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## States Empowering Plaintiff Cities

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## STATES EMPOWERING PLAINTIFF CITIES

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Eli Savit\*

### ABSTRACT

*Across the country, cities are becoming major players in plaintiff's-side litigation. With increasing frequency, cities, counties, and other municipalities are filing lawsuits to vindicate the public interest. Cities' aggressive use of lawsuits, however, has been met with some skepticism from both scholars and states. At times, states have taken action—both legislative and via litigation—to preempt city-initiated suits.*

*This Article contends that states should welcome city-initiated public-interest lawsuits. Such litigation, this Article demonstrates, vindicates the principles of local control that cities exist to facilitate. What is more, a motivated plaintiff city can accomplish public-policy goals that are important not just to the city, but to the state as a whole.*

*Accordingly, this Article contends, states should do more than just tolerate city-initiated litigation: States should actively encourage it. Towards that end, this Article sketches out a path through which states can remove some of the legal barriers plaintiff cities frequently face. Specifically, states can provide cities the authority to enforce state laws (such as state consumer-protection laws). In addition, states can and should delegate to cities standing to sue as *parens patriae*—that is, on behalf of the people of the state. This Article is the first piece of scholarship to flesh out a theory under which states can delegate their *parens patriae* authority. And importantly—particularly in era of gerrymandered districts that dilute cities' legislative power—this Article is also the first to argue that state delegation to cities can be effectuated not just through a state legislature, but by a motivated state attorney general.*

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## INTRODUCTION

For progressive city governments, it is the best and the worst of times. On the one hand, many American cities<sup>1</sup>—no longer content merely to provide basic municipal services such as trash pickup and snow removal—are acting assertively to protect their residents' interests. Across the country, cities are enacting bold, public interest-minded reforms and policies. Cities have played a lead role in raising the minimum wage;<sup>2</sup> enacting laws which protect vulnerable minority populations;<sup>3</sup> and passing ordinances protecting the environment.<sup>4</sup> Cities, moreover, are amplifying their voices on the national stage. It is not uncommon, for example, for cities to “pass regulations about national social issues,” “agree to international protocols,” and collaborate with other cities to share, lobby, and litigate.<sup>5</sup>

Yet even as cities move assertively to protect their residents, state governments are clipping their authority to do so. Many states have

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1. Although this Article repeatedly refers to “cities,” that reference should be read to be inclusive of all forms of local government—towns, counties, villages, and the like.

2. See, e.g., Julia Horowitz, *Here's Where the Minimum Wage Is Going Up in 2018*, CNN (Dec. 29, 2017), <https://money.cnn.com/2017/12/29/news/economy/2018-minimum-wage-increases/index.html>.

3. See, e.g., *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>.

4. See, e.g., Kat Stafford, *Detroit Council Approves Pet Coke Ordinance Despite Industry Pushback, 2 'No' Votes*, DETROIT FREE PRESS (Oct. 31, 2017), <https://www.freep.com/story/news/local/michigan/detroit/2017/10/31/detroit-pet-coke-regulations/817246001/>.

5. Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1286 (2018).

passed laws that preempt cities from raising revenue, from enacting anti-discrimination ordinances, and from regulating dangerous products such as firearms.<sup>6</sup> This trend towards state preemption of city policies has led one commenter to conclude that city-state relationships in the United States are at an “all-time low.”<sup>7</sup>

The push-pull between cities and states is also reflected in the litigation arena. Progressive-minded cities are increasingly launching lawsuits, an area that was long seen as the province of states. Cities have traditionally been defendants in civil litigation, but many “have resolved to become ‘so much more than that.’”<sup>8</sup> In cases involving the public interest, cities now regularly act as plaintiffs, filing lawsuits to protect consumers,<sup>9</sup> enforcing environmental protections,<sup>10</sup> and vindicating civil rights.<sup>11</sup> The legal theories at issue in such lawsuits vary widely. At their core, though, the suits share a common characteristic: local governments are suing not just to protect their proprietary interests, but to further the well-being of their residents.

Here, too, the relationship between states and cities is occasionally fraught. To be sure, many states support city participation in public-interest lawsuits and ally with city attorneys in major cases.<sup>12</sup> Yet not all states are as welcoming. Some state legislatures have bound the hands of city attorneys by prohibiting them from engaging in certain types of lawsuits against certain defendants.<sup>13</sup> In other instances, state attorneys general—seeking to sue the same defendants—have preempted cities from pursuing their own, separate claims.<sup>14</sup> And some state officials, like some scholars, have expressed unease with the new wave of city-initiated lawsuits.

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6. NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION 3 (2017), <http://nlc.org/sites/default/files/2017-02/NLC%20Preemption%20Report%202017.pdf>.

7. Chris Teale, *State v. City Government: A Relationship at an 'All-Time Low'?*, SMART CITIES DIVE (July 2, 2018), <https://www.smartcitiesdive.com/news/state-vs-city-government-relationship-an-all-time-low/526792/>.

8. Swan, *supra* note 5, at 1229 (quoting Los Angeles City Attorney Mike Feuer).

9. *See, e.g.*, *People v. Wells Fargo & Co.*, No. CV 15-4181-GW, 2015 WL 4886391, at \*1 (C.D. Cal. Aug. 13, 2015) (Los Angeles suit against Wells Fargo for opening accounts for customers without their knowledge).

10. *See, e.g.*, *People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499 (Ct. App. 2017) (lead-paint litigation brought by multiple California municipalities); *City of New York v. Keene Corp.*, 505 N.Y.S.2d 782 (Sup. Ct. 1986), *aff'd*, 513 N.Y.S.2d 1004 (App. Div. 1987) (New York City asbestos-remediation litigation).

11. *See, e.g.*, *Bank of America v. City of Miami*, 137 S. Ct. 1296 (2017).

12. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (multiple cities and states allying to force EPA regulation of greenhouse gases).

13. *See infra* notes 46–54 and accompanying text.

14. Swan, *supra* note 5, at 1275 n.275; *see also, e.g.*, *In re Certified Question from the U.S. Dist. Court for the E. Dist. of Mich.*, 638 N.W.2d 409, 411 (Mich. 2002) [hereinafter *Certified Question Case*].

This Article focuses specifically on the relationship between states and “plaintiff cities.” It contends that states should welcome cities’ participation in public-interest litigation and should encourage cities to do more of it. Cities, this Article contends, can provide much-needed resources to augment states’ litigative capacities in areas such as consumer protection, environmental protection, and enforcement of anti-discrimination laws. What is more, cities are the unit of government that is closest to residents. As such, empowered city attorneys should be expected to bring important cases involving quintessentially local concerns. Those cases may be those that the state would like to pursue. But because they involve such localized issues, they run the risk of evading state higher-ups’ attention.

To maximize the benefits of plaintiff cities, though, states cannot simply be passive observers; instead, states should enact policies that *empower* cities to sue. That is true for at least two reasons. First, cities often lack the statutory authority to sue to enforce important statutes, such as consumer protection laws. Second, courts have repeatedly held that cities (unlike states) may not sue as *parens patriae*—that is, to remedy an injury affecting the “well-being of its populace.”<sup>15</sup> Without the ability to sue as *parens patriae*, cities suing to protect the well-being of their citizens must sometimes pigeonhole their lawsuits into a legal fiction: namely, that the harm being inflicted on citizens is injuring the city as a body corporate. That strategy has sometimes proved successful, but it can only go so far.<sup>16</sup> Indeed, as a result of cities’ inability to sue as *parens patriae*, courts have tossed city-initiated lawsuits for want of a proper plaintiff.<sup>17</sup>

This Article suggests two specific means through which states might effectively empower cities. First, this Article endorses the suggestions, made by other scholars, that states can (and should) amend state laws to expressly allow for city enforcement.<sup>18</sup> That would enable cities to stand up for their residents in court without having to contort their case to invent a harm to the city as the body corporate. Second, this Article contends that states should express-

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15. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602 (1982).

16. *See, e.g.*, Bank of America v. City of Miami, 137 S. Ct. 1296 (2017) (city had cause of action under Fair Housing Act to sue for the economic losses suffered as a result of racially discriminatory housing policies).

17. *See, e.g.*, Ganim v. Smith & Wesson Corp., 780 A.2d 98 (Conn. 2001) (city lacked standing in lawsuit against gun industry because it did not bring suit in a “representative capacity”).

18. *See* Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, in HOW CITIES WILL SAVE THE WORLD 189, 202–04 (Ray Brescia & John Travis Marshall eds., 2016).

ly empower cities to sue *on behalf of the state*—thus allowing cities to exercise the *state's* authority to sue as *parens patriae*. Such a delegation would, in many instances, give cities standing to enforce both state laws *and* federal protections. This Article is the first to suggest this type of state-initiated empowerment of cities.

This Article proceeds in three parts. Part I provides an overview of recent city-initiated public-interest lawsuits. It focuses on how states have encouraged or discouraged certain specific city-initiated lawsuits. Part I concludes by making the affirmative case that states should be supportive of city-initiated public-interest lawsuits and should do everything possible to empower such city suits.

Part II surveys some of the structural obstacles that cities face when attempting to bring lawsuits in the public interest. These structural obstacles, which stem both from generally applicable statutes and from cities' place in the American constitutional system, are distinct from state "discouragement" of specific public-interest lawsuits outlined in Part I. As Part II explains, cities, unlike states, often categorically lack the authority to file a lawsuit on behalf of residents. That incapacity takes two forms. First, cities often lack the statutory authority to enforce state and federal laws. Second, courts have generally held that cities lack standing to sue on behalf of their residents as *parens patriae*.

Finally, Part III provides specific suggestions as to how states can remove those disabilities and empower city lawsuits that seek to protect the public interest. As an initial matter, state legislatures can and should amend their laws to allow city attorneys to sue to enforce them. What is more, states can and should also delegate the authority to sue on behalf of the state to their constituent cities. Such a delegation can be effected legislatively, but—notably—it could also theoretically be effected by a state attorney general (AG) who wishes to empower city-as-plaintiff suits.

## I. THE CITY AS PLAINTIFF

### A. *The Growing Prevalence of City-as-Plaintiff Litigation*

City law offices have not historically been at the forefront of public-interest litigation. City attorneys traditionally have two basic functions: they provide counsel to city officials, and they defend lawsuits when the city is sued.<sup>19</sup> And cities are sued—a lot. Because

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19. *Id.* at 191.

cities provide the front-line services that directly touch residents, they are exposed to liability on several fronts. Cities are defendants when someone sustains injuries on a city bus; they are defendants if a child hurts herself on a play structure at a city park. Cities, moreover, are often defendants in lawsuits alleging misconduct by police. City attorneys, therefore, are regularly asked to defend against claims such as excessive force, unlawful police shootings, and abuse of authority. Perhaps as a result of that dynamic, city law offices have not generally enjoyed a reputation as forward-thinking “public interest lawyers.”<sup>20</sup>

But that state of affairs is rapidly changing. City attorneys are increasingly adding plaintiff’s-side work to their litigation portfolios. And in many cases, cities are suing not just to protect their own proprietary interests, but to vindicate their residents’ interests. Over the past few years, cities have repeatedly sued polluters to remediate environmental harms, corporations to vindicate consumer-protection laws, and banks over racially discriminatory lending.<sup>21</sup> Cities have filed suit against local workplaces for wage theft and for maintaining unsafe working conditions.<sup>22</sup> Cities have also gone to court to force landlords to maintain habitable living conditions<sup>23</sup> and to compel condo-sellers to disclose relevant information to buyers.<sup>24</sup>

Cities are also now frequent players in major national litigation efforts. The City of San Francisco, for example, played a major role in challenging California’s ban on same-sex marriage.<sup>25</sup> More recently, in 2017 and 2018, hundreds of municipalities from across the country sued pharmaceutical companies over their alleged

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20. *Id.* at 189.

21. *See supra* notes 9–11.

22. *See* Howard Fine, *Updated: City Files Suit Against Contractors Alleging Wage Theft*, L.A. BUS. J. (Nov. 13, 2014) <http://labusinessjournal.com/news/2014/nov/13/city-files-suit-against-contractors-alleging-wage-/>; *see also* First Complaint for Declaratory and Injunctive Relief, Restitution, and Damages, *Cortez v. Choice Hotels International, Inc.*, No. RG17847671 (Cal. Super. Ct. Jan. 31, 2017), <http://www.oaklandcityattorney.org/PDFS/Quality%20Inn%20Complaint%201%2031%2017.pdf>. The City of Oakland and the State of California were also plaintiffs in this action.

23. Complaint for Injunctive Relief, Damages, Civil Penalties, and Other Equitable Relief, *People v. Jaber*, No. RG16829447 (Cal. Super. Ct. Aug. 31, 2016), <http://www.oaklandcityattorney.org/PDFS/1620%20Fruitvale%20-%20Complaint%20Summons%20Notice%20of%20Related%20Case.pdf>. The City of Oakland was also a plaintiff in this action.

24. City and County of San Francisco’s Cross-Complaint Against Mission Street Development LLC, *Lehman v. Transbay Joint Powers Authority*, No. CGC-16-553758 (Cal. Super. Ct. Aug. 17, 2016), <https://www.sfcityattorney.org/2016/11/03/herrera-sues-developer-failing-tell-home-buyers-millennium-tower-sinking/> (scroll to the bottom of the page and follow “CrossComplaint.pdf” hyperlink). The City and County of San Francisco was among the defendants in the original *Lehman* action.

25. *See Proposition 8*, S.F. CITY ATT’Y’S OFF., <https://www.sfcityattorney.org/tag/proposition-8/> (last visited Feb. 3, 2019).

roles in creating the opioid epidemic.<sup>26</sup> On the environmental front, several major cities have sued oil companies to recover the costs associated with climate change.<sup>27</sup> And since 2017, many Democratic-leaning cities have challenged the Trump Administration's policies in court. Multiple cities, for example, sued the Trump Administration over its threat to defund so-called "sanctuary cities."<sup>28</sup> Several California cities, moreover, joined a suit brought by the State of California seeking to enjoin the Trump Administration from asking a question about citizenship on the census.<sup>29</sup>

For many cities, plaintiff's-side lawsuits such as these are hardly one-offs. In fact, a number of cities have institutionalized their plaintiff's-side work by creating specialized units specifically dedicated to developing and bringing such cases.<sup>30</sup> Cities boasting such specialized units include major coastal cities such as San Francisco, New York City, and Los Angeles, as well as smaller cities like Buffalo, New York, and Central Falls, Idaho.<sup>31</sup> Other cities regularly engage in plaintiff's-side work without specialized units, and some partner with law schools to aid in their litigation efforts.<sup>32</sup>

City-initiated lawsuits, in short, are now a prominent feature of the American legal landscape. And, given cities' increasing appetite to push progressive reforms, their prominence can only be expected to grow in the coming years.

### B. *State Pushback Against City-Initiated Lawsuits*

Despite the increased prevalence of city-initiated lawsuits, they are not without complications. Of particular note, city-as-plaintiff lawsuits sometimes sit uneasily with cities' parent states. While

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26. Mitch Smith & Monica Davey, *With Overdoses on Rise, Cities and Counties Look for Someone to Blame*, N.Y. TIMES, Dec. 20, 2017 at A18.

27. William Neuman, *To Fight Climate Change, New York City Takes on Oil Companies*, N.Y. TIMES, Jan. 10, 2018 at A23; John Schwartz, *Judge Dismisses Suit Against Oil Companies Over Climate Change Costs*, N.Y. TIMES, June 25, 2018 at B4.

28. See Eli Rosenberg, *Federal Judge Blocks Trump's Executive Order on Denying Funding to Sanctuary Cities*, WASH. POST (Nov. 21, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/11/21/federal-judge-blocks-trumps-executive-order-on-denying-funding-to-sanctuary-cities/>. A "sanctuary city," generally speaking, is a city that refuses to cooperate with federal immigration authorities. *Id.*

29. Alan Gomez, *California Sues Trump Administration Over Census Citizenship Question*, USA TODAY (Mar. 27, 2018), <https://www.usatoday.com/story/news/nation/2018/03/27/california-sues-trump-administration-over-census-citizenship-question/462241002/>.

30. Swan, *supra* note 5, at 1229–30.

31. *Id.* at 1230 n.11.

32. *Id.*



some states welcome cities' participation in major lawsuits,<sup>33</sup> other states react cautiously (or even antagonistically) to cities' participation in public-interest litigation. On occasion, states have even taken affirmative steps to stop city-initiated lawsuits in their tracks.

In some respects, state unease with city-initiated public-interest litigation tracks scholarly critiques of the practice. As Professor Sarah Swan has written, critics raise two major "moral or political" issues with city-initiated litigation.<sup>34</sup>

First, some critics suggest that city-initiated lawsuits are simply an end-run around cities' inability to regulate conduct directly.<sup>35</sup> Cities are subordinate to states in the American federal system. Thus, if a city passes an ordinance which deviates too far from a state's legislative preferences, the state can pass a law superseding that ordinance. Because state supremacy over municipalities is a hallmark of American democracy, the argument goes, a city should not be able to circumvent state restrictions on its regulatory authority by suing to achieve the same ends.<sup>36</sup>

Second, some argue that plaintiff's-side litigation ought to be an arena reserved primarily for the states.<sup>37</sup> Here, the contention is that states are simply better situated than cities to litigate cases of significant import because states represent a broader swath of interested communities. States, therefore, should be plaintiffs in government-initiated public-interest lawsuit, not cities.<sup>38</sup>

These scholarly critiques cut to the core of real-world friction between cities and states. The idea that city-initiated litigation is a mere substitute for state regulation has been at the center of disputes between cities and states over city-as-plaintiff lawsuits. The theory that plaintiff's-side public-interest litigation should primarily be a state function has also been a critical disagreement. These city-state disputes are not academic. In many instances, states have

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33. For example, as noted above, California welcomed several of its cities as co-plaintiffs in its lawsuit challenging the federal government's plans to add a citizenship question to the 2020 Census. See Gomez, *supra* note 29 and accompanying text.

34. Swan, *supra* note 5 at 1267. Professor Swan also highlights a third critique: Namely, that city-initiated lawsuits are improper because they "bind" city residents who disagree with them. *Id.* at 1268–69. But that critique proves too much. As Professor Swan notes, that same critique can be leveled against any organization that engages in litigation. *Id.* When a corporation sues, some of its shareholders may not agree with its stance. Similarly, when a state or the federal government sues, some fraction of its residents will likely dissent. What is more, some city residents will inevitably object to litigation not just when city is the plaintiff, but also when it is a defendant. *Id.* That is particularly true in politically charged cases involving civil rights violations or police brutality. Taken to its logical conclusion, then, the suggestion that cities should not "bind" dissenting residents in litigation would apply to any litigation in which a city (or another multi-member organization) is a party. That cannot be correct.

35. *Id.*

36. *See id.*

37. *See id.*

38. *See id.* at 1273.

bristled at plaintiff cities and have taken affirmative steps to undermine city-led cases, either by passing laws or by litigating to stop these suits.

### 1. Legislative Preemption of City-Initiated Lawsuits

The first (and most aggressive) way in which states can undermine plaintiff cities is by passing laws that prohibit city-initiated litigation from moving forward. States generally use this maneuver when a city maintains a different ideological disposition than its parent state, and the state wishes to stop the city's ideological lawsuits from moving forward. To that end, states that preempt cities from suing on a particular topic are also likely to preempt cities from *legislating* on that topic. By preempting city-initiated suits through legislation, states are typically effectuating the first critique discussed above: that cities should not be able to accomplish through litigation what they cannot accomplish through regulation.

A state's authority to preempt city-initiated lawsuits is well-established. The United States Constitution establishes the United States as "a Nation of *States*," not of cities.<sup>39</sup> Thus, under the Constitution, cities are mere "creature[s] of the state"<sup>40</sup> and enjoy only the powers that states delegate to them.<sup>41</sup> As a result, states may add or subtract from a city's delegated suite of authority at any time. That includes taking away a city's ability to sue certain classes of defendants.

Legislative preemption of cities' *litigation* authority is thus a close cousin of legislative preemption of cities' *regulatory* authority. State preemption of local law has become increasingly commonplace over the past decade. Legislatures across the country have passed laws preventing cities from enacting local ordinances pertaining to hot-button issues including the minimum wage, paid leave, and LGBTQ discrimination.<sup>42</sup> Other states have enacted laws preventing cities from regulating ride-sharing, home-sharing, or municipal broadband.<sup>43</sup>

Often, laws that preempt cities from regulating conduct also prohibit cities from suing to enjoin that conduct. For example, some state laws that prohibit cities from extending anti-

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39. *Comty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 50 (1982) (emphasis added).

40. *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1256 n.7 (5th Cir. 1976).

41. Richard Briffault, *Our Localism* (pt. 1), 90 COLUM. L. REV. 1, 7 (1990).

42. See NAT'L LEAGUE OF CITIES, *supra* note 6, at 1, 3–4.

43. *Id.*

discrimination protections to LGBTQ people also prohibit cities from going into court to ensure equal treatment for that population.<sup>44</sup> The same is true for laws prohibiting cities from enacting ordinances relating to wage theft.<sup>45</sup> So, as states move more aggressively to preempt regulation, they may also move aggressively to preempt city-initiated litigation. The logic is readily apparent: if a state does not permit a city to achieve a certain end via regulation, why should it permit that same city to achieve the same end via litigation?

The gun litigation of the late 1990s and early 2000s provides a case in point. Between 1998 and 2000, a torrent of major American cities filed lawsuits against gun manufacturers, distributors, and trade associations, alleging various violations of state law.<sup>46</sup> The lawsuits had a mixed early track record of success: although some suits were dismissed on various grounds, others survived motions to dismiss.<sup>47</sup> Yet before the gun litigation could reach its conclusion, several state legislatures passed laws expressly forbidding municipalities from suing the firearms industry.

New Orleans's lawsuit, for example, was stopped in its tracks when Louisiana passed a law that forbade any local "political subdivision" from filing a lawsuit against virtually any actor in the firearms industry.<sup>48</sup> Georgia's legislature passed a nearly identical law, dooming the City of Atlanta's suit.<sup>49</sup> And in Michigan, a far-reaching suit against the gun industry filed by the City of Detroit survived motions for summary disposition in state court.<sup>50</sup> That suit, however, was dismissed after the Michigan Legislature passed a law that retroactively and prospectively forbade political subdivisions from filing suit against the gun industry.<sup>51</sup>

It is hardly an anomaly that states moved so swiftly and aggressively to pass laws preventing city lawsuits against the gun industry.

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44. See, e.g., ARK. CODE ANN. § 14-1-403 (2015) (local subdivisions of Arkansas cannot "enforce" any "ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law").

45. See, e.g., TENN. CODE ANN. § 50-2-113 (2014) (prohibiting municipalities from maintaining any "processes for the purpose of addressing wage theft").

46. See Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 840-53 (2004).

47. See *id.*; see also, e.g., *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (E.D.N.Y. 2004); *City of Boston v. Smith & Wesson Corp.*, No. 99-02590, 2000 WL 34018326 (Mass. Super. Ct. Nov. 21, 2000); *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568 (Mass. Super. Ct. July 13, 2000).

48. *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 6 (La. 2001); see also LA. STAT. ANN. § 40:1799 (1999).

49. *Smith & Wesson Corp. v. City of Atlanta*, 543 S.E.2d 16, 18 (Ga. 2001); see also GA. CODE ANN. 16-11-184 (1999) (repealed 2005).

50. *Mayor of Detroit v. Arms Tech., Inc.*, 669 N.W.2d 845, 854 (Mich. Ct. App. 2003).

51. *Id.* at 854-55; see also MICH. COMP. LAWS § 28.435 (2018).

More than forty states, after all, have passed laws prohibiting cities from regulating firearms directly.<sup>52</sup> State legislatures passed those laws after a “concerted lobbying campaign” by the deep-pocketed gun lobby.<sup>53</sup> It is only logical that an interest group that can convince state legislatures to defang cities’ power to regulate guns can (and did) convince those legislatures to defang cities’ litigation authority.

States that disagree with city-initiated litigation, then, can and do take legislative steps to stop it entirely. As outlined below, however, legislative preemption is not the only way that states can disrupt city-initiated litigation. States can be jealous overseers of municipalities. Thus, even when states agree ideologically with city-initiated lawsuits, they may still take litigation action to ensure that the *city* is not the entity pressing those suits forward.

## 2. Litigated Preemption of City Lawsuits

The second way that states stop city-initiated lawsuits, then, is somewhat different from the first. Whereas legislative preemption of city lawsuits is primarily motivated by ideological differences, *litigated* preemption may occur when cities and states are ideologically aligned. When states preempt their cities through litigation, it is not because they necessarily object to litigation *per se*. Instead, litigated preemption sometimes comes about because a parent state believes that it is the more appropriate actor to carry out that litigation. Litigated preemption thus tracks the second major academic critique of plaintiff cities: that plaintiff’s-side public-interest litigation is a function that is simply more appropriate for states.

Litigated preemption occurs when a state binds (or purports to bind) its constituent cities through litigation, a settlement, or a consent order. The New Hampshire case, *State v. City of Dover*, provides one example.<sup>54</sup> There, New Hampshire and two New Hampshire cities each filed lawsuits against manufacturers of a gasoline additive. The State subsequently filed suit against its cities, seeking a declaration that the cities’ suit must “yield to the State’s suit” and be dismissed.<sup>55</sup> The Supreme Court of New Hampshire sided with the State. Key to the court’s ruling was that New Hampshire was suing as *parens patriae*—that is, on behalf of its “populace.”<sup>56</sup> Accord-

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52. *State Firearm Preemption Laws*, EVERYTOWN FOR GUN SAFETY (Feb. 20, 2018), <https://everytownresearch.org/fact-sheet-preemption-laws/>.

53. *Id.*

54. 891 A.2d 524 (N.H. 2006).

55. *Id.* at 528.

56. *Id.*; see also *infra* Part III.B (providing overview of *parens patriae*).

ingly, the court held, the State was presumed to represent not just its residents' interests, but the cities' as well.<sup>57</sup> The court ordered the cities' cases dismissed because it found "no reason to conclude . . . that the State will not seek to obtain full compensation for *all* communities."<sup>58</sup>

A second example of litigated preemption came in the aftermath of a massive, multi-state settlement with the tobacco industry. In 1998, forty-six state AGs settled a wide-ranging set of claims against tobacco companies. That settlement purported to bind not just the states themselves, but also the states' political "subdivisions . . . including but not limited to municipalities, counties, parishes, villages, [and] unincorporated districts."<sup>59</sup> By its terms, the settlement purported to bind not just the states involved in the litigation, but also their constituent cities.

At least one local unit of government attempted to circumvent the tobacco settlement. The year after the settlement was finalized, Wayne County, Michigan, filed a suit against the tobacco companies, seeking "damages incurred in providing health care services to smokers."<sup>60</sup> The companies sought to dismiss the case, arguing that the Michigan Attorney General—a signatory to the forty-six-state settlement—had settled claims on behalf of Michigan's local subdivisions.<sup>61</sup> Ultimately, the Michigan Supreme Court sided with the tobacco companies. Its logic proceeded as follows: Michigan law gave the AG "the authority to sue on behalf of the state in matters of state interest."<sup>62</sup> Inherent in that authority was the authority to sue "on behalf of the state's political subdivisions."<sup>63</sup> And inherent in the authority to sue is the authority to settle. Thus, the court held that Michigan's AG maintains the authority not only to litigate on behalf of counties, but to bind those counties via settlement as well.<sup>64</sup>

The differences between legislated and litigated preemption are manifest, and the high-profile gun and tobacco lawsuits provide

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57. State v. City of Dover, 891 A.2d at 531–32.

58. *Id.* (emphasis added).

59. Master Settlement Agreement § II(pp) (1998), <http://ag.ca.gov/tobacco/pdf/lmsa.pdf>. This Agreement was incorporated into a consent decree resolving the state AGs' action. See Consent Decree and Final Judgment at 14, *People ex rel. Lungren v. Philip Morris, Inc.*, No. J.C.C.P. 4041 (Cal Super. Ct. Dec. 9, 1998), [https://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/consent\\_decree.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/consent_decree.pdf); see also *Master Settlement Agreement*, OFF. CAL. ATT'Y GEN., <https://oag.ca.gov/tobacco/msa> (last visited Feb. 3, 2019).

60. *Certified Question Case*, *supra* note 14, at 411.

61. *Id.*

62. *Id.* at 414.

63. *Id.*

64. *Id.* at 415. Both the New Hampshire decision and the Michigan decision discussed in this Part turned on state law, so they do not bind other states.

helpful examples of contrast. The legislated gun-lawsuit preemption reflected a belief among states that suits should not have been filed against the gun industry *at all*. With tobacco, though, both states and cities apparently agreed that litigation was appropriate; the sole question was who could bring the suit (and who could settle it). The tobacco settlement thus reflected a belief that states—not cities—bear sole responsibility for litigating major cases with statewide impact.

### C. *The Case for State Support of City-Initiated Lawsuits*

The gun litigation and the tobacco litigation each represent a major concern a state may have with city-initiated lawsuits. First (as in the gun litigation), cities might bring lawsuits that the state itself disagrees with. Second, (as in the tobacco litigation) a state might be concerned that city participation in plaintiff's-side litigation could complicate states' own comprehensive litigation efforts. Both of these concerns, however, are overblown and, collectively, are far outweighed by the benefits of city-initiated litigation.

#### 1. Misplaced State Concerns

As to the first concern—that cities might bring suits with which a state disagrees—it is of course true that cities may (and often do) have points of view that differ from their parent states. But city-state divergence is a key reason that elected city governments exist in the first place. The American constitutional system recognizes only two sovereign entities: the federal government and the states. There is no federal legal requirement that states maintain elected political subdivisions at all. States maintain cities by choice precisely because states recognize that local preferences may differ from statewide sensibilities.

Indeed, as the United States Supreme Court has made clear, cities are nothing more than creations of the state with no independent constitutional significance. That much has been clear at least since the 1907 case *Hunter v. City of Pittsburgh*, in which the Court upheld a Pennsylvania law that allowed Pittsburgh to annex its smaller municipal neighbors without their consent. As the Court explained in *Hunter*, cities are merely:

convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The number, nature, and duration of the powers conferred up-

on these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state . . . . The state, therefore, at its pleasure, may modify or withdraw all such powers . . . . repeal the [city] charter and destroy the corporation. All of this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme.<sup>65</sup>

Under the *Hunter* doctrine, then, cities are empty vessels created by the state that can be filled with whatever powers and duties the state deems necessary. Cities can be empowered, disempowered, and even destroyed at the state's whim. They are expressly subordinate to the state—no different from any other state “agency” such as a road commission or a health department.<sup>66</sup> Municipalities, in short, exist only at the pleasure of the state. And they can take whatever form a state chooses.

States could thus theoretically administer local functions—trash pickup, road maintenance, and so on—through unelected state agencies who answer directly to the state government. But no states are organized in that way. Instead, states have universally opted to empower self-governing, separately elected local bodies. This decision reflects an understanding that people in Chicago have different views than people in Peoria, and that the outcome of statewide elections should not dictate everything that happens on the ground in cities and neighborhoods.

So, the fact that cities may file lawsuits with which the state disagrees (or which the state would not have bothered to bring on its own accord) is a natural outgrowth of states' decision to govern through independent, elected local bodies. Indeed, when cities sue against their parent states' wishes, it is often because the city is trying to alleviate a problem of quintessentially local concern. The city-initiated gun lawsuits are illustrative. The city officials who authorized those suits were likely more politically liberal (and thus, likelier to support gun control) than the state leaders who squashed them. Fundamentally, though, those suits were filed by cities because gun violence is a scourge that is concentrated in urban centers. The plaintiff cities were doing precisely what cities are set up to do. They were addressing a local issue, for local residents—even though statewide politicians, most of whom represented areas with lower levels of gun violence, may have disagreed.

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65. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

66. *See id.*

One might still object that isolated political subdivisions should not be able to countermand state policy through litigation. Imagine, for example, that a major corporation—the largest employer in the state—negligently pollutes the drinking water supply in a tiny township. Should that township really be able to sue the corporation, putting at risk the state’s economic well-being and, potentially, the livelihood of its workers?

The short answer to that question is “yes.” In this respect, arguments against state preemption of city litigation are far less trenchant than arguments that could be made in favor of state preemption of city *regulation*. There are good arguments that, in certain instances, states should be able to prohibit cities from enacting local laws that would harm the state as a whole.<sup>67</sup> It would be problematic, for example, if a township were to impose a spurious regulation that would force the state’s biggest employer to leave the state.

But litigation is different. When a city brings a lawsuit, it generally needs to identify some existing law that has been violated in order to recover. If that law has indeed been broken, and if the city has standing to sue, it would be passing strange to say that a state should be able to veto that lawsuit.

The second concern—that plaintiff’s-side litigation should be the sole province of states—is equally unavailing. State officials who argue against city-initiated lawsuits assert that they are better situated to bring such lawsuits for at least three reasons. First, they contend that states have the capacity to push for a “comprehensive solution” to major problems like the opioid epidemic. Second, they claim that they are better able to equitably allocate any monetary recovery to the parts of state government that need it.<sup>68</sup> Third, they note that many cities use outside counsel (typically working on a contingency basis) to bring plaintiff’s-side suits and that states are able to bring suits without paying outside counsel.<sup>69</sup>

All of those arguments are overstated at best. It is true, of course, that there are fewer states than cities, so states can theoretically coordinate national litigation efforts against common defendants

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67. Take, for example, a state that wishes to shift its electrical generation to alternative energy. Many people want cleaner energy, but many also object to wind turbines in their communities. State preemption of local laws restricting such turbines could smooth those problematic incentives. For more on progressive preemption of local laws, see Nolan Gray, *The Positive Power of Preemption*, CITYLAB (Aug. 13, 2017), <https://www.citylab.com/equity/2017/08/the-positive-power-of-preemption/536241/>.

68. See, e.g., Daniel Fisher, *Cities Vs. States: A Looming Battle For Control Of High-Stakes Opioid Litigation*, FORBES (Mar. 28, 2018), <https://www.forbes.com/sites/legalnewsline/2018/03/28/cities-vs-states-a-looming-battle-for-control-of-high-stakes-opioid-litigation/>.

69. See, e.g., *id.*



more easily. But the challenges of coordinating multistate litigation efforts—such as the tobacco litigation—are hardly insubstantial. Indeed, it is far from clear that coordinating up to fifty geographically and politically disparate states is significantly easier than coordinating multiple political subdivisions.

As to the equitable allocation point, it is simply untrue that states generously pass along to cities the resources earned from plaintiff's-side litigation. The tobacco cases are illustrative. Though the tobacco litigation settled for \$246 billion, very little of that money ultimately went to cities.<sup>70</sup> That is true despite the fact that cities, counties, and other local units of government (who run hospitals, ambulances, and outreach services) incurred significant financial losses as a result of tobacco's adverse health consequences.<sup>71</sup>

Finally, the argument that cities are likely to use contingency-fee plaintiff's attorneys is inapposite. To be sure, in some cases (e.g., the tobacco litigation) government entities win huge sums of money and pay large percentages to contingency-fee attorneys. But in other cases (e.g., the gun litigation) government entities win next to nothing—and pay next to nothing for the costs of litigation. Use of contingency counsel thus allows government entities to take on litigation risk and sue monied corporations without outlaying significant taxpayer resources. And notably, cities are not the only entities that use contingency counsel. States also have regularly used contingency counsel—in the tobacco litigation and otherwise—which has furthered states' ability to conduct plaintiff's-side litigation in the first place.<sup>72</sup>

## 2. The Affirmative Case for State Support of City-as-Plaintiff Litigation

Thus, though states may feel some trepidation about city-initiated lawsuits, that trepidation is largely unfounded. To take matters further: states should affirmatively welcome the city-as-plaintiff trend. That is true for at least four reasons.

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70. *Id.*; see also *15 Years Later, Where Did All The Cigarette Money Go?*, NPR (Oct. 13, 2013), <https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go>.

71. See Fisher, *supra* note 68.

72. PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 99–102 (Univ. Press of Kan. 2015); see also *Lawyers Win Hefty Tobacco Case Fees*, CNN (July 30, 1999, 12:55 AM), <http://www.cnn.com/US/9907/30/tobacco.fees.01/>.

First, cities are better situated to address local issues and can act more nimbly to do so. Cities exist to be responsive to local concerns, and they often sue to remediate quintessentially local harms. Sometimes, as in the case of the gun lawsuits, that means that cities sue because they bear the brunt of the damage related to a national, hot-button topic. But that is hardly the typical case. Most often, city-initiated lawsuits are aimed at alleviating circumscribed harms that take place entirely within city limits. For example, cities regularly file suit against companies for illegal disposal of trash<sup>73</sup> and improper storage of hazardous materials;<sup>74</sup> against owners of rental units for neglect<sup>75</sup> and tax delinquency;<sup>76</sup> and against companies for causing specific, localized environmental harms.<sup>77</sup>

Those local issues concern (or should concern) the state as well. After all, a city's residents are also residents of a state. The safety of Spokane's drinking water is thus not just an issue that concerns the City of Spokane: it concerns the State of Washington as well.<sup>78</sup> Similarly, California has an interest in the safety of Oakland's buildings, and the proper disposal of hazardous waste in Los Angeles.<sup>79</sup> Yet, because such issues are localized, it makes sense that cities—which, again, are created by the state *to address local issues*—should be the plaintiff in any suit to address them. After all, issues of local concern will, in all likelihood, first come to the attention of cities, simply because of cities' "relative closeness to local citizens."<sup>80</sup>

Second, city-initiated lawsuits can alleviate financial pressure on states. Most notably, cities often have an on-the-ground investigatory apparatus—a local police force, for example—that is costly for the state to replicate.<sup>81</sup> And when a local unit of government sues to remedy a localized harm, it is one fewer issue that the state must deal with.

Cities can also help alleviate state resource constraints when states engage in major, complex litigation. State AGs are often

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73. See, e.g., Ryan Parker, *Albertsons to Pay \$3.4 Million to Settle Illegal Disposal Case*, L.A. TIMES (June 24, 2014, 6:16 PM), <http://www.latimes.com/local/lanow/la-me-ln-albertsons-settlement-20140624-story.html>.

74. See, e.g., Arezow Doost, *Commerce Sues Property For Poorly Disposed Asbestos*, CBS 11 (May 16, 2011, 10:00 PM) <http://dfw.cbslocal.com/2011/05/16/commerce-sues-complex-for-poorly-disposing-of-asbestos/>.

75. See *supra* note 23.

76. See, e.g., Chad Livengood, *Detroit Suing 700 Property Investors for Unpaid Taxes*, CRAIN'S DETROIT BUSINESS (Aug. 28, 2017, 9:17 PM) <http://www.craigslist.com/article/20170829/news/637586/detroit-suing-700-property-investors-for-unpaid-taxes>.

77. See, e.g., *City of Spokane v. Monsanto Co.*, 237 F. Supp. 3d 1086 (E.D. Wash. 2016).

78. See *id.*

79. See *supra* notes 23, 75 and accompanying text.

80. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 721 (2011).

81. See, e.g., Fisher, *supra* note 68.

woefully understaffed and outgunned when they litigate against major corporations. For example, when Rhode Island sued the lead paint industry, “there were more attorneys working for the defense than in the entire attorney general’s office.”<sup>82</sup> If properly coordinated, adding city attorneys to the litigation efforts can alleviate such pressure.

Of course, cities’ resources are also stretched thin, so state AGs should not count on city assistance in the mine-run of cases. But in cases where cities affirmatively choose to get involved in litigation, there is opportunity for them to add capacity to the state’s apparatus.

*Third*, the positive effects of city-as-plaintiff suits often radiate outwards and benefit communities across the state. City-initiated suits sometimes result in settlements or judgments that *expressly* require statewide change. Take Los Angeles’s lawsuit against the Albertson’s grocery store chain for illegal dumping in violation of California’s Hazardous Waste Law. The case ended up settling to the tune of \$3.4 million.<sup>83</sup> As part of that settlement, Albertson’s was required implement a formal environmental compliance program in all its California stores (not just those in Los Angeles).<sup>84</sup>

And even without specific statewide injunctions, city lawsuits can affect statewide behavior. Take, again, the Albertson’s example. Even without the injunctive relief, the amount of money Albertson’s was forced to expend to settle the lawsuit may well have been sufficient to deter Albertson’s from further violations of California law. That deterrence would presumably take place in stores across California, not just in Los Angeles.<sup>85</sup>

*Fourth*, city-initiated lawsuits can serve as models for future cases brought by the state. As compared to states, cities are likelier to be on the leading edge of innovative legal strategies because it is typically easier for a city to obtain political consensus about the need to bring a suit than it is for a state.<sup>86</sup> State actors, after all, have to take stock of a wide array of rural and urban constituencies. Cities, by contrast, are more circumscribed and are generally more homogeneous politically. When city law offices are encouraged to pursue creative litigation, states can thus sit back and watch them

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82. Swan, *supra* note 5, at 1281.

83. See Parker, *supra* note 73.

84. Morris, *supra* note 18, at 197.

85. Indeed, there do not appear to have been any further enforcement actions against Albertson’s related to violations of California’s hazardous waste laws since 2014.

86. See Swan, *supra* note 5, at 1272–73.

file innovative, longshot lawsuits—and wait to see whether those suits bear fruit before jumping into the litigation fray themselves.<sup>87</sup>

City-initiated lawsuits, in short, are beneficial not just to the city and its residents, but to the city's parent state, as well. Therefore, states should affirmatively support city-as-plaintiff litigation and proactively seek to remove barriers to such suits.

## II. OBSTACLES TO CITY-INITIATED LAWSUITS

If a state wishes to encourage city-as-plaintiff litigation, its active support for plaintiff cities is not just desirable, it is crucial. Despite the increased prevalence of city-initiated litigation, significant barriers to such lawsuits remain. That is true for two reasons. First, unlike states, cities often lack the authority to enforce important state and federal statutes. Second, unlike states, cities lack the authority to sue as *parens patriae* to remedy injury to their citizens.

These obstacles operate to keep cities out of court, but in different ways. A city's inability to sue as *parens patriae* means that there are cases in which a city lacks *standing* to file a lawsuit—despite the fact that its residents were harmed—because the city as a corporate body was not itself “among the injured.”<sup>88</sup> That disability, at least in federal court, is jurisdictional. When a city lacks standing, it means that the city is not “sufficiently adversary to a defendant to create an Art. III case or controversy.”<sup>89</sup>

By contrast, when a city lacks a statutory right to sue, it means that the city lacks a “cause of action” *under the relevant statute itself*. That question is distinct from the question of whether a city has standing. Even if a plaintiff has been injured by a statutory violation, it still must demonstrate that Congress (or the Legislature) provided it a cause of action to enforce the violation of that law.<sup>90</sup> In other words, standing hinges on whether a plaintiff has been in-

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87. At the time of this Article's writing, a dynamic along these lines was playing out in the opioid litigation. Municipalities have been on the leading edge of bringing suit against a wide range of opioid-related companies, with states following in their footsteps. See Jared Hopkins & Andrew Harris, *The Legal Engine Driving More Than 800 Lawsuits Against Opioid Makers*, INS. J. (July 24, 2018), <https://www.insurancejournal.com/news/national/2018/07/24/495880.htm> (explaining how a county spearheaded the strategy to sue not just opioid manufacturers, but distributors, as well).

88. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

89. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979).

90. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (“Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.”)

jured in the real world. A cause of action, by contrast, hinges on whether the statute at issue provided the plaintiff a right to sue.<sup>91</sup>

A plaintiff must have both standing and a cause of action to proceed with a case. The fact that a plaintiff has standing does not automatically give that plaintiff a cause of action.<sup>92</sup> Nor (at least in federal court) can a statute granting a plaintiff a cause of action automatically give that plaintiff standing. “Injury in fact,” the Supreme Court has emphasized, “is a constitutional requirement, and it is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”<sup>93</sup>

A further note: When cities lack statutory authority to bring a suit, that disability operates in both state and federal court. No matter the venue, cities simply cannot sue under the relevant statute. The ramifications of cities’ inability to sue as *parens patriae*, however, are a bit more complicated. Technically (as discussed in further detail below), *parens patriae* is a doctrine of *federal court* standing that allows states the authority to sue on behalf of their residents. Because state courts often have more lenient standing requirements than federal courts,<sup>94</sup> there is theoretically no reason that the federal *parens patriae* doctrine should apply in state courts. In practice, however, state courts “routinely” apply and adopt the federal *parens patriae* standard.<sup>95</sup> Cities’ inability to sue as *parens patriae*, then, is a disability that, as a practical matter, has ramifications in both federal and state court.

#### A. Cities’ Lack of Statutory Authority

The United States Congress and state legislatures have passed numerous laws in recent decades that allow for enforcement by state AGs. On the federal level, states are perhaps most frequently granted enforcement powers in the field of consumer protection. A hodge-podge of federal statutes grant state AGs the power to sue to force compliance with a wide variety of laws on topics ranging

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91. See *id.*

92. See *Davis*, 442 U.S. at 239 n.18.

93. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016).

94. See, e.g., *Lansing Sch. Educ. Ass’n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 693–94 (Mich. 2010) (noting that the Michigan Constitution, unlike the United States Constitution, lacks a case-or-controversy standing requirement, and accordingly there is “no textual basis” for “importing the federal case-or-controversy requirement into Michigan law”).

95. Patrick Hayden, Note, *Parens Patriae, the Class Action Fairness Act, and the Path Forward: The Implications of Mississippi Ex Rel. Hood v. Au Optronics Corp.*, 124 YALE L.J. 563, 571–72 (2014).

from flammable fabrics to email spam to telemarketing.<sup>96</sup> What is more, the 2012 Dodd-Frank Act—a sweeping consumer-protection law—sets out perhaps the most comprehensive federal-state “dual-enforcement” scheme in the United States.<sup>97</sup> Under Dodd-Frank, both the federal Consumer Financial Protection Bureau (CFPB) and state attorneys general may sue to enforce the law’s prohibition on “unfair, deceptive, or abusive act[s] or practice[s],” and to enforce rules promulgated by the CFPB.<sup>98</sup>

But federal laws that empower states typically do not empower cities. Dodd-Frank, for example, grants enforcement power *only* to a state’s “attorney general (or the equivalent thereof).”<sup>99</sup> Other statutes are worded similarly. A federal law regulating packaging of household substances grants enforcement powers only to the “attorney general of a State, or other authorized State officer.”<sup>100</sup> A law regulating sports agents allows for “state” enforcement, if the “attorney general of a State” so directs.<sup>101</sup> The specific, unequivocal inclusion of state attorneys general in such laws—combined with the omission of other state or sub-state actors—leaves little room for municipal enforcement.<sup>102</sup>

State laws are similar. Every state has its own consumer-protection laws, and the vast majority of those laws vest general enforcement powers in the state attorney general.<sup>103</sup> Just seven of those laws provide for city or county enforcement.<sup>104</sup>

As Professor Kathleen Morris wrote, the failure to empower cities via consumer protection laws means that cities are unable to “halt illegal and unfair corporate practices within their jurisdictions at the earliest stages.”<sup>105</sup> Instead, such practices can be stopped (if at all) only when (1) a state AG decides to enforce the law, or (2) consumers sue directly. Compounding matters, consumer-initiated lawsuits might be unavailable or unviable in several

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96. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 708–10 (2011).

97. Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 117–18 (2013).

98. 12 U.S.C. § 5536 (2018) (prohibiting “unfair, deceptive, or abusive act[s] or practice[s]”); *id.* § 5552 (granting state AGs the authority “to enforce provisions of this title”).

99. *Id.* § 5552.

100. 15 U.S.C. § 1477 (2018).

101. *Id.* § 7804 (2018).

102. This is not to say that federal law *never* allows municipal suits. The Clean Air Act, for example, includes a “citizen suit” provision, which allows any aggrieved “person” to bring a suit, and further defines “person” to include a “State, *municipality*, [or] political subdivision of a State . . . .” 42 U.S.C. § 7602(e) (2018) (emphasis added).

103. Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903 app. (2013).

104. *Id.* at 1906.

105. Morris, *supra* note 18, at 203.

circumstances. If consumers sign binding arbitration agreements, for example, they may not be able to sue in a court of law.<sup>106</sup> Similarly, if consumers sign an enforceable class-action waiver, there is often little incentive for them to sue. Absent the possibility of a class action, a consumer who is cheated out of a small-to-moderate amount of money is unlikely to bother to pursue litigation—much less find an attorney who is willing to do so.<sup>107</sup>

Thus, in many cases, the *only* realistic judicial recourse is for a state AG to take up a case. And state AGs may lack the time, inclination, or capacity to do so. The lack of local enforcement mechanisms in state and federal law severely limits the efficacy of those laws and often prevents cities from stopping unlawful conduct within city limits.

### B. Cities' Inability to Sue as *Parens Patriae*

A further obstacle to city-initiated lawsuits comes as a result of courts' refusal to recognize cities' authority to sue as *parens patriae*. That means that cities—unlike states—are unable to sue to vindicate an injury suffered by their residents; instead, they may sue only to vindicate an injury suffered by the city as a body corporate.

The concept of *parens patriae*—Latin for “parent of [the] country”—dates back at least to English common law.<sup>108</sup> At common law, *parens patriae* was a doctrine that gave the Crown the legal responsibility to act on behalf of children and mentally incapacitated persons.<sup>109</sup> After the Revolution, *parens patriae* was incorporated into the American constitutional system. Instead of being vested in a single sovereign, the rights and responsibilities to act as *parens patriae* accrued to both the federal government *and* the states, because both were seen as “sovereign” successors to the Crown.<sup>110</sup>

Over time, *parens patriae* also evolved into a theory of federal court standing under which a “parent” state may sue to remedy in-

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106. *Id.* at 192.

107. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (“What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?”).

108. *Parens Patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014).

109. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982) (quoting JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 155 (1820)).

110. *See* *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890) (*parens patriae* is “inherent in the supreme power of every state”); *see also In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir. 1973) [hereinafter *Vehicle Air Pollution Case*].

jury to its residents.<sup>111</sup> Although states have exercised *parens patriae* standing since at least the turn of the twentieth century,<sup>112</sup> the doctrine was most fully fleshed out in the 1982 case *Snapp v. Puerto Rico*. In that case, the Commonwealth of Puerto Rico sued a group of Virginia apple growers who had allegedly discriminated against hundreds of Puerto Rican residents who were seeking seasonal employment.<sup>113</sup> Emphasizing Puerto Rico's interest in preventing discrimination against its citizens, the Court upheld the Commonwealth's authority to sue as *parens patriae* and seek remedy on behalf of its citizens.<sup>114</sup>

Though a state's authority to sue as *parens patriae* is well-established, the concept of *parens patriae* is something of an anomaly in the federal judicial system. Article III of the United States Constitution limits federal court jurisdiction to "cases" and "controversies."<sup>115</sup> To ensure that an actual case or controversy exists, the Supreme Court has emphasized that federal plaintiffs *themselves* must have suffered a "concrete and particularized" injury-in-fact.<sup>116</sup> It is not enough, the Court has explained, for a plaintiff to demonstrate an abstract "injury to a cognizable interest."<sup>117</sup> Rather, a plaintiff must "be himself among the injured."<sup>118</sup> That doctrine, at first blush, is in severe tension with *parens patriae* standing. After all, when a state sues as *parens patriae*, it is not suing for an injury that the state has incurred. Instead, the state is suing to remedy a harm that has been visited on its *residents*.

Recognizing the tension between *parens patriae* and Article III standing, the Court in *Snapp* explained that it is not enough for a state to simply assert that some of its residents were injured. Instead, a state seeking to sue as *parens patriae* must allege that an injury to its citizens infringed a "quasi-sovereign" interest of the state.<sup>119</sup> The Court declined to delineate precisely what constitutes a "quasi-sovereign" interest—forthrightly noting that the concept was "a judicial construct that does not lend itself to a simple or exact definition."<sup>120</sup> The Court did explain, however, that "quasi-

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111. See *Snapp*, 458 U.S. at 600–01.

112. See *Louisiana v. Texas*, 176 U.S. 1, 19 (1900); see also *Snapp*, 458 U.S. at 602 (referring to *Louisiana v. Texas* as the "first" recognition of *parens patriae* "by this Court").

113. *Snapp*, 458 U.S. at 597–98.

114. Though Puerto Rico is not a state, the Court held that "the Commonwealth of Puerto Rico is similarly situated to a State in this respect," and that it "has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State." *Id.* at 608 n.15.

115. U.S. CONST. art. III, § 2, cl. 1.

116. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

117. *Id.* at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972)).

118. *Id.* (quoting *Sierra Club*, 405 U.S. at 735).

119. *Snapp*, 458 U.S. at 601.

120. *Id.*



sovereign interests” are generally those that the State has in the “well-being of its populace.”<sup>121</sup> A quasi-sovereign interest is thus distinct from a state’s *sovereign* interest in, for example, securing its borders.<sup>122</sup> It is also distinct from a state’s proprietary interests in its own property or money.<sup>123</sup> Fundamentally, a “quasi-sovereign” interest is simply an interest that stems from a state’s concerns for residents’ well-being.

In the decades that followed *Snapp*, states have asserted a broad array of “quasi-sovereign” interests to establish *parens patriae* standing. Perhaps most prominently, *parens patriae* standing played a major role in the multi-state tobacco litigation in the 1990s, where an early case vindicated the State of Texas’ quasi-sovereign interest in defending “the economy of the State and the welfare of its people.”<sup>124</sup> States have also successfully used *parens patriae* standing to sue on behalf of residents who were victims of discrimination on the basis of race,<sup>125</sup> age,<sup>126</sup> disability,<sup>127</sup> and HIV-positive status.<sup>128</sup> And states have repeatedly invoked *parens patriae* in lawsuits based on corporate misdeeds. States have, for example, invoked *parens patriae* standing to bring consumer-protection lawsuits.<sup>129</sup> They have also successfully invoked *parens patriae* in the antitrust context, asserting a quasi-sovereign interest in “securing the integrity of the marketplace.”<sup>130</sup>

Cities, however, have had far less luck in their attempts to sue as *parens patriae*. Federal courts have consistently held that cities may not sue as *parens patriae*. The rationale? Cities—unlike states—are not formal “sovereigns.” The Ninth Circuit Court of Appeals, for example, has repeatedly rejected cities’ attempts to sue as *parens patriae*,<sup>131</sup> reasoning that because *parens patriae* was originally vested in “the English Sovereign,” formal sovereignty is a prerequisite to

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121. *Id.* at 602.

122. *Id.* at 601.

123. *Id.*

124. Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997).

125. See, e.g., New York v. Peter & John’s Pump House, Inc., 914 F. Supp. 809 (N.D.N.Y. 1996).

126. See, e.g., Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90 (D. Mass. 1998).

127. See, e.g., New York *ex rel.* Vacco v. Mid-Hudson Med. Grp., 877 F. Supp. 143 (S.D.N.Y. 1995).

128. See, e.g., Support Ministries For Persons With AIDS, Inc. v. Village of Waterford, 799 F. Supp. 272 (N.D.N.Y. 1992).

129. See Illinois v. SDS W. Corp., 640 F. Supp. 2d 1047, 1050 (C.D. Ill. 2009) (citing consumer-protection cases).

130. Hood *ex rel.* Mississippi v. Microsoft Corp., 428 F. Supp. 2d 537, 545 (S.D. Miss. 2006).

131. See, e.g., City of Sausalito v. O’Neill, 386 F.3d 1186, 1197–98 (9th Cir. 2004); Colorado River Indian Tribes v. Town of Parker, 776 F.2d 846, 848 (9th Cir. 1985); *Vehicle Air Pollution Case*, *supra* note 110, at 131.

suing as *parens patriae*.<sup>132</sup> And because the United States Constitution recognizes only “the federal government and the states” as “sovereigns,” the Ninth Circuit held that “political subdivisions”—cities, counties and the like—“cannot sue as *parens patriae*.”<sup>133</sup> Similarly, the Fifth Circuit has held that cities, as mere “creature[s] of the state,” cannot exercise the same *parens patriae* powers as their parent states.<sup>134</sup> Multiple district courts have reached the same conclusion.<sup>135</sup>

Cities have fared only slightly better in state courts. State courts, of course, may impose more lenient standing requirements than federal courts, because state courts are not bound by the federal Constitution’s “case or controversy” requirement. To that end, state courts have occasionally held (or suggested) that cities enjoy authority to sue on behalf of their residents as *parens patriae*.<sup>136</sup> A New York court, for example, held that New York City had the authority to sue as *parens patriae* because its city charter granted it the authority to sue on behalf of its residents.<sup>137</sup> But such cases are few and far between. More frequently, state courts brusquely reject local government entities’ attempts to sue as *parens patriae*, citing federal precedent and noting only that cities and counties “lack the element of sovereignty” necessary to maintain a *parens patriae* suit.<sup>138</sup>

Cities’ inability to sue as *parens patriae* makes it difficult for cities to bring a straightforward public-interest suit based on a harm that has been visited on its residents. Instead, cities must either figure out a way in which wrongdoing harms the city as a body corporate or forego a lawsuit entirely. In Michigan, for example, a court rejected a township’s attempt to sue to protect a local lake “from pollution and its effects” because the township *itself* had not suffered a “specific injury” that was “distinct from those of the general pub-

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132. *Vehicle Air Pollution Case*, *supra* note 110, at 131.

133. *Id.*

134. *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1256 (5th Cir. 1976).

135. *See Brazoria County v. Hartford Cas. Ins. Co.*, No. CIV.A. G-04-691, 2005 WL 1364837, at \*3 (S.D. Tex. June 7, 2005); *Prince George’s County v. Levi*, 79 F.R.D. 1, 4 (D. Md. 1977); *Bd. of Supervisors v. United States*, 408 F. Supp. 556, 566 (E.D. Va. 1976).

136. *See, e.g., City of New York v. Wyman*, 321 N.Y.S.2d 695 (Sup. Ct. 1971), *rev’d on other grounds*, 281 N.E.2d 180 (N.Y. 1972); *see also* Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 365–68 (2006).

137. *Wyman*, 321 N.Y.S.2d at 712.

138. *Bd. of Cty. Comm’rs v. Denver Bd. of Water Comm’rs*, 718 P.2d 235, 241 (Colo. 1986); *Capital View Fire Dist. v. County of Richland*, 377 S.E.2d 122, 123 (S.C. Ct. App. 1989); *see also City of Compton v. Bunner*, 243 Cal. Rptr. 100, 119 (Ct. App. 1988) (ordered not published); *Coldsprings Township v. Kalkaska Cty. Zoning Bd. of Appeals*, 755 N.W.2d 553, 555 (Mich. Ct. App. 2008); *County of Lexington v. City of Columbia*, 400 S.E.2d 146, 147 (S.C. 1991); *Tuma v. Kerr County*, 336 S.W.3d 277, 282 (Tex. App. 2010).

lic.”<sup>139</sup> Similarly, a gun lawsuit brought by the City of Bridgeport, Connecticut, was rejected because the city could not identify a sufficiently “direct” injury *to the city*.<sup>140</sup> For these reasons, as Professor Sarah Swan noted, standing presents perhaps the “biggest doctrinal hurdle” for plaintiff cities.<sup>141</sup>

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In sum, as compared to states, cities face two main obstacles to bringing public-interest lawsuits. First, a number of state and federal statutes expressly empower state AGs to file suit but omit any mention of city attorneys. Second, at least in federal court, cities have generally been denied the authority to sue as *parens patriae*.

### III. STATES EMPOWERING CITIES: HOW STATES CAN REMOVE BARRIERS TO CITY-AS-PLAINTIFF LAWSUITS

To review: Cities across the country are demonstrating an increased appetite for plaintiff’s-side public-interest litigation.<sup>142</sup> Despite skepticism from some corners, this trend should be seen as a mostly positive development from the perspective of states.<sup>143</sup> Yet city-initiated lawsuits face several hurdles, including cities’ inability to sue as *parens patriae* and the fact that cities often lack a statutory cause of action.<sup>144</sup>

What, then, can states do to help cities overcome these hurdles? Quite a lot. States can change their laws to provide cities with a cause of action to enforce various statutes. States, moreover, can delegate to cities the authority to act on behalf of the people of the state (and thus, to sue as *parens patriae*). And, at least in many states, both of these steps can be accomplished either legislatively or through the AG’s office.

#### A. *Providing Cities a Statutory Cause of Action*

The first and most straightforward thing that states can do to facilitate city-initiated lawsuits is to provide cities with an express cause of action to enforce those laws. This idea, though not widely

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139. *Coldsprings Township*, 755 N.W.2d at 556.

140. *See Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 129 (Conn. 2001).

141. Swan, *supra* note 5, at 1252.

142. *See supra* Part I.A.

143. *See supra* Parts I.B; I.C.

144. *See supra* Part II.

implemented, is hardly new or novel. Indeed, in seven states, cities and counties are already provided some authority to sue to enforce state consumer-protection laws.<sup>145</sup>

In one of those states—California—local enforcement of state law has proved quite successful. California’s consumer-protection law expressly grants cities with populations exceeding 750,000 the authority to file suit to enforce the law “in the name of the people of the State of California.”<sup>146</sup> California’s consumer-protection law is robust, broadly prohibiting any “unlawful, unfair or fraudulent business act or practice.”<sup>147</sup> The California Supreme Court has given that language an expansive reading, holding that the law prohibits “anything that can properly be called a business practice and that at the same time is forbidden by law.”<sup>148</sup> What is more, California also grants cities the authority to sue to abate public nuisances on behalf of the “people of the state of California.”<sup>149</sup> Again, “public nuisance” is broadly defined: it includes any nuisance that “affects . . . an entire community or neighborhood, or any considerable number of persons.”<sup>150</sup>

California’s largest cities have made effective use of their formidable litigation authority. The City of San Francisco has filed lawsuits on topics ranging from climate change to lender abuse to unlawful arbitration practices to juvenile health-care.<sup>151</sup> Los Angeles waged a successful battle against unlawful dumping of hazardous waste.<sup>152</sup> And a consortium of Californian cities and counties obtained a massive judgment requiring corporations to abate lead paint from California homes.<sup>153</sup> The success of that lawsuit was

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145. See Morris, *supra* note 103, at 1911.

146. CAL. BUS. & PROF. CODE § 17204 (West 2018).

147. *Id.* § 17200.

148. Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co., 973 P.2d 527, 539 (Cal. 1999).

149. CAL. CODE CIV. PROC. § 731 (West 2018).

150. CAL. CIV. CODE § 3480 (West 2018).

151. See generally Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 51 (Kathleen Claussen et al. eds., 2010). See also Complaint for Public Nuisance, People *ex rel.* Herrera v. BP P.L.C., No. CGC-17-561370 (Cal. Sup. Ct. Sept. 19, 2017), <https://www.sfcityattorney.org/2017/09/19/san-francisco-oakland-sue-top-five-oil-gas-companies-costs-climate-change/> (scroll to the bottom of the page and follow “San Francisco complaint.pdf” hyperlink) (action brought by the San Francisco City Attorney alleging public nuisance related to climate change).

152. Morris, *supra* note 18, at 196–97.

153. See Michael Hiltzik, *In Landmark Ruling, Court Orders Paint Companies to Pay to Clean Lead Paint Out of California Homes*, L.A. TIMES (Nov. 15, 2017, 1:55 PM), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-lead-paint-ruling-20171115-story.html>.

somewhat unexpected. Many other jurisdictions previously tried to sue the lead-paint industry, and nearly all failed.<sup>154</sup>

In light of these successes, Professor Kathleen Morris—herself a veteran of the San Francisco City Attorney’s Office—has called for other states to amend their own organic statutes to allow enforcement by city officials.<sup>155</sup> Unfortunately, Professor Morris’s suggestion has not been taken up by state legislatures, many of whom (as noted earlier) have taken an increasingly adversarial approach to cities generally.<sup>156</sup> Yet, the California model is well worth replicating. California’s largest cities have used their litigation authority to win victories that affect *all* citizens of the State.<sup>157</sup> The lead-paint suit, in particular, is an example of a risky suit that paid tremendous dividends—precisely the type of suit that state governments should encourage cities to pursue. And there have been few, if any, discernible downsides to California empowering its cities. Empowering cities to enforce consumer-protection laws does not, for example, appear to have undermined the business climate in California. California, empowered city attorneys and all, now ranks as the fifth-largest economy in the world.<sup>158</sup>

### B. *Delegating Parens Patriae Standing*

In addition to granting cities the authority to sue to enforce state laws, states can—and should—delegate to cities the authority to sue as *parens patriae*, thus opening a pathway for cities to sue in a representative capacity.

The notion that states can empower cities to sue as *parens patriae* may seem farfetched at first blush. After all, every federal court that has considered the question has flatly rejected the idea that cities can sue as *parens patriae*.<sup>159</sup> So, too, have the vast majority of state courts. Their logic is straightforward: *Parens patriae* accrues only to “sovereigns.”<sup>160</sup> The only two “sovereigns in our constitu-

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154. Multiple cities, in multiple other states, have attempted to sue the lead paint industry—with little to no success. *See, e.g.*, *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 128–29 (Ill. App. Ct. 2005); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. 2007) (en banc).

155. Morris, *supra* note 103, at 1906.

156. *See supra* Part I.B.1.

157. *See supra* notes 154–56 and accompanying text.

158. Kieran Cochran, *California’s Economy Is Now the 5th-Biggest in the World, and Has Overtaken the United Kingdom*, BUS. INSIDER (May 5, 2018 7:09 AM), <https://www.businessinsider.com/california-economy-ranks-5th-in-the-world-beating-the-uk-2018-5>.

159. *See supra* notes 134–38 and accompanying text.

160. *Vehicle Air Pollution Case*, *supra* note 110, at 131.

tional scheme” are “the federal government and the states.”<sup>161</sup> Cities are neither of those entities. Accordingly, cities cannot sue as *parens patriae*.<sup>162</sup>

But even though cities *themselves* lack formal “sovereignty,” nothing prevents cities from exercising a *state’s* sovereign authority to sue as *parens patriae*. That is true (somewhat ironically) because of cities’ subordinate role in the federal constitutional system. Recall that, under longstanding Supreme Court doctrine, cities are nothing more than creations of the state, with no independent constitutional significance. As the Court held in *Hunter v. City of Pittsburgh*, the “number, nature, and duration of the powers conferred upon [cities] . . . rests in the absolute discretion of the state.”<sup>163</sup> Cities are, at bottom, sub-state agencies, conceptually identical to any other agency chartered by the state.

That point is critical, because state-directed litigation is always carried out by a sub-state agency of the state’s choosing. A state, the Supreme Court has recognized, is nothing more than “a political corporate body” that “can act only through agents.”<sup>164</sup> That is obviously true when a state litigates. A state, as a “corporate body,”<sup>165</sup> cannot walk, talk, or write legal briefs. Accordingly, states can litigate only through the designated agents of their choosing. To be sure, as the Supreme Court has recognized, “[t]hat agent is typically the State’s attorney general.”<sup>166</sup> Yet the Court has also recognized that a state may also empower “other officials to speak for the State in federal court.”<sup>167</sup>

So when a state chooses to litigate, it is up to the state to choose who gets to speak for it. Courts will not generally second-guess the state’s choice of a representative.<sup>168</sup> That doctrine is fully consistent with the principle that the state is the relevant unit of government in the American constitutional system, and sub-state actors—AGs and executive-branch departments, as well as cities and counties—have no independent constitutional significance.<sup>169</sup> They are, in the words of *Hunter*, merely “convenient agencies for exercising such of the governmental powers of the state as may be entrusted to

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161. *Id.*

162. *Id.*

163. 207 U.S. 161, 168 (1907) (emphasis added).

164. *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885).

165. *Id.*

166. *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013).

167. *Id.*

168. *See id.*

169. *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 50 (1982) (“[W]e are a Nation of States . . .”).

them.”<sup>170</sup> A state can thus imbue with litigation authority any sub-state actor it chooses without running afoul of federal law.

Accordingly, nothing in federal law prevents a state from entrusting to its *cities* the authority to “speak for the State in federal court.”<sup>171</sup> And when a city steps into the state’s litigation shoes, it should (depending on the scope of its delegated powers) be permitted to sue as *parens patriae*. In such a situation, the city would be speaking not as a municipal corporation, but as an arm of the state. In that respect, it should be treated no differently from a state AG who claims the authority to sue as *parens patriae*.

It may seem odd for a territorially bound city to exercise litigation authority that belongs to the state as a whole. But states *already* divide their litigating units into regional units. Many state AGs maintain regional offices.<sup>172</sup> And when lawyers from one of those regional offices file suit on behalf of the state, they are, presumably, permitted to sue as *parens patriae*.<sup>173</sup> The analysis should be no different for state-empowered cities. In the federal system, after all, cities really are nothing more than territorially bound state administrative agencies, albeit agencies whose leaders are democratically elected.

To be sure, any real-world arrangement in which a city is delegated the authority to sue as *parens patriae* will likely involve the city using that power where a defendant primarily harms city residents.<sup>174</sup> But that is of no moment. Nothing in the doctrine of *parens patriae* requires a state to demonstrate that the complained-about harm affects a geographically diverse cross-section of state residents. Indeed, federal courts already entertain hyper-local *parens patriae* suits. The New York Attorney General’s Office, for example, brought a *parens patriae* suit alleging that a single Syracuse nightclub had engaged in racial discrimination against eight

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170. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

171. *Hollingsworth*, 570 U.S. at 710. Of course, state law may impose some restraints (e.g., by specifying in a state constitution that an attorney general is the sole authorized legal representative of a state). In such cases, a state constitutional amendment would be required to effect a delegation to cities.

172. *See, e.g., Division of Regional Offices*, N.Y. ATT’Y GEN., <https://ag.ny.gov/legal-recruitment/division-regional-offices> (last visited Feb. 3, 2019); *Office of the Attorney General: Regional Offices*, OFF. VA. ATT’Y GEN., <https://www.oag.state.va.us/9-about/268-regional-offices> (last visited Feb. 3, 2019).

173. *See, e.g., New York v. Peter & John’s Pump House*, 914 F. Supp. 809 (N.D.N.Y. 1996) (*parens patriae* suit brought by Syracuse-based assistant attorney general).

174. That said, nothing (at least in federal law) would prevent a state from empowering a city to sue on behalf of residents across the state. A state can modify “all” of a city’s powers, *Hunter*, 207 U.S. at 178, so nothing in federal law would prohibit, for example, the State of Louisiana from giving the City of New Orleans power to sue as *parens patriae* on behalf of all residents of Louisiana.

patrons.<sup>175</sup> Empowering the Syracuse city attorney to bring similarly constrained lawsuits on behalf of the state would not run afoul of the *parens patriae* doctrine.

A state that wishes to empower city-initiated lawsuits, then, can do so simply by enacting laws that delegate to cities the authority to sue as *parens patriae*. Because a state maintains “absolute discretion” on the “number, nature, and duration of the powers conferred upon” cities,<sup>176</sup> a delegation of *parens patriae* authority might be broad or narrow. A state could expansively provide its cities with unfettered *parens patriae* authority, granting cities standing wherever there is an articulable quasi-sovereign interest. Alternatively, a state could limit that delegation to suits involving a particular subject matter or to cities that exceed a certain population threshold.<sup>177</sup> To avoid difficulties with coordination, a state might also provide that a city may sue as *parens patriae* only in the event the state AG declines to press such a suit.

It falls outside the scope of this Article to speculate as to each and every way in which a state might delegate its *parens patriae* authority. And, of course, a state legislature wishing to make such a delegation may have constraints imposed on it by the state constitution. Yet nothing in federal law prohibits a willing state from imbuing its cities with *parens patriae* standing.

### C. *The Role of State Attorneys General*

Given the fraught relationship between states and cities, all of this may appear to be armchair theorizing. Many state legislatures are increasingly antagonistic to local units of government. States are now regularly passing laws that preempt cities from even legislating on certain topics. In this climate, is it realistic to expect those same state legislatures to empower cities to litigate?

Perhaps not. But even without legislative consent, a state AG may well be able to empower plaintiff cities. State AGs, after all, are the actors who are authorized to carry out the duties this Article contemplates could be delegated to cities. As noted, state AGs are empowered to enforce a wide variety of state and federal laws.<sup>178</sup> State AGs, moreover, are generally given authority to sue as *parens*

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175. *Peter & John's Pump House, Inc.*, 914 F. Supp. at 812.

176. *Hunter*, 207 U.S. at 178.

177. This is arguably what California has done, albeit in the context of state statutes. Recall that California grants cities with more than 750,000 people the authority to sue to enforce consumer protection laws “in the name of the people of the State of California.” CAL. BUS. & PROF. CODE § 17204 (West 2018).

178. See *supra* notes 99–105 and accompanying text.



*patriae*.<sup>179</sup> Thus, a state AG could *directly* delegate to cities the litigation authority discussed in this Part without legislative action—so long as state law permits it. Such a delegation could turbocharge cities’ litigation capabilities.

And in many states, the AG’s office can indeed delegate its authority. Most commonly, state statutes provide that AGs may delegate their “duties” and “powers” to employees: assistant attorneys general, deputy attorneys general, and the like.<sup>180</sup> But many states also authorize the AG to delegate the powers of her office to “special assistant attorneys general”—outside lawyers who are not employed by the state.<sup>181</sup> Express statutory authorization to empower outside counsel, moreover, is often not necessary. Even in states where the legislature has not expressly permitted the appointment of “special assistant attorneys general,” courts have held that the AG’s office has the inherent authority to delegate its authority to outside lawyers.<sup>182</sup>

Importantly, few states have imposed any real limits on the types of authority a state AG can delegate.<sup>183</sup> To be sure, a state AG cannot assign away a responsibility that the state’s constitution requires her to personally fulfill.<sup>184</sup> Thus, where a state constitution provides that an elected AG must fulfill the duties of an incapacitated governor,<sup>185</sup> the AG cannot delegate that duty to another. But when it comes to litigation, state AGs have significant discretion to delegate to outside counsel. State AGs, for example, “often” delegate to private plaintiffs’ lawyers the authority to press suits as *parens patriae*<sup>186</sup> even though those private lawyers are not “sovereign,” and are not even employed by the sovereign state.

179. See *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013) (“[A State’s] agent is typically the State’s attorney general.”).

180. 7 AM. JUR. 2D ATT’Y GEN. § 11 (2018); see, e.g., OR. REV. STAT. § 180.140 (2018); N.Y. EXEC. LAW § 62 (McKinney 2018); WASH. REV. CODE § 43.10.060 (2018).

181. 7 AM. JUR. 2D ATT’Y GEN. § 11 (2018); see, e.g., DEL. CODE ANN. tit. 29, § 2505 (2018); 42 R.I. GEN. LAWS § 42-9-2 (2018); S.D. CODIFIED LAWS § 1-11-5 (2018).

182. *State ex rel. Discover Fin. Servs. v. Nibert*, 744 S.E.2d 625, 649 (W. Va. 2013).

183. The process by which a state attorney general can delegate authority to outside counsel, however, varies. In Maryland, for example, an attorney general may hire outside counsel only “with the written approval of the Governor.” MD. CODE ANN., STATE GOV’T § 6-105 (West 2018).

184. *In re Title, Ballot Title & Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colo. Adding Subsection (10) to Sec. 20 of Art. X (Amend TABOR 25)*, 900 P.2d 121, 124 (Colo. 1995) (en banc) (“The only limitation placed on the delegation of duties by . . . the attorney general is a prohibition against the attorney general delegating any of his or her [personal] constitutional duties.”).

185. See, e.g., MICH. CONST. art. V § 26.

186. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758, 764 (S.D. Miss. 2012); see also *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997) (authority to sue as *parens patriae* upheld in a case where Texas was represented by outside counsel).

If AGs can delegate their powers to private attorneys, it stands to reason that they should also be able to delegate those powers to city attorneys. The precise delegation mechanism would vary by state. But in general, a state AG should be able to designate one or more city attorneys as a “special assistant attorney general” capable of suing as *parens patriae* or of wielding a cause of action reserved for state AGs. Alternatively, an AG could delegate authority to a city attorney only for particular issues or lawsuits that directly pertain to the city. Indeed, at least one state AG has done something similar with sub-state units of government. Using nothing more than a memorandum of understanding, Colorado’s AG delegated to the University of Colorado’s Counsel the authority to litigate, on behalf of the AG, all state cases involving the University of Colorado.<sup>187</sup>

Of course, any city attorneys who are delegated such authority would have to abide by relevant ethics and conflict-of-interest rules. But those should not be particularly onerous. Courts have ruled, for example, that criminal defense attorneys may simultaneously maintain appointments as special assistant attorneys general—so long as they are not directly involved in prosecutions.<sup>188</sup> By that light, a city attorney who is designated a special assistant attorney general should not have a conflict, provided that none of his work is directly adverse either to the city or the state.

A public-interest minded AG, then, can provide an end-run around a legislature that is hesitant to empower plaintiff cities. Of course, in many instances, a legislature that is hostile to plaintiff cities is likely to be paired with a state AG who is similarly hostile. But not in all cases. Due in part to partisan gerrymandering, the number of statewide urban votes are often not reflected proportionately in a statewide legislature.<sup>189</sup> It is therefore quite possible for a state legislature to be dominated by rural members who are relatively antagonistic to increased city authority, but for an elected state AG to be more sympathetic to urban interests. The state AG’s office thus provides another powerful tool by which states can empower plaintiff cities.

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187. *Booth v. Univ. of Colorado*, 64 P.3d 926, 927 (Colo. App. 2002), *aff’d*, 78 P.3d 1098 (Colo. 2003).

188. *See, e.g., Hamm v. State*, 913 So. 2d 460, 482 (Ala. Crim. App. 2002); *People v. Rogers*, 382 N.E.2d 1236, 1238 (Ill. App. Ct. 1978).

189. *See, e.g., Barry Yeoman, How Gerrymandering Silenced North Carolina’s Cities*, CITYLAB (Jan. 12, 2018), <https://www.citylab.com/equity/2018/01/how-gerrymandering-silenced-north-carolinas-cities/550406/>.

## CONCLUSION

From a state's perspective, the increased prevalence of city-directed public-interest litigation is a welcome development. Such litigation protects state residents and is relatively cost-effective. For that reason, states should encourage cities to vigorously pursue public-interest litigation on behalf of their citizens. Thankfully (and somewhat ironically) cities' subordinate status allows states to vest cities with significant litigation authority—up to, and including, the authority enjoyed by the state itself.