expansions. Of these 196 bills, only 11 were ultimately enacted, and most (8) expanded the scope of practice for providers to administer vaccines (see figure 2). Laws enacted in Georgia, Kansas, Maryland, Montana (2 bills), North Carolina, and West Virginia (2 bills) enabled more health care professionals, including pharmacists, pharmacy technicians, pharmacy interns, dentists, and dental hygienists to administer vaccines.¹¹

The 3 remaining bills of the 11 enacted prohibit school-entry vaccination requirements. Florida Senate Bill 252 prohibits public and private educational institutions from requiring COVID-19 vaccination docu-

Table 1

Enacted bills by domain, May 21, 2022–Oct. 6, 2023

Bill Type	Number Enacted Bills
Limiting public health measures	20
Vaccine measures	17
Expanding public health measures	15
Vaccine measures	9
Preempting public health measures	6
Vaccine measures	5
Limiting public health authority	12
Reallocating public health authority	1
Strengthening public health authority	4
Limiting state enforcement of federal law	1

mentation for enrollment. Tennessee enacted companion bills, House Bill 252 and Senate Bill 644, which remove the previous requirement for home-school children to be vaccinated.¹² While the Florida bill was limited to the COVID-19 vaccination, the Tennessee bills were not, applying to all required vaccinations for home-schooled children who, like any other school children, can still expose others to infection and are at no less risk of contracting vaccine-preventable diseases.

Despite the low enactment rate for bills limiting school-entry vaccination, the public health field must remain vigilant of activity in this domain. Both the volume of legislation and breadth of some of the bills are

striking — with some proposals seeking to eliminate historically nonpartisan vaccine-preventable disease policies that contribute to increased life expectancy and improved population health status at every stage of life.¹³ During the observation period, nine states (Kansas, Kentucky, Maine, Mississippi, Missouri, New York, Tennessee, Texas, and West Virginia) introduced five or more bills seeking to *limit* vaccination (see figure 4). This contrasts with only two states (Minnesota and New York) introducing five or more bills seeking to *support* vaccination (see figure 3). Efforts countering potentially harmful bills drain limited resources, preventing more robust efforts to support vaccine-promoting bills, especially in those states where multiple health-harming bills are introduced.

Expanding provider scope of practice to administer vaccines is necessary to increase access to more communities. At the same time, these changes must also be accompanied by policies, programs, and resources — for both providers and patients — to improve ease of access and vaccine uptake more generally. This includes, among others, efforts to address misinformation and improve vaccine confidence, eliminate payment barriers, find regulatory efficiencies, and ensure a trained workforce.

The main takeaway from A4PH's 2023 tracking is that the vast majority of vaccine bills seeking to prohibit school-entry vaccine requirements or expand non-medical exemptions were unsuccessful, with most not passing a single legislative chamber. Combined with a solid majority of enacted bills expanding access to vaccinations, the tide has already turned from the early COVID-19 legislative tracking.

Figure 2

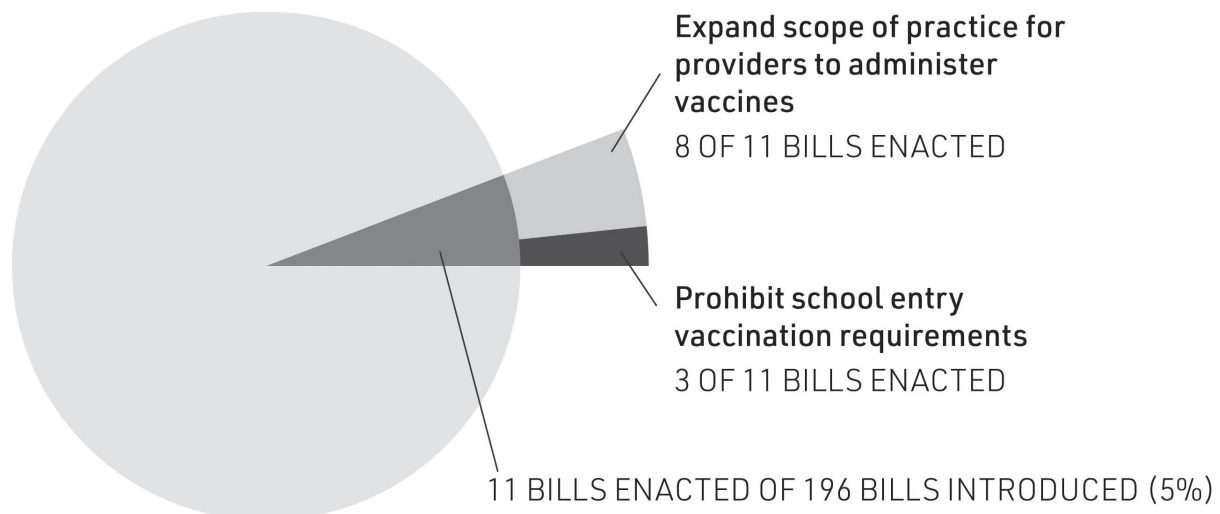
Portion of enacted vaccine bills by type, Jan. 1, 2023 - May 22, 2023

Figure 3

Bills introduced promoting vaccination, Jan. 1, 2023–May 22, 2023

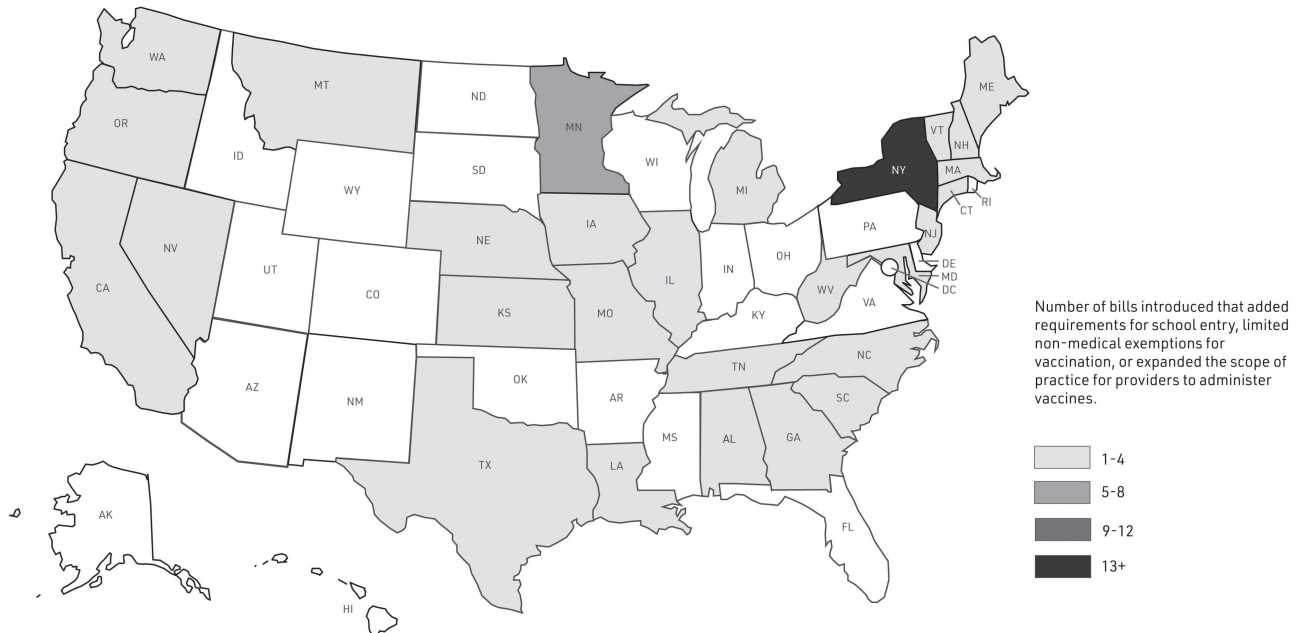
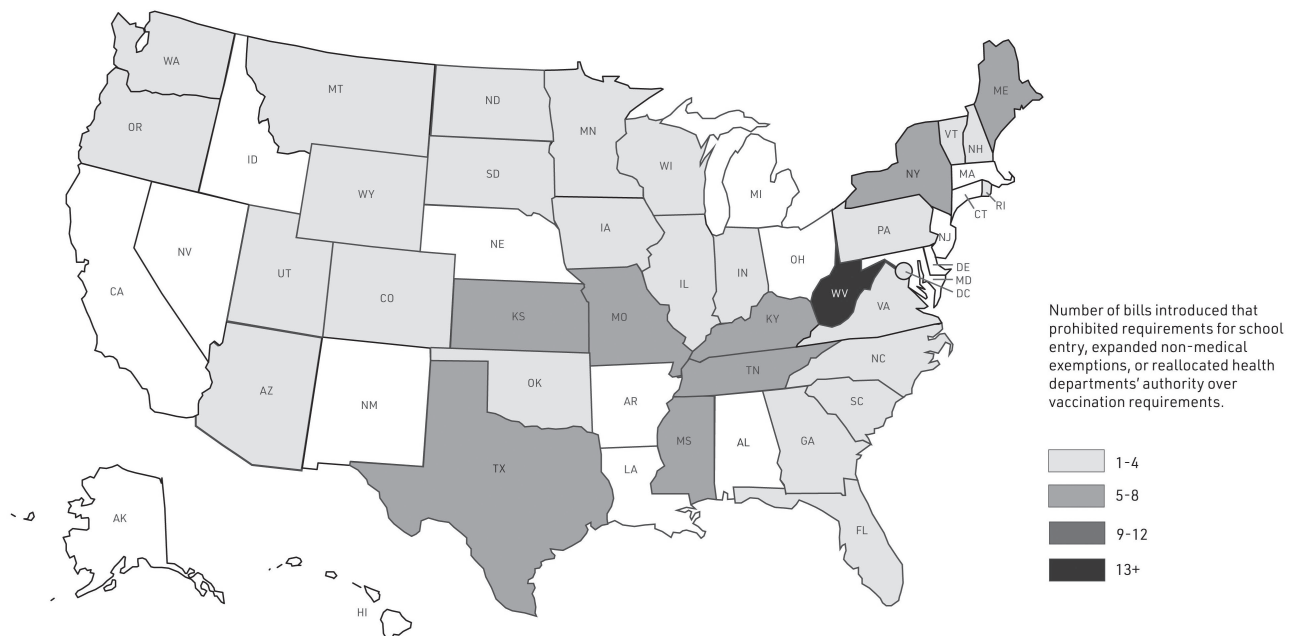


Figure 4

Bills introduced limiting vaccination, Jan. 1, 2023 - May 22, 2023



Toward More Proactive, Equitable, and Effective Public Health Authority

In some jurisdictions, the response to attacks on public health powers has been primarily reactive, fighting off rollbacks of foundational public health authority, especially those legal underpinnings that support preventing the spread of disease, responding to emergencies, and advancing health equity.¹⁴ In other jurisdictions, the pandemic created a policy window to advance conversations about legal structures that prioritize health and racial equity and modernize statewide public health systems to serve the needs of, and be accountable to, all residents.¹⁵

Indiana and Oregon are two states working toward more proactive, equitable, and effective public health

*demio Public Health System.*²² The report categorizes examples in six distinct, but interconnected, areas: (1) governance, (2) funding, (3) health equity, (4) infrastructure, (5) workforce, and (6) interventions and emergency orders. Additional notable examples include declarations of racism as a public health crisis²³ and racial equity impact assessments,²⁴ which begin to make equitable policymaking the norm, and laws to protect local control so policymaking is closer to the people. A unifying vision among all examples is a public health system empowered to truly serve everyone.

To catalyze structures of legal authority that support public health in creating a fair and community-centered public health system, A4PH is developing a

We view a just and effective public health system as one where the law intentionally serves the whole public and is both rooted in community partnership and aligned with community priorities.

authority. In Indiana, as the pandemic exposed gaps in the state's public health system and raised the profile of the impacts of those gaps, the Governor established, by executive order, a Public Health Commission in the summer of 2021.¹⁶ By the end of the 2023 legislative session, key recommendations made by the Commission, including defining foundational public health services, updating local public health governance and infrastructure,¹⁷ and increasing funding, were enacted into law.¹⁸

In Oregon, several pieces of legislation to modernize the state's public health system had been adopted in the years preceding the arrival of COVID-19. Exponentially more funding was allocated to implementing modernization during and after the pandemic, including allocations totaling \$110 million in the current biennium (2023–2025).¹⁹ The state also acknowledged the role of structural racism in public health and prioritized collaboration with community groups to better reach key populations, allocating \$10 million specifically for community-based organizations in 2021–2023 (16.5% of the total \$60.6 million allocation for statewide modernization),²⁰ which supported nearly 200 community-based organizations through a braided-funding approach.²¹

These efforts to modernize and transform the way public health is structured and delivered are cataloged in a recent report by the Network for Public Health Law, *Innovative Laws and Policies for a Post-Pan-*

legal framework clarifying the foundational elements of public health authority. We view a just and effective public health system as one where the law intentionally serves the *whole public* and is both rooted in community partnership and aligned with community priorities. We seek to identify what laws and governance structures are needed to ensure that public health officials can:

- Respond adequately and in a way that centers equity during public health emergencies;
- Carry out the day-to-day (non-emergency) work of public health such that equity is a driving force; and
- Address the social determinants of health in a way that is responsive to community priorities and needs.

These laws and governance structures must be designed with appropriate guardrails in place. This includes, for example, better understanding essential factors for balancing individual freedoms and the public good in the exercise of public health authority and mitigating the structural power imbalances embedded in communities. Act for Public Health's legal framework also seeks to catalog examples of equitable and effective structures of public health authority to support and connect public health practitioners.

Conclusion

Legislative efforts to curtail public health authority became more widespread with the extreme politicization of the COVID-19 pandemic. Most common in 2023 state legislative sessions were efforts related to vaccines, including school-entry vaccination requirements and expansion of non-medical exemptions. However, only a small percentage of these bills were enacted, and most enacted vaccine bills introduced in 2023 state legislative sessions promote — rather than inhibit — vaccine access by expanding provider scope-of-practice laws for vaccine administration. While communities must continue efforts to counteract bills that would harm the public's health, many jurisdictions also have an opportunity to consider legal structures and policies that support more proactive, equitable, and effective public health activities. Act for Public Health seeks deeper partnerships to catalog equitable and effective examples of public health authority and continue developing a legal framework rooted in core public health values: evidence-informed action to improve health, good governance, and equity and fairness.

Acknowledgments

The Act for Public Health partnership includes the Center for Public Health Law Research, ChangeLab Solutions, Network for Public Health Law, Public Health Law Center, and Public Health Law Watch. Members of the following organizations also provided assistance, guidance, or feedback on the research or its presentation: the Association of State and Territorial Health Officials, the Local Solutions Support Center, and Berkeley Media Studies Group. The authors thank Jill Krueger for her vision for the Network for Public Health Law report, *Innovative Law and Policy Strategies for a Post-Pandemic Public Health System*; Sara Bartel and Sabrina Adler from ChangeLab Solutions for their leadership on the developing public health law framework; and Katie Moran-McCabe from the Center for Public Health Law Research and Andy Baker-White and Maggie Davis from the Association of State and Territorial Health Officials for their contributions to the legislative tracking work. The authors also thank Bethany Saxon and Hope Holroyd from the Center for Public Health Law Research, who provided assistance with data visualization, and Shaddai Martinez Cuestas from Berkeley Media Studies Group, for her guidance on strengthening narrative power for public health.

Support for this research was provided by the Robert Wood Johnson Foundation. The views expressed here do not necessarily reflect the views of the Foundation.

References

1. A. Skinner et al., "A Database of US State Policies to Mitigate COVID-19 and its Economic Consequences," *BMC Public Health* 22 (2022): 1124.
2. L. Weber and J. Achenbach, "Covid Backlash Hobbles Public Health and Future Pandemic Response," *Washington Post*, March 8, 2023.
3. S. Adler et al., "Authority to Improve or Harm Health: The Public Health Front in a Decades-long Battle Over Governmental Powers," *Saint Louis University Journal of Health Law & Policy* 17 (forthcoming).
4. S. Burris et al., "A Transdisciplinary Approach to Public Health Law: The Emerging Practice of Legal Epidemiology," *Annual Review of Public Health*, 37 (2016):135–48.
5. S. Adler et al., "Reclaiming Public Health Authority: Toward a Legal Framework that Centers the Public's Health, in the Courts and Beyond," *Journal of Law, Medicine & Ethics* xx, no. x (2024): xx-xx.
6. *CDC Museum COVID-19 Timeline* (March 15, 2023), Centers for Disease Control and Prevention (hereinafter cited as CDC), available at <<https://www.cdc.gov/museum/timeline/covid19.html>> (last visited December 4, 2023).
7. E. Platt et al., "Trends in US State Public Health Emergency Laws, 2021-2022," *American Journal of Public Health*, 113 (2023): 288–96, at 290–91.
8. *State Legislation Addressing Public Health Emergency Authority*, Center for Public Health Law Research LawAtlas Policy Surveillance Program (hereinafter cited as LawAtlas) available at <<https://lawatlas.org/page/state-legislation-addressing-public-health-emergency-authority>> (last visited December 4, 2023).
9. Platt et al., *supra* note 7.
10. *Laws Addressing Public Health Authority to Respond to Emergencies*, LawAtlas, available at <<https://lawatlas.org/datasets/laws-addressing-public-health-authority-to-respond-to-emergencies>> (last visited December 4, 2023).
11. *State Bills Relating to Vaccines in Schools and Provider Scopes of Practice*, LawAtlas, available at <<https://lawatlas.org/datasets/act-for-public-health-vaccine-bills>> (last visited December 4, 2023).
12. *Id.*
13. Ram Koppaka, CDC, "Ten Great Public Health Achievements — United States, 2001-2010," *Morbidity and Mortality Weekly Report* 60, no. 19 (2011): 619–23.
14. Network for Public Health Law (hereinafter cited as NPHL), *State Laws Limiting Public Health Protections: Hazardous for Our Health* (October 2022).
15. NPHL, *Innovative Laws and Policies for a Post-Pandemic Public Health System* (June 2023).
16. Ind. Exec. Order No. 21-21 (Aug. 18, 2021).
17. NPHL, *supra* note 15.
18. M. Messerly, "A Red State Boosted Public Health Funding by 1,500 Percent. This is How They Did It," *Politico*, July 13, 2023.
19. Public Health Accreditation Board, *Oregon's Investment in Public Health Transformation and Modernization: PHAB 21st Century Learning Community and Beyond*, (August 21, 2023), available at <<https://phaboard.org/2023/08/21/oregons-investment-in-public-health-transformation-and-modernization-phab-21st-century-learning-community-and-beyond/>> (last visited December 4, 2023).
20. Oregon Health Authority Public Health Division, *Public Health Modernization: Funding Report to Legislative Fiscal Office in Fulfillment of ORS 431.139 and ORS 431.380*, June 2022, available at <<https://www.oregon.gov/oha/PH/ABOUT/TASKFORCE/Documents/2022-Public-Health-Modernization-Funding-Report.pdf>> (last visited December 4, 2023).
21. NPHL, *supra* note 15.
22. *Id.*
23. *Declarations*, Collaborative for Anti-Racism & Equity, available at <<https://herenow.org/declarations/>> (last visited December 4, 2023).
24. D. Hunter and S. Rogers, *Legislative Trends in Health and Racial Equity, 2021-2022* (December 9, 2022), NPHL, available at <<https://www.networkforphl.org/news-insights/legislative-trends-in-health-and-racial-equity-2021-2022/>> (last visited on December 4, 2023).