Cities on Offense: Why Cities Bring Suit and What States Should Do About It

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ABSTRACT

Cities are an important tool for self-governance in the United States. These governments reflect their citizens' identities, values, and beliefs, constituting much more than random groupings of individuals who collectively buy municipal services. While cities have always been active litigants, since the 1980s, they have increasingly leveraged offensive litigation as a means of upholding and defending the interests of their citizens, securing financial compensation for mass tort-style harms, and furthering state-building efforts. Simultaneously, states have engaged in new, punitive forms of preemption—seeking to stymie city-led lawsuits through parallel state attorneys general–initiated *parens patriae* actions and state legislation that limits cities' regulatory and litigation powers. Some of this preemption is warranted insofar as cities' rationale for litigation are illegitimate, as when cities use litigation to seek windfall settlement recoveries or undermine state legislative authority, but in other cases where truly local issues are involved, a city-initiated lawsuit is an appropriate tool for local governance.

This Essay argues first that states should permit city-led lawsuits concerning truly local issues that the state, whether due to its lagging institutional competency or resource constraints, is ill-equipped to address. By contrast, when both a state and its constituent cities seek to litigate an issue, state attorneys general should lead the effort in order to maximize the benefits of centralized litigation; however, cities should be afforded additional procedural protections in such cases to ensure their interests are adequately represented by the state. Reforms centered on "loyalty," "exit," and "voice" have been proposed to address issues in other aggregate

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litigation contexts—both public and private—and offer a useful framework for assessing reforms to safeguard defensible city suits from overly broad state preemption efforts too. Cognizant of the benefits from centralized aggregate litigation and the political reality of the present moment, this Essay next argues that where a state leads litigation implicating its cities' interests, those cities should be afforded heightened voice protections to ensure any settlement or judgment sought is informed by their needs, which ought to be represented by the state attorney general acting as *parens patriae* in the lawsuit. Together, such a model of government-led litigation offers a politically palatable distribution of litigation authority that seeks to protect cities' and states' interests while preserving the benefits of public aggregate litigation.

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I. INTRODUCTION

The city is an important thread in the fabric of self-governance in the United States. Many predate the states where they are located, and even the United States itself.[1] Cities often form an integral part of an individual's sense of self too: "Many people emotionally affiliate with their city of residence . . . ."[2] Cities oftentimes reflect their citizens'

1. *See, e.g.*, *New York City*, HISTORY (Mar. 15, 2019), https://perma.cc/5P49-NPE5 (discussing the four hundred–year history of New York City).

2. Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 96 (2014).

identities, values, and beliefs.[3] This is in no small part because the identities, values, and beliefs prevailing in many large American cities are not reflected writ large in the states where these cities are located.[4]

In an effort to uphold these normative interests and defend them locally and more broadly, in addition to protecting important financial interests, cities have increasingly turned to another inherently American endeavor as their tool of choice: the lawsuit. To be sure, cities have always been active litigants, but historically, their role was largely confined to defense.[5] However, cities have increasingly gone on the offensive since the 1980s,[6] bringing suits against oil companies for perpetuating climate change harms;[7] pharmaceutical companies for causing the opioid crisis;[8] firearm companies for contributing to gun violence;[9] banks for exacerbating the mortgage crisis;[10] and more.[11]

States—despite engaging in plaintiff-side litigation of their own through their attorneys general—have been quick to limit these city-led lawsuits to protect their own litigation positions and, occasionally, industry actors who might find themselves on the other side of city-led lawsuits.[12] Assuming this preemptory trend will continue, this Essay looks

3. *See id.*; *see also* Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1257–58 (2018).

4. *See, e.g.*, Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1998 (2018) ("Even as a majority of states are controlled by Republicans, most cities, particularly big cities, are led by Democrats. Thirty-three of the fifty largest cities have Democratic mayors; fourteen of those are in Republican trifecta states."); Janell Ross, *A Big Blue Dot in a Deep Red State, Ready for Biden*, NBC NEWS (Oct. 31, 2020, 6:47 AM), https://perma.cc/ZS2S-RP55; Jeffrey Ann Goudie, *If We Start Seeing Kansas as Dots of Blue and Red, It Looks Like a Place of Possibilities*, KAN. REFLECTOR (Nov. 28, 2020, 3:27 AM), https://perma.cc/L8RV-5N39.

5. *See* Swan, *supra* note 3, at 1229.

6. *See id.* at 1233–34.

7. *See* Lesley Clark, *Chicago Becomes the Latest City to Sue the Oil Industry over Climate Change*, SCI. AM. (Feb. 21, 2024), https://perma.cc/CXF5-XUPB.

8. *See* Irine Ivanova & Christine Weicher, *Walgreens to Pay San Francisco $229 Million over Opioid Crisis*, CBS NEWS (May 17, 2023, 8:36 PM), https://perma.cc/BF6E-TQMB.

9. *See* Isabella Volmert, *GOP Interference on Decades-Old Gun Lawsuit Leaves Some Indiana Residents Disheartened and Angry*, AP NEWS (Apr. 6, 2024, 2:29 PM), https://perma.cc/XVG7-MAP7 (describing a lawsuit led by Gary, Indiana, targeting the gun industry).

10. *See* Robert Barnes, *Supreme Court Says Cities Can Sue Big Banks over Housing Bubble Damages*, WASH. POST (May 1, 2017, 11:39 AM), https://perma.cc/6DTU-YAFD.

11. Modern city suits, for example, include cases against manufacturing firms responsible for pollution from perfluoroalkyl and polyfluoroalkyl substances, commonly referred to as "PFAS" or "forever chemicals." *See* Laura Shulte & Thao Nguyen, *Wisconsin City Files Lawsuit Against 'Forever Chemical' Makers Amid Groundwater Contamination*, USA TODAY (Dec. 4, 2023, 2:01 PM), https://perma.cc/4TAF-X2R9 (describing a suit brought by Wausau, Wisconsin, to address groundwater contamination from PFAS).

12. *See infra* Section II.B.

to potential procedural protections that states should employ to ensure cities have a meaningful opportunity to raise their concerns and advocate for their interests when states bring suit on behalf of cities and their constituents.[13] Although others have made similar recommendations as it relates to private citizens' relationship with government-led *parens patriae* litigation,[14] this Essay explores the relationship between cities and state-led *parens patriae* litigation.[15]

The Essay proceeds as follows: Part II offers background on city suits and their unique traits and shortcomings before providing a more detailed account of the ways in which states have come to dominate government-led litigation, thereby displacing many city suits. Part III then highlights the goals that cities strive to achieve through litigation, irrespective of the goals' perceived democratic legitimacy. And finally, Part IV offers politically palatable reforms to ensure that state-led litigation gives cities a chance to advocate for themselves and their constituents. A brief conclusion follows. Ultimately, the Essay endeavors to answer two related questions: First, why do cities bring suit? And second, what should states do about it?

II. PLAINTIFF CITIES

When cities engage in offensive litigation, the claims raised and harms complained of tend to fit a certain mold. Almost as predictable is the state-level response to controversial litigation, which often includes state preemption of the cities' efforts through state-initiated litigation or state legislation. Understanding the city suit and the state response helps

13. *See infra* Part IV.

14. *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000) (advocating for increased client autonomy in class actions); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 502–03, 508 (2012) (arguing for increased procedural protections and preemption reforms in *parens patriae* litigation); Gabrielle J. Hanna, *The Helicopter State: Misuse of* Parens Patriae *Unconstitutionally Precludes Individual and Class Claims*, 92 WASH. L. REV. 1955, 1976–77 (2017) (adding joinder and stay policies to reforms advanced by *id.*).

15. Although others have advocated for increased city-led litigation, this Essay does not take a stance on the efficacy of city-led litigation generally speaking. *See, e.g.*, Swan, *supra* note 3 (defending the legality; fiscal feasibility; and moral, political, and sociological legitimacy of the city suit); Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J.L. REFORM 581 (2019) (arguing for states to expand cities' ability to bring public-interest lawsuits). Instead, the Essay focuses on politically palatable reforms that states can enact even if they continue to limit cities' ability to bring certain lawsuits, which seems highly plausible at this juncture. *But see* Sarah L. Swan, *Preempting Plaintiff Cities*, 45 FORDHAM URB. L.J. 1241 (2018) (arguing that locally enacted regulations may be in danger from state-level preemption although city-led litigation may not be as vulnerable).

contextualize the issues in this field and lays important groundwork for potential reforms to address the conflicts therein.

A. Features of City-Led Litigation

City-led lawsuits are typically defined by several characteristics that center both on attributes that the suits and their underlying harms possess and characteristics that the plaintiff-cities lack. Plaintiff-cities typically bring lawsuits as a means of addressing some public (as opposed to private and individual) health- or safety-related harm—specifically, public harms that afflict vulnerable populations and grow slowly over time.[16]

Governments are better equipped to bring these types of suits than private litigants for two primary reasons.[17] First, the collective nature of the harm suffered overcomes defenses centered on individual autonomy. It is more difficult for a smoker to cry foul about the harmful consequences of smoking after a lifetime of cigarette use than it is for a city or state to allege analogous harms arising from the same underlying corporate conduct.[18] Second, *parens patriae* standing and the public nuisance claim[19] seem to interact so as to expedite resolution of mass torts, which many city

16. *See* Swan, *supra* note 3, at 1243–44. Although the presence of these attributes is generally dependent on the context in which the harm materializes. City-led lawsuits surrounding thefts of Kia and Hyundai vehicles, for example, were quickly filed in response to a TikTok trend that enabled aspiring thieves to learn how to exploit the vehicles' lack of antitheft technology, rapidly leading to huge year-over-year increases in Kia and Hyundai thefts. *See* Kelly Puente, *Nashville Sues Automakers Kia and Hyundai over Rash of Car Thefts in Music City*, TENNESSEAN (Sept. 26, 2024, 8:50 AM), https://perma.cc/P487-QQ5N ("In Nashville, 1,504 Kia and Hyundai vehicles were stolen [in 2023] for a 555% increase compared to 2022, and a more than 750% increase since 2021, the lawsuit notes."); *see also* Jule Steinberg, *Kia, Hyundai Must Face US Cities' Claims Cars Are Easy to Steal*, BLOOMBERG L. (Nov. 20, 2023, 9:37 AM), https://perma.cc/JC57-2NN7 (describing lawsuits against Kia and Hyundai filed by New York City, Cincinnati, and other cities).

17. Cost may be another important distinction since many cities have personal law departments that individuals lack, but even cities have trouble financing these suits out-of-pocket. *See* Swan, *supra* note 3, at 1279–84.

18. *See id.* at 1243.

19. The public nuisance action is typically available to private litigants, but they need to show that the harm they personally suffered is a special kind of harm compared to that suffered by the public generally. *See Nuisance*, CORNELL L. SCH., https://perma.cc/LYC5-XWCM (last visited Apr. 18, 2024) ("Most public nuisances must be brought by government officials on behalf of the public. . . . For a private individual to bring an action on their own, they must have suffered a greater or different nuisance than the rest of the public."). Governments (state governments at least) also tend to be viewed as more entitled to certain kinds of relief than private litigants in public nuisance cases. *See* Georgia v. Tenn. Copper Co., 206 U.S. 230, 237–38 (1907) ("If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be.").

suits seek to address, although this resolution may not always be effective at achieving the broader goals of aggregate tort litigation.[20]

Notwithstanding the perceived benefits of *parens patriae* standing and the public nuisance claim, this theory of standing is typically only available to states,[21] and public nuisance claims are difficult to win,[22] even if they may allow municipal litigants to work around standing limitations.[23] Furthermore, other state and federal statutes that cover consumer protection, for example—the basis of many high-profile government-led suits[24]—typically delegate enforcement authority to state attorneys general, not city attorneys.[25] Considering the difficulties that private plaintiffs face suing to combat long-term, public health–based harms, the procedural barriers that cities face in bringing suit to combat the very same harms evinces a constitutional theory (through standing) and a statutory policy (through limits on available causes of action) of only, or at least primarily, supporting states as plaintiffs bringing these lawsuits.

B. State Primacy in City-Plaintiff Suits

Overt actions by state attorneys general and state legislatures seem to reenforce the preference for state-led public litigation.[26] Despite cities'

20. *See* Michelle L. Richards, *Pills, Public Nuisance, and* Parens Patriae*: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. RICH. L. REV. 405, 408–09 (2020) (noting that the synergy between *parens patriae* standing and public nuisance claims may be mutually desirable for the parties while "caution[ing] against the use of *parens patriae* standing and public nuisance claims to achieve a mass settlement without first examining whether the use of those tools will truly lead to a resolution that fulfills the goals of tort litigation").

21. The doctrine of *parens patriae*—translated to mean "parent of the country"—is adopted from English law and allows "state governments to sue on behalf of their citizens when the interests of the state were violated." *Id.* at 410. The concept—which was originally a basis for *federal* Article III standing but has since expanded to state courts despite their relatively lax standing requirements, see Savit, *supra* note 15, at 600—has largely been rejected as a means of establishing cities' standing to sue. *See, e.g.*, *id.* at 604–05 ("Cities [ ] have had far less luck in their attempts to sue as *parens patriae*."); Colo. River Indian Tribes v. Town of Parker, 776 F.2d 846, 848 (9th Cir. 1985) ("[P]olitical subdivisions such as [the Town of] Parker cannot sue as *parens patriae* because their power is derivative and not sovereign.").

22. *See* Swan, *supra* note 3, at 1261 (noting that state and cities' public nuisance claims have "thus far been mostly unsuccessful").

23. *See id.* at 1259–60 (arguing for recognition of cities' standing to bring public nuisance claims under a public-law model for standing).

24. *See, e.g.*, *id.* at 1235 (discussing New Orleans's product liability suit against gun manufacturers).

25. *See* Savit, *supra* note 15, at 600–02 (discussing state-level enforcement of state and federal consumer-protection laws); *cf.* Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903 (2013).

26. Savit identifies two primary arguments that opponents raise concerning city suits: First, "cities might bring suits with which a state disagrees." Savit, *supra* note 15, at 593–95. Second, states "are better situated to bring such lawsuits" because they can deliver a

desire to bring these mass tort-style suits, even on the rare occasion when cities have standing and a statutory cause of action available, states often act to limit cities' ability to move forward with various lawsuits. States primarily limit city-led litigation through preemptory, state-led litigation and legislation that restricts cities' ability to legislate in certain fields.

1. Preemption Through Litigation

When states initiate litigation acting as *parens patriae*, the final adjudication (or settlement more likely) binds all other would-be plaintiffs in the state—including cities.[27] In these cases, there is not necessarily disagreement between states and cities about the need to sue, which alleviates a common concern of critics that cities will bring suits that states disapprove of.[28] However, a debate arises over *who* gets to bring the suit and how the suit will proceed.[29] Several high-profile mass tort cases demonstrate the precarious position this leaves cities in. When forty-six state attorneys general announced the Master Settlement Agreement with the tobacco companies in 1998, Wayne County, Michigan, was dissatisfied and filed suit against the very same companies the following year.[30] The Michigan Supreme Court was asked: "Does the Michigan Attorney General have the authority to bind/release claims of a Michigan county as part of a settlement agreement in an action that the Attorney General brought on behalf of the State of Michigan?" The Court answered in the affirmative.[31]

The New Hampshire Supreme Court responded similarly when the State sued to enjoin duplicative litigation led by the City of Dover. In that case, the state court held that the City's suit was required to yield to the State's because the State was acting as *parens patriae*, meaning that the State was presumably representing the City's interests in addition to the interests of other constituencies in the state.[32] The state court so held despite arguments that "the State's suit name[d] fewer defendants, fail[ed] to allege a number of theories of liability alleged by the cities, fail[ed] to

comprehensive solution, more equitably distribute settlement funds, and litigate with minimal use of high-cost outside counsel. *Id.* at 595–96. Savit also provides subsequent arguments as to why these concerns are "overstated at best" and why states should support city suits. *Id.* at 593–99. *But see* TREVOR S. COX & ELBERT LIN, U.S. CHAMBER OF COM. INST. LEGAL REFORM, MUNICIPALITY LITIGATION: A CONTINUING THREAT 4–5 (2021), https://perma.cc/KQ44-FVZQ (outlining potential problems with city-led litigation).

27. *See* William Organek, *Mass Tort Bankruptcy Goes Public*, 77 VAND. L. REV. 723, 773–74 (2024); *see also* Savit, *supra* note 15, at 591.

28. *See supra* note 26.

29. *See* Savit, *supra* note 15, at 591.

30. *See In re* Certified Question from the U.S. Dist. Ct. for the E. Dist. of Mich., 638 N.W.2d 409, 411–12 (Mich. 2002).

31. *Id.* at 411.

32. *See* State v. City of Dover, 891 A.2d 524, 530–31, 534 (N.H. 2006).

seek the remedies sought by the cities, and [was] subject to defenses based upon the State's history of regulating [the product at issue,] which [were] not applicable to the cities."[33] In its ruling, the state court relied heavily on the test for municipal intervention when a state is already a party that the U.S. Supreme Court articulated in *New Jersey v. New York*—a case where Philadelphia tried to intervene to protect its interest in water from the Delaware River, notwithstanding Pennsylvania's earlier intervention.[34] That test requires the municipality to "show[ ] some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, [that] is not properly represented by the state."[35] The City of Dover failed to carry this burden before the New Hampshire Supreme Court just as Philadelphia failed to do before the U.S. Supreme Court.[36] This high bar for intervention often acts as a significant barrier to city-led litigation, allowing state-led lawsuits to effectively preempt related city-led lawsuits.

2. Preemption Through Legislation

When states and cities litigate the same claims against the same defendants, the intergovernmental disputes are less about *whether* to litigate than they are about *who* litigates. But what happens if a city wants to litigate, but the state does not? In these cases, states will often use legislation to preempt city suits altogether.[37] Sometimes this disagreement is a function of politics—red states preventing blue cities from acting—

33. *Id.* at 531. Similar issues persist today with cities raising objections to state settlements over PFAS-pollution disputes. *See* Clark Mindock, *3M, DuPont PFAS Settlements Called Inadequate by Cities, Other Objectors*, REUTERS (Nov. 13, 2023, 5:57 PM), https://perma.cc/G7FT-6F82 ("[Objecting cities] said the settlements will not fully cover cleanup and legal costs facing water providers after the companies allegedly polluted drinking water with . . . PFAS.").

34. *See City of Dover*, 891 A.2d at 530. The court relied heavily on this "compelling interest" test despite articulating an alternative test tied to the adequacy of the State's representation of the City's interests: "[A] person or entity seeking to maintain a separate suit, as the cities here seek to do, must overcome the 'presumption of adequate representation.'" *Id.* at 531. But this test may not have been any easier to satisfy. The state court added, "'A minimal showing that the representation may be inadequate is not sufficient. The applicant for intervention must demonstrate that its interest is in fact different from that of the state and that that interest will not be represented by the state.'" *Id.* (citing Env't Def. Fund, Inc. v. Higginson, 631 F.2d 738, 740 (D.C. Cir. 1979)).

35. New Jersey v. New York, 345 U.S. 369, 373 (1953).

36. *See City of Dover*, 891 A.2d at 534 ("The cities have failed to show a sufficient reason why the State cannot adequately represent them and obtain a complete remedy.").

37. Although this Subsection broadly refers to preemption through *state* legislation, states can also leverage *federal* law to argue that city-led litigation is preempted. *See* Amicus Brief of Attorney General, City of Charleston v. Brabham Oil Co., No. 2020-CP-10-03975 (S.C. Ct. Com. Pl. Sept. 4, 2024) (arguing that federal common law and the Clean Air Act preempt Charleston's state law claims filed against the oil company–defendants, necessitating the case's dismissal).

although some argue that the acts grow out of deep-seated anti-urbanism as well.[38] However, whenever states enable government through local, independently elected bodies, disagreements are inevitable.[39]

Almost as inevitable then is state intervention in suits where disagreements arise since states have broad latitude to preempt the regulatory actions of their cities. And this seems all the more inevitable today as many states increasingly invoke this preemption power in new, punitive ways.[40] Although state constitutional protections—usually in the form of Home Rule provisions[41]—provide municipalities with an exclusive sphere of local control, by and large, cities are "political subdivisions of the state, created as convenient agencies for exercising . . . the governmental powers of the state as may be intrusted to them."[42] And what powers the state grants, the state may take away.[43]

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38. *See* Briffault, *supra* note 4, at 1997 ("The rise of the new preemption is closely connected to the interacting polarizations of Republican and Democrat, conservative and liberal, and nonurban and urban."); *see also* Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1232 (2018) ("The attack on the cities is not simply a function of present-day polarized American politics. Anti-urbanism is instead deeply embedded in the structure of American federalism . . . .").

39. *See* Savit, *supra* note 15, at 594 ("[T]he 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.").

40. *See, e.g.*, Fla. Carry, Inc. v. City of Tallahassee, 212 So.3d 452 (Fla. Dist. Ct. App. 2017) (concerning a dispute grounded in Florida's preemption of local firearm regulation); FLA. STAT. § 790.33 (2013).

41. *See generally* PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY, NAT'L LEAGUE CITIES (2020), https://perma.cc/7AQC-2J9S.

42. Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907); *see also* Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 50–51 (1982) (highlighting "the federalism principle that we are a Nation of States, a principle that makes no accommodation for sovereign subdivisions of States"); Coleman v. Miller, 307 U.S. 433, 441 (1939) (describing cities as "creatures of the State"). This conclusion is somewhat odd given the lack of Eleventh Amendment protection afforded to municipalities. *See Amendment 11.5.3 Suits Against States*, CONST. ANNOTATED, https://perma.cc/5DVM-B2WJ (last visited Oct. 26, 2024) ("Because Eleventh Amendment sovereign immunity inheres in states and not their subdivision or establishments, a state agency that wishes to claim state sovereign immunity must establish that it is acting as an arm of the state."); *see also* Lake Cnty. Ests. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 400–01 (1979) ("[T]he Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'"). *But see* Printz v. United States, 521 U.S. 898 (1997) (applying some Tenth Amendment protection to "local chief law enforcement officers").

43. *See Hunter*, 207 U.S. at 178–79 ("The state, therefore, at its pleasure, may modify or withdraw all such powers . . . repeal the charter and destroy the corporation . . . conditionally or unconditionally, with or without the consent of the citizens, or even against their protest."). In this version of Home Rule, cities have Home Rule *initiative* powers (i.e., they can enact local regulations), but they lack Home Rule *immunity* (i.e., they cannot overcome state preemption). *See* Schragger, *supra* note 38, at 1220; New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So.2d 1098, 1103 (La. 2002) ("Local governmental autonomy or home rule exists only to the extent that the state

Just as states have acted to restrict local legislative authority, so too have they acted to restrict local litigation authority.[44] States have preempted cities' regulation of the minimum wage,[45] employee benefits,[46] the sharing economy,[47] LGBT discrimination,[48] immigration issues,[49] fracking,[50] and vaping products.[51] Sometimes the preemption directly targets successful city-led litigation after the fact. For example, statutes in Georgia, Louisiana, and Michigan barred cities from suing firearm manufacturers, despite varying levels of success in active suits against the firearms industry across these states.[52] Firearm-litigation battles such as these are still being fought today in at least one other state.[53] Collectively, these cases demonstrate the lengths that states will go to in order to prevent city suits altogether, even if the state has no intention of bringing suit itself.

constitution endows a local governmental entity with two interactive powers: the power to initiate local legislation and the power of immunity from control by the state legislature.").

44. *See* Savit, *supra* note 15, at 589 ("Legislative preemption of cities' *litigation* authority is thus a close cousin of legislative preemption of cities' *regulatory* authority."). Oftentimes, this preemption focuses on deep-pocketed industries with significant lobbying presences in state capitals. *See* Schragger, *supra* note 38, at 1170–74. The capture issues that lobbying creates in states are likely a function of state legislators' limited time and access to expertise and the limited lobbying capacity of most American cities. *See id.* at 1226–28. These capture issues, although not discussed at length in Part III, may also motivate cities to bring lawsuits against industries they deem harmful. *See* Morris, *supra* note 25, at 1915.

45. *See, e.g.*, Ky. Rest. Ass'n v. Louisville/Jefferson Cnty. Metro. Gov't, 501 S.W.3d 425 (Ky. 2016); KY. REV. STAT. ANN. § 337.395 (West 2024).

46. *See, e.g.*, ALA. CODE § 25-7-41(b) (2024).

47. *See, e.g.*, TENN. CODE ANN. § 65-15-302(c) (West 2024).

48. *See, e.g.*, ARK. CODE ANN. § 14-1-403(a) (West 2024).

49. *See, e.g.*, TEX. GOV'T CODE ANN. §§ 752.053, .056, *invalidated by* City of El Cenizo v. Texas, 890 F.3d 164 (2018).

50. *See, e.g.*, State ex rel. Morrison v. Beck Energy Corp., 37 N.E.3d 128 (Ohio 2015); OHIO REV. CODE ANN. § 1509.02 (West 2024).

51. *See, e.g.*, WASH. REV. CODE § 70.345.210 (West 2024). For a more thorough discussion of the extent of state preemption of local regulation, see NICOLE DUPUIS, TREVOR LANGAN, CHRISTINA MCFARLAND, ANGELINA PANETTIERI & BROOKS RAINWATER, NAT'L LEAGUE CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS (2018), https://perma.cc/NXS4-4WFC; see also Schragger, *supra* note 38.

52. *See* Savit, *supra* note 15, at 590; Mayor of Detroit v. Arms Tech., Inc., 669 N.W.2d 845, 854–55 (Mich. Ct. App. 2003) (remanding case for trial court to enter judgment in favor of defendant firearm companies pursuant to a state statute retroactively barring such suits after plaintiff cities previously overcame defendants' motions for summary disposition); MICH. COMP. LAWS § 28.435(9) (2024); *see also* Smith & Wesson Corp. v. City of Atlanta, 543 S.E.2d 16 (Ga. 2001); GA. CODE ANN. 16-11-184 (West 2000) (repealed 2005); Morial v. Smith & Wesson Corp., 785 So.2d 1 (La. 2001); LA. STAT. ANN. § 40:1799 (2024).

53. *See* Volmert, *supra* note 9 (describing Indiana's efforts to thwart litigation the City of Gary initiated against gun manufacturers after a modest victory twenty-five years after the City initiated the lawsuit).

III. WHY CITIES BRING SUIT

Although city-led litigation fits a certain profile and states have historically found it necessary to intervene in these litigation efforts, understanding *why* cities feel compelled to fight these battles (and whether their rationales are legitimate) informs potential solutions to the pervasive city-state tension in this area of law. Cities' primary rationales for offensive litigation center on the local nature of the issues addressed, potential revenue from a settlement or judgment, and various regulatory goals.[54]

A. Proximity to the Issues

A fundamental reason that cities want to engage in litigation is to remedy harms of local concern. The rationale for this urge is two-fold. The first is grounded in the relative institutional competency of cities as it relates to local issues. City governments are closer to some issues than the state, which makes those cities uniquely equipped to understand what and how these problems affect the local community.[55] This, in essence, is the basis of cities' Home Rule powers, and "[i]t is no great stretch to say that this applies to *litigation* addressing local concerns" too.[56] Of course, the same rationale underlies decentralization in the federal-state context.[57] The

54. Scholars have also highlighted regulatory capture in the federal and state governments as a rationale for more localized legal enforcement under, for example, consumer protection statutes. *See* Morris, *supra* note 25, at 1915.

55. *See* Savit, *supra* note 15, at 584 ("What is more, cities are the unit of government that is closest to residents."); *cf.* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 490 n.7, 491 (1999) [hereinafter Barron, *The Promise of Cooley's City*] ("[L]ocal governments are often uniquely well positioned to give content to the substantive constitutional principles that should inform the consideration of such public questions—better positioned in some instances, that is, than either federal or state institutions."); Morris, *supra* note 25, at 1915 (advocating local consumer protection enforcement because of cities' proximity to the commercial lives of their citizens); Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 39 (2012) ("Allowing localities to pursue constitutional claims would bring constitutional litigation *closer to the People*." (emphasis added)). In the constitutional context, the City of Santa Cruz perhaps put it best when it argued that "cities, by virtue of their closeness to the community and their responsibility for carrying out myriad governmental functions—from law enforcement to schooling—are acutely aware of the social consequences of constitutional judgments." David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2239 n.77 (2006).

56. Swan, *supra* note 3, at 1271–72 (emphasis added); *see* Schragger, *supra* note 38, at 1232 ("For some, the states' primacy in the constitutional system may be not only defensible but worthy of celebration. Others might find the Constitution's anti-urban bias to be troubling for reasons of equal treatment or because it generates disfavored policy outcomes.").

57. *See* John Samples & Emily Ekins, *Public Attitudes Toward Federalism: The Public's Preference for Renewed Federalism*, POLICY ANALYSIS, CATO INSTIT. 2 (Nov. 23, 2014), https://perma.cc/3J95-MJYQ ("Contemporary federalists argue that moving decisionmaking closer to the voters will be more efficient, pragmatic, and responsive

second rationale rests in state nescience over local issues. These local issues, like whether a particular neighborhood's garbage is collected on time, may be *too* local to capture state officials' attention.[58] In these cases, cities may be the only governments willing to intervene, whether through litigation or with legislation.[59] Both points challenge the notion that subnational government–led litigation should solely be a prerogative of states.[60]

A different version of the proximity rationale may also motivate city-led litigation if there is any level of political heterogeneity within the state, which there almost universally is across the country.[61] Although the state may ultimately bring litigation over an issue of local importance, the city may believe that the state is a poor advocate for the city's interests,[62] particularly urban cities in states with significant nonurban populations. This heterogeneity of interests is yet another rationale underlying Home Rule.[63] Inadequate representation concerns were central to the City's arguments in *City of Dover*,[64] but these arguments fell short, indicating the great difficulty that cities have successfully demonstrating how their interests are "in fact different from that of the state" such that the city's "interest will not be represented by the state."[65] This high threshold for

because government officials will be in closer proximity to the voters affected by their decisions."). For more on city-centered federalism, see generally Trevor Langan, *Cities Should Be the Focus of Federalism*, NAT'L LEAGUE CITIES (Mar. 6, 2017), https://perma.cc/MT6K-2DPW; Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553 (1987).

58. Resource constraints might prevent a state attorney general's office from bringing the sort of contract claims that might remedy a garbage pick-up issue with a contractor even if the office was made aware of the issue. Knowledge is not a perfect solution in the legislative branch either. If the local issue reaches a legislator or finds itself the subject of a bill within the legislature, the state-wide remedy that would be generated might be ill-fitting in many parts of the state, notwithstanding the fact that it may be the perfect remedy for the idiosyncratic problem faced by a handful of constituents in a particular locality.

59. *See* Savit, *supra* note 15, at 584 ("[E]mpowered 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."); *supra* note 58.

60. *See supra* note 26.

61. *See* Briffault, *supra* note 4, at 1998; *supra* note 39 and accompanying text.

62. *See supra* notes 32–36 and accompanying text.

63. *See* Schragger, *supra* note 38, at 1233:

Another set of arguments in favor of federalism focuses on minority rights and the benefits of fragmented government. If the most consequential political and cultural divide of twenty-first-century America is the division between urbanites and non-urbanites, then state-based federalism will not be responsive. City power is necessary to vindicate the values of diversity, majority rule, and local self-government.

64. *See supra* Subsection II.B.1.

65. State v. City of Dover, 891 A.2d 524, 531 (N.H. 2006) (discussing the test for assessing the permissibility of a city-led suit parallel to a state suit, which was not ultimately applied since no party challenged the "compelling interest" test that prevailed in the lower court).

intervention is not surprising since the city needs to overcome courts' implicit desire to protect judicial economy by limiting the number of parties to a manageable level[66] and courts' trepidation at fielding far-reaching disputes between cities.[67]

B. Financial Compensation

Another primary interest underlying the increase in municipal litigiousness is cities' financial well-being. Cash-strapped cities have increasingly turned to litigation to offset increased costs tied to urban decline, social programs, and security.[68] Settlement funds from litigation are useful given this need for revenue, the relatively limited means by which cities may generate revenue,[69] and the undesirable consequences of raising revenues through other permissible means, like increasing sales taxes.[70] Oftentimes, cities bring suit seeking damages from the very actors that precipitated the problematic budget shortfalls in the first instance. During the Great Recession, for example, high population loss in cities and increased property tax delinquency coupled with an increasing supply of abandoned properties from displaced residents created massive budget shortfalls for cities, and litigation against mortgage lenders sought to address these harms that were ultimately attributable to the lenders' business practices.[71]

Despite the theoretical link between harms suffered and compensation sought, some have criticized the compensation justification for city-led litigation, arguing that the revenues that cities hope to derive from litigation are less about compensation for harm actually suffered than about creating a financial windfall for the plaintiff cities.[72] This concern is

66. *See* FED. R. CIV. P. 24(b)(3) ("In exercising its discretion [to grant a motion for intervention], the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.").

67. *See* New Jersey v. New York, 345 U.S. 369, 373 (1953) ("If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth."). Admittedly, this trepidation is probably less prevalent in state courts.

68. *See* Swan, *supra* note 3, at 1282.

69. *See* Laura L. Gavioli, *Who Should Pay: Obstacles to Cities in Using Affirmative Litigation as a Revenue Source*, 78 TUL. L. REV. 941, 945 (2004) ("Why have cities resorted to litigation as a potential new source of revenue? Two reasons seem apparent. The need for urban revenue is great, and the power of cities to collect revenue and to act, generally, is limited.").

70. *See* GERALD E. FRUG, RICHARD T. FORD, DAVID J. BARRON & MICHELLE W. ANDERSON, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 703 (7th ed. 2022) (highlighting the regressive nature of the sales tax).

71. *See* Swan, *supra* note 3, at 1239–40, 1282–83.

72. *See* COX & LIN, *supra* note 26, at 3 (noting guidelines for opioid litigation funds that were proposed to alleviate this concern). The Chamber of Commerce has—unsurprisingly given the commercial enterprises on the other side of these city suits—been critical of the practice of government-led mass tort litigation, specifically municipal

exacerbated by the limited downside risk cities face in many of these suits since outside counsel working on a contingency-fee basis are often contracted to spearhead the litigation.[73] The contingency-fee arrangements enabling many of these suits are especially controversial since they oftentimes lead to huge sums being paid to private law firms when a lawsuit is successful;[74] however, these arrangements also mean cities pay nothing if a suit fails to deliver a damages award.[75] Notably, these critiques (and defenses) apply to both state-led and city-led litigation.[76]

C. Regulation Through Litigation

Cities may also engage in some litigation as a form of "state building." This litigation gives cities the opportunity—exploiting a regulatory void left by state and federal governments' legislative abdication—to establish themselves as entities capable of delivering justice for their citizens and quasi-states that constitute meaningful political bodies as it relates to local, national, and international issues.[77] Even under the most expansive Home Rule provisions, many of the lawsuits that cities have engaged in can hardly be considered local in the way contemplated by Home Rule jurisprudence today.[78]

This gives rise to a criticism that cities are utilizing litigation as a way to circumvent other limits on their regulatory powers. To critics, cities bring these lawsuits to engage in statewide or national policymaking,

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litigation and suits premised on novel theories of public nuisance. *See* ROB MCKENNA, ELBER LIN & DREW KETTERER, U.S. CHAMBER COM. INST. LEGAL REFORM, MITIGATING MUNICIPALITY LITIGATION: SCOPE AND SOLUTIONS (2019), https://perma.cc/FV2E-C8PK; JOSHUA K. PAYNE & JESS R. NIX, U.S. CHAMBER COM. INST. LEGAL REFORM, WAKING THE LITIGATION MONSTER: THE MISUSE OF PUBLIC NUISANCE (2019), https://perma.cc/PWE3-7EPA.

73. *See* COX & LIN, *supra* note 26, at 3; *see also* Swan, *supra* note 3, at 1280.

74. *See* COX & LIN, *supra* note 26, at 5.

75. *See* Savit, *supra* note 15, at 595–96; Swan, *supra* note 3, at 1279–81; *see also* John C. Coffee, Jr., *"When Smoke Gets in Your Eyes": Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 DEPAUL L. REV. 241, 242–43, 252 (discussing the ubiquity of outside counsel in subnational government–led suits and describing the arrangements as "compensa[tion] . . . with lottery tickets").

76. *See* Savit, *supra* note 15, at 596. With the tobacco litigation in the 1990s, for example, cities complained that settlement funds went into *state* treasuries, and billions ultimately went to private litigation firms despite states' leading role in those cases. *See* Daniel Fisher, *Cities Vs. States: A Looming Battle for Control of High-Stakes Opioid Litigation*, FORBES (Mar. 28, 2018, 10:30 AM), https://perma.cc/HLP7-HT5H.

77. *See* Swan, *supra* note 3, at 1285–86.

78. *Cf.* New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So.2d 1098, 1103 (La. 2002) (invalidating New Orleans's city-wide minimum wage ordinance); Town of Telluride v. Lot Thirty-Four Venture, 3 P.3d 30 (Colo. 2000) (invalidating Telluride's affordable housing land use ordinance). While arguing that issues like gun violence are "local," for example, Savit is making a normative argument about the way the law should be, not a positive argument about how the law currently stands. *See* Savit, *supra* note 15, at 594–95.

which allows them to usurp the powers of the state and federal governments.[79] However, insofar as one believes that cities are more than mere creatures of the state,[80] state building in this manner is a perfectly reasonable exercise of municipal authority as "parent of the city," so to speak—especially in the face of legislative abdication by state legislatures.[81] And as with the financial criticisms raised above, many of the state-building criticisms could be leveled at state attorneys general too.[82] Furthermore, when officials use the courts to fill regulatory voids, some blame also lies with the legislators who permit and enable the void's existence.[83]

79. *See* COX & LIN, *supra* note 26, at 4; Swan, *supra* note 3, at 1231 ("[C]ritics mainly argue that plaintiff cities are usurping the democratic process by regulating through litigation what they cannot regulate directly, thus grossly overstepping the appropriate city-state allotment of power."); *see also* Savit, *supra* note 15, at 589 (arguing that states' legislative preemption of city-led suits, see Subsection II.B.2 above, is a result of the critique that "cities should not be able to accomplish through litigation what they cannot accomplish through regulation"); George Jepsen & Perry Zinn Rowthorn, *Leave Opioid Litigation to State Attorneys General*, WALL ST. J. (Mar. 3, 2014, 4:44 PM), https://perma.cc/DG99-K48B (arguing that local government–led suits undermine the ability of state attorneys general to bring successful litigation).

80. *See* Barron, *The Promise of Cooley's City*, *supra* note 55, at 490–91 (arguing that cities are "important political institutions that are directly responsible for shaping the contours of 'ordinary civic life in a free society,'" which "calls into question their current treatment as institutions that are no different from state environmental agencies on the one hand, or private homeowner associations on the other").

81. After all, the state remains free to preempt this litigation subject to fairly weak Home Rule limitations. *See supra* notes 38–53, 78 and accompanying text.

82. And many have been. While the debate in the city-suit context focuses on cities undermining state authority (particularly authority of state attorneys general, see COX & LIN, *supra* note 26, at 4), a separate debate is raging about the extent to which litigation led by state attorneys general similarly illegitimately siphons off legislative power from state legislatures. *See, e.g.*, Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 969 (2008) ("[T]he attorney general's appropriate role within the constitutional framework is not to replace the legislatively enacted provisions regulating produces with a regulatory scheme, whether resulting from settlement or judicial decree, which implements his or her own vision of social engineering."); Massachusetts v. EPA, 549 U.S. 497 (2007) (state- and city-led litigation concerning climate change); West Virginia v. EPA, 597 U.S. 697 (2022) (state- and city-led litigation concerning climate change); Joe Nocera, *Why Are Lawyers Doing the Work of Lawmakers?*, N.Y. TIMES (Dec. 12, 2021), https://perma.cc/54LX-GFWW (questioning the wisdom of government litigation as an opioid-regulation strategy); *see generally* AEI-BROOKINGS JOINT CTR. FOR REGUL. STUD., REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002). The shorthand for attorney general, "AG," has even been said to stand for "aspiring governor" because of the increased policymaking power the office has subsumed in recent decades. *See* Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 596 (2010).

83. *Cf.* Francesca Procaccini & Nikolas Guggenberger, *Opinion: Angry About the Supreme Court? Blame Congress*, L.A. TIMES (July 5, 2023, 10:59 AM), https://perma.cc/YAE8-PS85 ("Congress has constrained its own legislative capacity while simultaneously neglecting its oversight role. The resulting power vacuum invited Supreme

IV. WHAT STATES SHOULD DO ABOUT IT

If recent trends continue, states—both their legislatures and attorneys general—will continue preempting city suits, seemingly thwarting cities' attempts to utilize litigation to advocate for their citizens' interests, to receive just financial compensation for harms suffered, and to regulate "local" issues.[84] But even if these preemption trends continue and government-led litigation becomes a predominantly state-level affair, cities' litigation-related goals may still be realized through modest procedural reforms to litigation brought by states as *parens patriae*. By allowing cities to maintain select suits that address truly local issues and increasing their voice during state-led litigation in other instances, legitimate goals of city-led litigation will be preserved while simultaneously maximizing the benefits from state-led litigation.

A. Local Issues Demand Local Lawsuits

Inherent in the existence of the city is the power to sue and to be sued.[85] This premise is noncontroversial, having been established by courts, individual city charters, and general municipal incorporation laws in the states.[86] To be sure, this right was never meant to be absolute, but the truly local suits that predate the city-led, mass tort–style litigation discussed in this Essay will likely continue to be noncontroversial applications of this inherent municipal power.[87] As such, when legislatures enact preemptory laws inhibiting cities from bringing specific lawsuits or regulating in certain fields, the legislatures should be careful not to implement restrictions that prevent cities from leveraging their close proximity to certain truly local issues and populations. Theoretically, the suits that cities would most wish to maintain—those concerning local issues that pass under the state's radar and would otherwise go unaddressed entirely—would be the most politically feasible suits to preserve since cities care so much about them in part because states care so little about them. Therefore, allowing these suits to continue will

Court overreach, making the court's imperial problem largely a problem of Congress' secession.").

84. This assumption is supported by states' apparent comfort "punching down" and the punitive nature of the "new preemption." *See* LYDIA BEAN & MARESA STRANO, NEW AM., PUNCHING DOWN: HOW STATES ARE SUPPRESSING LOCAL DEMOCRACY 9–14 (2019), https://perma.cc/DD7L-APF6; Briffault, *supra* note 4.

85. *See* Zachary D. Clopton & Nadav Shoked, *The City Suit*, 72 EMORY L.J. 1351, 1363–64 (2023) (quoting EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS §§ 2486–2487 (1913)).

86. *See id.* at 1356 ("Courts took notice of the mechanical inclusion of the right to sue in practically all city charters ever adopted in America.").

87. One example might include the contract litigation described in the garbage-collection hypothetical above. *See supra* note 58 and accompanying text.

provide cities with a significant benefit at little to no cost to the states' interests.

B. Voice Protections in State-Led Lawsuits

Notwithstanding the rosy picture for suits that concern truly local issues, in some cases cities may seek litigation-based solutions to problems that are not strictly local, which will inevitably create city-state tension. Given modern preemption trends, if this tension builds and cities cannot sue on their own, then cities risk becoming fully detached from state-led litigation that has meaningful implications for cities' policy and financial interests. Reforms to address how "loyalty," "exit," and "voice" may be leveraged to support cities' interests in these state-led cases should, therefore, be earnestly considered by state legislatures.[88] These broad

88. Loyalty, exit, and voice are terms originally used to describe safeguards implicated when agency costs undermine effective governance, primarily in a corporate context. *See* Coffee, *supra* note 14, at 376 & n.17; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337; *see also* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). Hirschman principally argued that when a firm's performance wanes, it learns of the waning when "customers stop buying the firm's products or some members leave the organization" (i.e., exit) or when "customers or the organization's members express their dissatisfaction directly to management . . . or through general protest addressed to anyone who cares to listen" (i.e., voice). HIRSCHMAN, *supra*, at 4. Loyalty, in Hirschman's view, complicates customers' analysis of when exit or voice is most advantageous because the customers are loyal to the firm. *See id.* at 77.

Scholars have since appropriated the terms to describe the varied procedural protections that define the bounds of complex litigation. *See* Lemos, *supra* note 14, at 500–01; Coffee, *supra* note 14, at 376–77. In contrast to Hirschman's view, which placed loyalty, exit, and voice with the consumer, complex litigation scholarship recenters loyalty on the fealty of the class counsel to the class member while opportunities for exit and voice remain with class members. *See* Coffee, *supra* note 14, at 377 n.17. Loyalty conceptualized in this way—the idea that counsel should put her client's interests before her own—permeates Rule 23 of the Federal Rules of Civil Procedure, for example. Rule 23(a) requires as a condition of class certification that "the representative parties will fairly and adequately protect the interests of the class," and Rule 23(g) speaks specifically to class counsel's loyalty, charging class counsel with a duty to "fairly and adequately represent the interests of the class." FED. R. CIV. P. 23(a), (g). Similarly, rules of professional conduct concerning conflicts of interest are replete with limitations imposed on lawyers whenever their "loyalty and exercise of independent judgment" are potentially compromised, including in aggregate litigation contexts specifically. *See* UJVALA SINGH, CALIFORNIA PROFESSIONAL LIABILITY AND RESPONSIBILITY § 6.02 (2024 ed.); MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. ¶ 8 (AM. BAR. ASS'N 1983). The Federal Rules of Civil Procedure codify voice and exit protections too. Rule 23 imposes notice requirements with the goal of providing class members with the opportunity to either influence the ensuing litigation by entering an appearance or opting out of the class action altogether, thus preserving their right to sue in their individual capacities in the future. *See* Lemos, *supra* note 14, at 507 & n.87–88. In damages class actions, "the court must direct to class members the best notice [of the class action] that is practicable under the circumstances," which includes acknowledgment "that a class member may enter an appearance through an attorney if the

classifications of reform—loyalty, exit, and voice—provide a useful framework for assessing potential reforms to protect cities' interests in state-led *parens patriae* litigation.[89]

Courts and legislators alike have focused primarily on loyalty concerns in aggregate litigation,[90] but this concern has not translated to *parens patriae* litigation. Courts tend not to question the loyalty of state attorneys general because they assume that the electoral process provides sufficient guarantees that the attorneys general will vigorously defend the interests of their constituents and subordinate governments.[91] This presumption of loyalty can be contrasted with the more stringent procedural protections that courts afford litigants in conventional aggregate litigation to ensure adequate representation by class counsel.[92] And the efforts by cities to intervene in state-led suits discussed above suggest that cities do not subscribe to this presumption of loyalty in the same way that courts do.[93] But loyalty, exit, and voice can act as substitutes for one another, so minimal scrutiny of loyalty protections can be offset with strengthened exit and voice safeguards as the context warrants.[94]

Unfortunately, courts tend to focus even less on the extent to which litigants in a class, particularly cities, have opportunities for exit and

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member so desires" (a voice protection) and "that the court will exclude from the class any member who requests exclusion" (an exit protection). FED. R. CIV. P. 23(c)(2)(b); *id.*

Coffee and Issacharoff brought loyalty, exit, and voice to aggregate litigation, and Lemos brought the terms into public aggregate litigation. This Essay brings the loyalty, exit, and voice framework a little further still, applying them in the context of city-led litigation.

89. *See* Coffee, *supra* note 14, at 376–77 (describing these three categories from corporate governance and applying them to aggregate litigation); Lemos, *supra* note 14, at 500 (describing the categories' application to class actions).

90. *See* Coffee, *supra* note 14, at 378 ("To date, the Supreme Court has focused primarily on the loyalty component . . . .").

91. *See* Lemos, *supra* note 14, at 510 ("To the extent that courts inquire into the adequacy of public representation, they tend to assume that the attorney general's 'loyalty' to the individuals he represents is assured by his elected status."); Organek, *supra* note 27, at 781–82; Hanna, *supra* note 14, at 1976–77; *cf.* State v. City of Dover, 891 A.2d 524, 531 (N.H. 2006) ("There is no reason for the Court to conclude, on the facts presented, that the State will not seek to obtain full compensation for all communities, including the Cities.").

92. *See* Lemos, *supra* note 14, at 500, 503 ("Questions of adequate representation recede from view when aggregate litigation moves into the public sphere."); Hanna, *supra* note 14, at 1967 ("[I]ndividuals may be bound by the judgment of a *parens patriae* suit without having the opportunity to opt out or even receive notice, and without any inquiry into whether their interests are being adequately represented."); *see also* FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the representative parties will fairly and adequately protect the interests of the class.").

93. *See supra* Subsection II.B.1; Swan, *supra* note 3, at 1273–74 (discussing the City of Dayton's distrust of Ohio's handling of the opioid litigation).

94. *See* Coffee, *supra* note 14, at 376–78.

voice.[95] Exit, for instance, is unavailable to potential private litigants in *parens patriae* litigation, even if those litigants are cities, for many of the reasons discussed above concerning loyalty.[96] If cities' interests are presumably represented in the state *parens patriae* litigation, then notions of fairness require that they do not "get multiple bites at the apple."[97] Reforms to increase exit would also likely undermine the aggregation benefits of state-led litigation[98]—which includes facilitating a global remedy, an overt goal of both attorneys general and defense counsel that typically increases the total settlement amount.[99] Even if states were open to reforms that enable private litigants to exit *parens patriae* litigation in certain circumstances, which some scholars have advocated for,[100] modern preemption trends suggest exit-centered reform is substantially less likely as it relates to cities.

Despite limited loyalty and exit protections, increased voice in state-led litigation may give cities meaningful opportunities to vindicate their interests while preserving the benefits of centralized, state-led litigation. That said, voice-centered reforms have one important limitation worth highlighting at the outset. Voice is not implicated in situations where cities are preempted from bringing suits concerning nonlocal issues that states themselves choose not to pursue, as with the firearm litigation, for example.[101] As such, voice reforms alone leave some local interests vulnerable to frustration when cities want someone to file suit and states ultimately refuse.

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95. *See id.* ("To date, the Supreme Court has focused principally on the loyalty component and ignored the possibility that 'exit' and 'voice' may sometimes be partial substitutes for ideal representational adequacy."); *see also* Lemos, *supra* note 14, at 500.

96. *See* Lemos, *supra* note 14, at 500 ("[T]he prevailing view is that the judgment in a state case is binding 'on every person whom the state represents as *parens patriae*.'" (citing Coffee, *supra* note 14, at 376 & n.17)).

97. *Id.*

98. *See* Hanna, *supra* note 14, at 1984 ("[A]llowing citizens to opt-out of a *parens patriae* suit would defeat the purpose of the state acting on behalf of its citizens. If individuals have the choice to opt-out, the state is [ ] acting on behalf of only some injured citizens, which makes *parens patriae* hardly distinguishable from private class actions.").

99. *See* Jepsen & Rowthorn, *supra* note 79 (arguing that city-led "lawsuits threaten to disrupt [state-led litigation] by delaying a global settlement in the state cases" and undermine negotiations since defendants' agree to come to the negotiating table "as long as they can achieve close to complete global relief from civil litigation"); Organek, *supra* note 27, at 734–35 (describing the peace premium that defendants pay to achieve global relief).

100. *See* Lemos, *supra* note 14, at 542–48 (arguing for a convergence in procedural requirements, including for notice, exit, and preclusion, between *parens patriae* litigation and private class actions); Hanna, *supra* note 14, at 1981–86 (recounting and further contextualizing the arguments advanced by *id.*).

101. *See supra* notes 52–53 and accompanying text; *see also* Amicus Brief of Attorney General, City of Charleston v. Brabham Oil Co., No. 2020-CP-10-03975 (S.C. Ct. Com. Pl. Sept. 4, 2024) (arguing that Charleston's lawsuit should be dismissed even when the Attorney General was not engaged in parallel litigation).

Still, thwarting cities' policymaking interests may be desirable in some cases even if other legitimate goals, like financial compensation for harms suffered, are undermined. All of the concerns that surround extraterritorial effects of state action (i.e., the imposition of costs or other consequences on people and lands beyond the acting state's jurisdiction) apply equally to cities, or perhaps apply even more strongly to cities since they are not themselves considered sovereigns.[102] Further, the policymaking goal of city-led litigation can be seen as the least legitimate of cities' three litigation-based goals because the cities are "regulating through litigation what they cannot regulate directly" and, therefore, "grossly overstepping the appropriate city-state allotment of power."[103] These concerns suggest that cities' state-building goals should be thwarted, at least to some extent.

Nonetheless, voice can—and should—help vindicate cities' other more legitimate litigation goals.[104] Although some states engage with cities in major cases, there are no requirements that states do so.[105] This means that states might pursue a case fully detached from the desires of their constituent cities—as prior litigation has demonstrated.[106] In other aggregate-litigation contexts, this opportunity for input from class members has proven especially valuable in negotiating the terms of settlement, particularly when extracting nonmonetary concessions from defendants.[107]

Legislatures can ensure that cities have a meaningful voice in any litigation that implicates cities' interests by amending statutes that grant state attorneys general causes of action to enforce certain state laws. These amendments should introduce procedural protections that ensure attorneys

102. *Cf.* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 375–76 (2023) (rejecting an expansive interpretation of the Court's extraterritoriality jurisprudence concerning the dormant Commerce Clause but taking care not to "trivialize the role territory and sovereign boundaries play in our federal system"); Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497 (2016); Robin Feldman & Gideon Schor, Lochner *Revenant: The Dormant Commerce Clause & Extraterritoriality*, 16 N.Y.U. J.L. & LIBERTY 209 (2022).

103. Swan, *supra* note 3, at 1231; *accord* COX & LIN, *supra* note 26, at 4. *But see* Savit, *supra* note 15, at 596–99; Swan, *supra* note 3, at 1269–71.

104. *Cf.* William L. Anderson & Richard E. Wallace, Jr., *Torts, Courts and Attorneys General: Tort Litigation by States*, DEF. COUNCIL J. (July 21, 2020), https://perma.cc/W85C-KVTC (discussing the lack of public comment in state-led litigation as compared to the significant public comment periods available during other regulatory processes).

105. *See* Savit, *supra* note 15, at 583 ("To be sure, many states support city participation in public-interest lawsuits and ally with city attorneys in major cases."); *see, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007) (environmental litigation with state and city plaintiffs).

106. *See supra* notes 30–36 and accompanying text.

107. *See* Organek, *supra* note 27, at 774–81 (discussing nonmonetary benefits negotiated during litigation involving the Sackler family and the Boy Scouts of America).

general engage with cities throughout the litigation process and any subsequent settlement negotiations whenever the attorney general invokes *parens patriae* standing.[108] Although these requirements would not compel attorneys general to act on the cities' input or preferences, providing cities with a meaningful opportunity to voice their concerns will strengthen the democratic legitimacy of *parens patriae* suits and provide attorneys general with meaningful information that they might otherwise lack.[109]

Giving cities increased voice in state-led litigation may provide opportunities to advance their financial interests as well, which is especially important since litigants "precluded by *parens patriae* suits have no say in how damages obtained by a *parens patriae* judgment or settlement are disbursed."[110] For example, the lack of input in how funds from the Master Settlement Agreement with the tobacco companies were distributed was a point of contention between cities and states because most money flowed directly into state treasuries, which cities had no control over.[111] Although some modern state-suit settlements take cities into consideration more fully,[112] a statutory obligation to engage with cities as to their financial needs would help alleviate remaining apprehension surrounding mismanagement of prior settlements and

108. Notably, the power of state attorneys general to enforce various laws comes from both federal and state sources, meaning Congress and state legislatures have a role to play in enacting the proposed reform. *See* Savit, *supra* note 15, at 600–02 (describing federal and state consumer protection laws that confer enforcement powers only on state attorneys general). To the extent *parens patriae* standing is conferred on or delegated to attorneys general statutorily by the state legislatures, rather than through constitutions or the common law, these procedural voice protections could instead be incorporated into these *parens patriae* statutes.

109. The success of the National Environmental Policy Act ("NEPA") in the environmental context supports this logic as that law has been held to only impose procedural requirements and not substantive ones—making the law functionally an information generation statute, like the reform proposed here. *See* Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) (establishing NEPA as a procedural statute).

110. Hanna, *supra* note 14, at 1976.

111. *See* Fisher, *supra* note 76; Savit, *supra* note 15, at 596; *cf.* State v. City of Dover, 891 A.2d 524, 531 (N.H. 2006) ("The cities also point out that the State has promised to use any recovery to establish a public fund to be managed by the attorney general instead of distributing it to cities in accordance with individual damages.").

112. *See, e.g.*, FAQS FOR TENNESSEE'S FOOD CITY SETTLEMENT, OFF. TENN. ATT. GEN. 1–2, https://perma.cc/GC9D-RSV3 (last visited Apr. 18, 2024). *But see* Aubrey Whelan, *Pennsylvania Judge Rules in Favor of State in Opioid Settlement Dispute with Philadelphia's District Attorney*, PHILA. INQUIRER (Jan. 26, 2024, 6:27 PM), https://perma.cc/EZH4-JNA8.

actually put states in a superior informational position to distribute funds flowing from settlements or adjudications on the merits.[113]

Insofar as this reform would create a significant procedural burden for states given the potential volume of cities with interests to defend,[114] voice-strengthening reform could instead require engagement with the regional councils (as opposed to individual cities) that already exist in many states to aid regional planning and manage funds received under various federal laws.[115] This modified reform would streamline the proposed consultation process for cities and states but also ensure smaller communities are not left to fend for themselves in high-stakes negotiations with states and other larger municipalities.[116] Even if courts and legislatures fail to see the value in reforms strengthening loyalty and exit protections,[117] simple consultation-based reforms to *parens patriae* litigation centered on amplifying cities' voice at the negotiating table (even if not at the counsel's table) offer states a politically feasible, good-governance solution to the pervasive tension surrounding state-led litigation and the preclusive air that surrounds it.

V. CONCLUSION

Cities are vital components of any state. Cities are "not simply arbitrary collections of small groups of people who happen to buy public services or engage in public decision making together" but "communities, . . . groups of people with shared concerns and values, tied up with the history and circumstances of the particular places in which they are located."[118] And city officials rightfully work hard to protect those communities, alleviate their concerns, and uphold their values. Litigation has increasingly been an avenue for so doing, but states have increasingly

113. *See* Savit, *supra* note 15, at 595 (noting state arguments that states "are better able to equitably allocate any monetary recovery to the parts of state government that need it").

114. *Cf. supra* notes 66–67 and accompanying text.

115. *See, e.g.*, *Organization and Membership*, GREATER NASHVILLE REG'L COUNCIL, https://perma.cc/QE9Q-6QN7 (last visited Apr. 18, 2024) (describing the myriad governments represented on the Council); *Metropolitan Planning Organization (MPO) Coordination*, TN. DEP'T TRANSP., https://perma.cc/4PXN-UPSV (last visited Apr. 18, 2024) (describing "Metropolitan Planning Organizations," which are developed under federal law for the regional planning and distribution of federal highway funding).

116. *Cf.* Schragger, *supra* note 38, at 1228 ("The lack of a concerted municipal qua municipal voice in state-city preemption debates means that specific policy interest groups tend to drive intergovernmental relations."). This sort of regional engagement by which cities engage collectively with the state comports with Frug's argument that cities should band together in order to protect their interests in a federal system. *See* Frug, *supra* note 57.

117. *See supra* notes 90–100 and accompanying text.

118. Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 259 (2004).

thwarted this means of local governance.[119] Insofar as that trend continues, state legislatures should act to ensure cities' voices are heard whenever states engage in *parens patriae* litigation to ensure those same concerns and values inform the lawsuit and any settlement deriving therefrom.[120] Such a reform—even if not the most normatively desirable—is a pragmatic and politically feasible one since states retain primary control over the litigation while providing cities meaningful opportunities to advocate for themselves and their diverse constituencies.

119. *See supra* Part II.
120. *See supra* Part IV.