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Preempting Plaintiff Cities

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PREEMPTING PLAINTIFF CITIES

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ABSTRACT

Within the city-state relationship, states hold an enormous amount of power. Recently, states have been using that power to pass extremely aggressive preemption laws that prohibit cities' regulatory efforts on many fronts. These new preemption laws most commonly occur in the context of red states limiting the regulatory scope of blue cities, inflaming those already tense city-state relationships and cutting into what many view as the appropriate scope of local autonomy.

But despite this intense clash in the regulatory sphere, when we move away from the world of city regulation and toward the world of city litigation, things look surprisingly different. Although cities have been bringing forward hundreds of quite controversial claims against corporate wrongdoers for harms ranging from the subprime mortgage crisis to the opioid epidemic, such plaintiff city litigation has provoked relatively little state hostility. States have not ratcheted up their response to this exercise of city power in at all the same way as they have for regulation. Rather, states have shown a remarkably limited appetite for preempting plaintiff city litigation.

What accounts for these differing responses? Three main factors are likely in play. First, while regulatory preemption is largely the result of intense political polarization, states have historically viewed litigation against corporate wrongdoers in less partisan terms. Both blue and red states have themselves engaged in this type of litigation, and there is thus an institutional tradition of flexibility in this context. Second, and relatedly, the issues at the heart of plaintiff city litigation are often not as politically divisive as those at the heart of the

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preempted regulations. Harms like lead paint poisoning and the opioid epidemic have attracted widespread condemnation, while many of the regulation preemption subjects remain hotly contested. Finally, unlike regulation, litigation is not an obvious instrument of governance. It has unpredictable outcomes, it is not an exclusively governmental power, and it relies on existing law.

Since plaintiff city litigation operates mostly outside of state crosshairs, it can provide a space for cities looking to pursue progressive goals. Plaintiff city litigation may not achieve the same immediate governance goals as regulation, but it does have significant political benefits for cities and their residents. Thus, even in an era of rampant regulatory preemption and deep political animosity between cities and states, plaintiff city litigation presents a viable parallel track for cities to continue their pursuit of urban social justice. Although such litigation does not directly address the contentious issues forming the basis of regulatory battles, it does offer a means of protecting vulnerable communities and advancing goals of democratic equality in other ways.

INTRODUCTION

Within the city-state relationship, states hold enormous power.[1] Lately, states have been exercising that power by passing extremely

1. Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1165 (2018).

broad, extremely aggressive laws that preempt and prohibit cities' regulatory efforts on many fronts.[2] Variously called "hyper preemption,"[3] the "new preemption,"[4] "super preemption,"[5] "nuclear preemption,"[6] or "maximum preemption,"[7] these new state efforts remove significant regulatory authority from cities, and typically function to stop municipalities from enacting socially progressive or liberal-leaning regulation.[8] They occur in a wide variety of contexts, targeting everything from sprinklers and plastic bags, to minimum wage ordinances, and anti-discrimination laws.[9]

While "conflicts between statehouses and city halls" are nothing new,[10] these new preemption laws dramatically differ from the old ones in both quantity and quality. Quantitatively, preemption activity has increased significantly every year since 2011, and shows no signs of slowing down.[11] In fact, given that conservative political groups like the American Legislative Exchange Council (ALEC) offer and encourage the use of preemption law templates,[12] preemption activity is only expected to grow.

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2. *See id.*

3. Erin Scharff, *Hyper Preemption: A Reordering of the State and Local Relationship?*, 106 GEO. L.J. 1469, 1473 (2018).

4. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018).

5. Simon Davis-Cohen, *The Latest Weapon Against Local Democracy? "Super Preemption,"* PROGRESSIVE (Mar. 8, 2018), http://progressive.org/dispatches/super-preemption-local-democracy-180308/ [https://perma.cc/6MNP-GACC].

6. Briffault, *supra* note 4.

7. Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403, 405 (2017).

8. Briffault, *supra* note 4, at 1997, 1998.

9. *Id.* at 1999–2002; *see also* Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2242–43 (2017).

10. William D. Hicks et al., *Home Rule Be Damned: Exploring Policy Conflicts Between the Statehouse and City Hall*, 51 AM. POL. SCI. ASS'N 26, 26 (2018).

11. Riverstone-Newell, *supra* note 7, at 406. Indeed, "2015 saw 'more efforts to undermine local control on more issues than any other year in history.'" *Id.* (quoting Brendan Fischer, *Corporate Interests Take Aim at Local Democracy*, PR WATCH (Feb. 3, 2016, 10:26 AM), https://www.prwatch.org/news/2016/02/13029/2016-ALEC-local-control [https://perma.cc/9GA6-NQJE]).

12. *Id.* at 405–06; Kriston Capps, *The Cities that Are Fighting Back Against State Intervention*, CITYLAB (Oct. 3, 2016), https://www.citylab.com/equity/2016/10/cities-fighting-back-against-state-intervention/502232/ [https://perma.cc/5VE2-KSR6]; *see, e.g.*, *Living Wage Mandate Preemption Act*, AM. LEGISLATIVE EXCH. COUNCIL (Jan. 28, 2013), https://www.alec.org/model-policy/living-wage-mandate-preemption-act/ [https://perma.cc/JN93-AH3X] (providing a model preemption statute for minimum wage ordinances).

Qualitatively, the new preemption laws differ from the old in a number of ways. First, the new preemption laws are punitive.[13] Individual local officials can be sued, fined, or removed (or some combination of all three) for trying to enact regulations in prohibited fields.[14] Local governments can also be fiscally penalized for such attempts, either through the withholding of state funds, or through fines.[15] Second, some new preemption laws fundamentally alter what steps local governments can take to challenge state preemption.[16] In part because of these features, preemption laws have been the source of intense consternation, and are a site of deepening animosity between state and local governments.[17]

Given the high-intensity city-state conflict evident in regulatory preemption, it is perhaps surprising that when we move away from the world of city regulation and into the world of city litigation, things look drastically different. Cities have increasingly been using litigation, in addition to regulation, as a tool to achieve progressive ends and have been bringing forward hundreds of quite controversial claims against corporate wrongdoers in contexts like the opioid epidemic, the financial crisis, lead paint poisoning, and climate change.[18] Yet states have not responded with anywhere near the fury that they have displayed on the regulatory front. Rather, states have adopted a relatively restrained approach to city litigation, and much city litigation continues unimpeded by state intervention.[19]

This Article addresses this paradox. It describes the current state of city litigation preemption, explains the reasons why states have been relatively non-confrontational in this area, and argues that even in this era of rampant regulatory preemption, plaintiff city litigation presents a viable means of accomplishing certain progressive goals. While the possibility of litigation preemption battles constantly looms over plaintiff city litigation, city litigation is often in the shared interest of both cities and states. Such interest alignment suggests

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13. Phillips, *supra* note 9, at 2247.

14. Lisa Gonzalez, *Infographic: The Threat of Super-Preemption to US Cities*, INST. FOR LOC. SELF-RELIANCE (May 11, 2017), https://ilsr.org/infographic-the-threat-of-super-preemption-to-us-cities/ [https://perma.cc/RR2V-92EM].

15. Phillips, *supra* note 9, at 2247, 2250.

16. *Id.* at 2250.

17. *See* Abby Rapoport, *Blue Cities, Red States*, AM. PROSPECT (Aug. 22, 2016), http://prospect.org/article/blue-cities-battle-red-states [https://perma.cc/YYK9-L8N8].

18. *See* Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1285–86 (2018). States sometimes also bring litigation targeting these harms, but cities are motivated to maintain their own lawsuits for a number of reasons. *Id.* at 1272–73.

19. *See* discussion *infra* Part II.

that plaintiff city litigation may well continue to escape the fate of preempted regulation.

Part I of this Article descriptively maps the litigation preemption landscape. It sets out the means by which states can preempt city litigation and explores the instances in which states have done so. This Part shows that while there have been strong state-city disagreements over plaintiff city litigation, to date, litigation preemption has not undergone nearly the same kind of aggressive overhaul as regulatory preemption. Indeed, in a number of recent examples, states have actually backed down from legal confrontations with cities over such litigation.[20]

Part II explains why city litigation has thus far been mostly spared the venomous state response that has befallen regulation. First, the new regulatory preemption is largely the result of extreme political polarization—specifically Republican-led states clashing with Democratic-led cities.[21] This political dynamic is muted in the litigation context. States themselves have a history of engaging in bipartisan litigation against third-party wrongdoers and have long been able to overlook partisan differences when it comes to litigation.[22] Institutionally, such historical flexibility likely enables states to avoid myopic political entrenchment about city litigation as well. States and cities are typically compelled to expend enormous resources as a result of the litigated harms,[23] and where there is a possibility of recouping some of this expense, states are able to look past their ideological differences in favor of a shared benefit for all.

Second, the issues that cities litigate are often much less politically polarizing than those that they regulate. There is general, widespread, bipartisan agreement that the opioid epidemic, lead paint poisoning, and the sub-prime mortgage crisis are serious harms.[24]

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20. *See* discussion *infra* Part II.

21. Briffault, *supra* note 4; Riverstone-Newell, *supra* note 7, at 406; Vladimir Kogan, *Means, Motives, and Opportunities in the New Preemption Wars*, 51 PS: POL. SCI. & POL. 28, 28–29 (2018).

22. PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICY MAKING IN CONTEMPORARY AMERICA 28 (2015).

23. *See, e.g.*, Swan, *supra* note 18, at 1242 (discussing costs to cities arising from the opioid epidemic).

24. Indeed, states themselves engaged in bipartisan litigation against the major banks for their role in creating the mortgage crisis. States are also investigating the opioid manufacturers. Press Release, Eric Schneiderman, N.Y. Att'y Gen., N.Y. Att'y Gen.'s Press Office, A.G. Schneiderman, Bipartisan Coalition of AGs Expand Multistate Investigation into Opioid Crisis (Sept. 19, 2017), https://ag.ny.gov/press-release/ag-schneiderman-bipartisan-coalition-ags-expand-multistate-investigation-opioid-crisis [https://perma.cc/428N-QD48]. Many states passed regulations

Conversely, there is much less agreement on issues like sanctuary cities, local minimum wage laws, and the appropriate scope of anti-discrimination laws.[25]

Third, while regulation is obviously a form of governance, litigation is a much subtler tool.[26] Litigation is more commonly viewed as a form of law enforcement, rather than law creation, and in that sense, it appears non-threatening to those who prefer maintenance of the status quo to progressive change. Plaintiff city litigation does have important political functions, in that it helps to define polities and sends valuable expressive messages,[27] but it does not implicate questions of governing power the way regulation does.

Part III explores the political possibilities for plaintiff city litigation. Although such litigation does not address the contentious issues forming the basis of regulatory battles, it does, as I have argued earlier, offer a means of protecting vulnerable communities in other ways.[28] Thus, even in an era of rampant regulatory preemption and deep political animosity between cities and states, plaintiff city litigation currently remains a viable parallel track for cities to continue pursuing urban social justice.

I. FORMS OF LITIGATION PREEMPTION

Just as states can preempt and prohibit city regulation, they can also preempt and prohibit plaintiff city *litigation*. This Part describes the means by which states preempt plaintiff city litigation: namely, by entering into settlements that preclude cities from litigating, directly suing cities to stop plaintiff city litigation, and by passing legislation that prohibits such litigation.

A. State Settlements that Preclude City Claims

State-city preemption can occur through state settlements with third parties. The best example of this arose in the tobacco litigation context, when state-initiated tobacco litigation ultimately resulted in the Master Settlement Agreement (the "MSA"), one of the largest

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governing lead paint remediation and treatment. Katrina S. Korfmacher & Michael L. Hanley, *Are Local Laws the Key to Ending Childhood Lead Poisoning?*, 38 J. HEALTH POL., POL'Y & L. 757, 757 (2013).

25. However, there are preemption laws over seemingly innocuous areas like plastic bags and sprinklers as well. Briffault, *supra* note 4.

26. *See* NOLETTE, *supra* note 22, at 163 (describing litigation as only "subtly regulatory").

27. *See* Swan, *supra* note 18, at 1285.

28. *Id.*

civil settlements in American history.[29] The story of this preemption-by-settlement actually begins with a story of typical, standard regulatory preemption. In 1985, Florida, influenced heavily by the tobacco lobby, became the first state to preempt local smoking laws.[30] But soon after this regulatory preemption occurred, the tobacco lobby's fortunes changed, as states (and two cities) began to sue tobacco companies in the late 1980s.[31] When the MSA was eventually signed, it both ended the existing litigation and functioned as a form of litigation preemption for cities that did not join the initial litigation.[32] It precluded prospective plaintiff cities from litigation harms caused by tobacco.[33]

As "creatures of the state," municipalities and other sub-state governmental entities "have only those powers granted to them by the state."[34] Accordingly, in the MSA, many state attorneys general could agree not only to relinquish their own future legal claims against the tobacco industry, but also those of their municipalities and other sub-state governmental entities.[35] So when Wayne County, Michigan, for example, filed a suit against tobacco companies shortly after the MSA was signed, the County's case was dismissed on the basis that the state attorney general had released the tobacco defendants from the County's potential claims.[36] Wayne County was

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29. The estimated value at the time of settlement was $105 billion. David M. Cutler et al., *The Economic Impacts of the Tobacco Settlement*, 21 J. POL'Y ANALYSIS & MGMT. 1, 1 (2002).

30. *Preemption of Smokefree Air Laws in Florida*, AM. FOR NONSMOKERS' RIGHTS, http://www.protectlocalcontrol.org/docs/Florida 20preemption 20factsheet_2010.pdf [https://perma.cc/Q4LM-UY6M].

31. *Id.*

32. Peter Enrich, *The Preclusive Effect of the MSA on Future Actions by State and Local Governments Against Participating Manufacturers*, *in* THE MULTISTATE MASTER SETTLEMENT AGREEMENT AND THE FUTURE OF STATE AND LOCAL TOBACCO CONTROL: AN ANALYSIS OF SELECTED TOPICS AND PROVISIONS OF THE MULTISTATE MASTER SETTLEMENT AGREEMENT OF NOVEMBER 23, 1998 37 (Graham Kelder & Patricia Davidson eds., 1999).

33. *Id.*

34. Enrich, *supra* note 32, at 39.

35. *Id.* States could not, however, "release private claims for compensation due to injuries from smoking. As the Georgia Supreme Court stated, for purposes of preclusion in a private suit following a state parens (patriae) action, 'the State and its citizens can be privies . . . only with regard to public claims; they cannot be privies with regard to private claims.'" Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313, 2344 (2016).

36. *In Re*: Certified Question from the U.S. District Court Wayne County v. Philip Morris, 638 N.W.2d 409 (Mich. 2002); *see also* Daniel Fisher, *Cities vs. States: A Looming Battle for Control of High-Stakes Opioid Litigation*, FORBES (Mar. 28,

thus unable to seek or obtain compensation for its alleged tobacco related injuries.[37]

However, not every state was able to so easily preclude its municipalities from initiating tobacco suits. The authority of state attorneys general to bind their municipalities ultimately depends on state law, and states' laws differ.[38] Accordingly, at least one city, St. Louis, successfully defeated a preclusion challenge when it launched a suit against tobacco.[39] The MSA, though, foresaw and prepared for this potential complication. It incorporated terms to minimize the effect of such plaintiff city suits, and included a provision that deducts any damages a locality might recover from those received by the state.[40] The MSA also explicitly gives states the right to intervene in such city suits.[41] The MSA thus leaves states well-incentivized and well-equipped to deter any potential city suits that they did not have overt authority under state law to prohibit.[42]

B. State-City Lawsuits

States may also seek court orders to stop city litigation. For example, in *State v. City of Dover*,[43] two New Hampshire cities, Dover and Portsmouth, brought suit against various defendants for the harms caused by the gasoline additive MTBE.[44] New Hampshire, though, had already brought an MTBE suit, and it sued to have the

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2018), https://www.forbes.com/sites/legalnewsline/2018/03/28/cities-vs-states-a-looming-battle-for-control-of-high-stakes-opioid-litigation/#6c463e074b5d [https://perma.cc/h63h-t8pe].

37. *In Re: Certified Question from the U.S. Dist. Ct. Wayne Cty. v. Philip Morris*, 638 N.W.2d at 411.

38. *Id.*

39. *See* City of St. Louis v. American Tobacco., 70 F. Supp. 2d 1008 (E.D. Mo. 1999). Ultimately, approximately thirteen years after the suit was filed, the case was heard before a jury, and the City lost. *See* Kelsey Volkmann, *Jury Sides with Big Tobacco over Missouri Hospitals*, ST. LOUIS BUS. J. (Apr. 29, 2011), https://www.bizjournals.com/stlouis/news/2011/04/29/jury-sides-with-big-tobacco-over.html [https://perma.cc/6KJD-4V83].

40. Enrich, *supra* note 32, at 39–40.

41. *Id.* at 40.

42. *Id.*

43. 891 A.2d 524 (N.H. 2006). See also the discussion of this case in Margaret Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 521–22 (2012), and in Swan, *supra* note 18, at 1273.

44. MTBE, which stands for methyl tertiary butyl ether, makes the water supply odorous and terrible to taste, and it may cause cancer. *See* Elizabeth Thornburg, *Public as Private and Private as Public: MTBE Litigation in the United States*, *in* CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION 342, 344 (Deborah R. Hensler et al. eds., 2016).

cities' suits stopped. New Hampshire claimed that the Cities' lawsuit was redundant,[45] while the two cities claimed that their lawsuit was necessary because the New Hampshire suit failed to represent their interests.[46] Specifically, the Cities argued that the state suit did not sue enough defendants, did not incorporate all the viable liability theories, sought different remedies from the city suit, and was vulnerable to specific regulatory defenses that were exclusive to the state, but not relevant to the cities.[47] These arguments failed to convince the New Hampshire Supreme Court.[48] The court held that the Cities' suit "must yield" to the State's suit, because the State had parens patriae standing to bring its claim, and there was "no reason to conclude" that it would not adequately represent the cities' interests.[49]

Arkansas also recently sought to preempt city litigation through a court order. The State of Arkansas initiated an opioid lawsuit against three defendants, but a consortium of fifteen cities and seventy-five counties launched their own lawsuit, in which they sued approximately sixty defendants. Notably, they also included the State as a plaintiff.[50] The Arkansas State Attorney General petitioned the Supreme Court, seeking a finding that only the state's Attorney General's Office had the authority to bring forward opioid litigation.[51] In the Attorney General's own words, her petition was "about who represents the people and the State of Arkansas."[52] In

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45. 891 A.2d 524 (N.H. 2006).

46. *Id.* at 531.

47. *Id.*

48. *Id.* at 534.

49. *See also* State of New Hampshire v. Hess Corporation, 20 A.3d 212 (N.H. 2011). In *Hess*, the court equated the Cities' initiation of a lawsuit in *Dover* to an intervention in an existing law suit. The court suggested that in *Dover*, the applicable test should have been the one set out in *Envtl Def. Fund, Inc. v. Higginson*: "*Higginson* held that a person or entity seeking to maintain a separate suit, as the cities here seek to do, must overcome the 'presumption of adequate representation. A minimal showing that the representation is 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.'" *Dover*, 891 A.2d at 531 (quoting Env't Defense Fund, Inc. v. Higginson, 631 F.2d 738, 740 (D.C. Cir. 1979)).

50. David Ramsey, *Attorney General Leslie Rutledge in Spat with Cities and Counties over Opioid Lawsuits*, ARK. BLOG (Apr. 4, 2018, 11:44 PM), https://www.arktimes.com/ArkansasBlog/archives/2018/04/04/attorney-general-leslie-rutledge-in-spat-with-cities-and-counties-over-opioid-lawsuits [https://perma.cc/VW3F-Q9YZ].

51. *Id.*

52. *Id.*

April 2018, the Arkansas Supreme Court rejected the Attorney General's petition, issuing a "one-sentence denial" rebuffing the claim.[53]

C. Preemption through Legislation: Implied, Express, and Super

Another path to preempting litigation is legislative, as states have broad powers to legislatively preempt plaintiff city litigation. This broad legislative power operates in three main ways: through implied preemption, through express preemption, and sometimes, through super preemption. First, states and private parties can make implied preemption arguments, claiming that state legislation which does not directly or obviously target city litigation nevertheless preempts it. Second, states can use express preemption and pass legislation that clearly and obviously prohibits city litigation. Third, some new "super preemption" laws may technically prohibit litigation (though they tend to exist in areas where litigation is already uncommon).

1. Implied Preemption

Implied preemption provides one way that legislation can preempt plaintiff city litigation. Implied preemption occurs when states or private parties argue that a particular piece of state legislation prohibits city action, even though the legislation does not expressly articulate or offer "clear guidance" regarding the preemption being

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53. David Ramsey, *State Supreme Court Denies Attorney General Leslie Rutledge's Request to Pull Prosecutor from Opioid Lawsuit*, ARK. BLOG (Apr. 6, 2018, 8:00 PM), https://www.arktimes.com/ArkansasBlog/archives/2018/04/06/state-supreme-court-denies-attorney-general-leslie-rutledges-request-to-pull-prosecutor-from-opioid-lawsuit [https://perma.cc/68FS-K785]. The court's ruling consisted of a statement that the "petitioner's emergency petition for writ of mandamus is denied," but gave virtually no explanation as to the grounds for the dismissal. *See* Wesley Brown, *AG Rutledge Loses 'Writ of Mandamus' Request, Second Opioid Lawsuit May Proceed with 'State Actor*,' TALK BUS. & POL. (Apr. 6, 2018, 4:29 PM), https://talkbusiness.net/2018/04/ag-rutledge-loses-writ-of-mandamus-request-second-opioid-lawsuit-may-proceed-with-state-actor/ [https://perma.cc/6WYG-9YG2]. But in Alabama, a court dismissed a case filed by a district attorney after the state attorney general filed a "notice of dismissal." Ex parte King, 59 So. 3d 21 (Ala. 2010), discussed in NAAG, *Decisions Affecting the Powers and Duties of State Attorneys General*, 4 NAA GAZETTE 10 (2010), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/HR3T-BU4G]. (noting that the district attorney "pointed to no rule or statute that permits a district attorney, in the exercise of [] duties, to disregard the direction, control, and instruction of the attorney general . . . . Where, as here, the attorney general clearly directs and instructs that litigation on behalf of the State be dismissed, his instructions in that regard take precedence over a district attorney's desire to proceed with the action.").

argued.[54] Implied preemption played an important role in the plaintiff city litigation over the sub-prime mortgage crisis, as banks and financial institutions frequently argued (mostly successfully) that cities could not bring suit against them for the consequences of the sub-prime mortgage crisis because state legislation implicitly preempted such municipal claims.[55]

Many courts agreed with the banks' arguments that the statutory wording at issue meant that the State had intended to occupy the field, and thereby prevent cities from both regulating *and* litigating.[56] In *City of Cleveland v. Ameriquest Mortgage Securities, Inc.*, for example, the court said that an Ohio law expressly preempting municipalities from regulating in the area of mortgage loans also implicitly included a prohibition on municipal litigation in the area.[57] The statute at issue included in its definition of regulation "other actions taken directly or indirectly," and the court found that this broad language "preempts more than just traditional legislative and administrative efforts;" it also encompasses common law based litigation.[58] The court declared:

> Without question, common law actions for damages represent an important manner of regulating conduct [. . .] The United States Supreme Court has recognized that the judicial process can be viewed as the extension of a government's regulatory power. [. . .] Given the expansive wording of the statute and the powerful regulatory potential of common law damage claims, the Court finds that [the statute] includes common law public nuisance claims like the one asserted by the City.[59]

Later, in *City of Cincinnati v. Deutsche Bank National Trust Co.*, the district court found that the City's public nuisance claims against

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54. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114, 1116 (2007). In practice, virtually all implied preemption claims are brought by private parties seeking to get out from under the regulation. *Id.*

55. *See, e.g.*, City of Cleveland v. Ameriquest Mortgage Securities, Inc., 621 F. Supp. 2d 513, 517 (N.D. Ohio 2009).

56. "Some plaintiff city suits are also preempted by federal legislation, as was the case when Los Angeles's case against JPMorgan for predatory lending was preempted by the Financial Institutions Reform, Recovery and Enforcement Act." Swan, *supra* note 18, at n.325 (citing Jonathan Stempel, *JPMorgan Wins Dismissal of Los Angeles Lawsuit over Mortgage Lending*, REUTERS, https://www.reuters.com/article/us-jpmorganchase-losangeles-lawsuit-idUSKBN0G62AT20140806 [https://perma.cc/9JD6-9K3A]).

57. 621 F. Supp. 2d at 517–18.

58. *Id.* at 518.

59. *Id.*

the bank were similarly preempted by the Ohio statute reserving regulatory power over credit to the state.[60]

Implied preemption also resulted in the dismissal of a lead paint case in New Jersey. *In Re Lead Paint Litigation* involved a number of lead paint companies, which successfully argued that the state Lead Paint Act and Products Liability Act preempted a public nuisance claim brought by "twenty-six municipalities and counties."[61] A two-judge dissent, however, disagreed with the four-member majority opinion, instead arguing that public nuisance "exists independent of any legislative pronouncement."[62] The dissent found that "[t]he Lead Paint Act and the public nuisance doctrine" were in fact "complementary mechanisms aimed at the same evil."[63]

As the vociferous dissent in *In Re Lead Paint Litigation* suggests, implied litigation preemption arguments are not always well-received.[64] Some state courts impose a very high bar on implied preemption arguments, requiring "an express statement of intent to preempt before any such preemption will be found."[65]

2. Express Preemption

Unlike the ambiguity which drives implied preemption cases, states sometimes use legislation to expressly and quite clearly prohibit city litigation.[66] This express preemption power is so broad that it may actually extend to *state* litigation as well. Ohio's state legislature tested the limits of express preemption in the early 2000s. At that time, many Ohio cities, as well as the State of Ohio, had all brought suits over lead paint poisoning.[67] After the city cases were dismissed, the Ohio General Assembly passed legislation to terminate the *state* litigation.[68] The battle over the state litigation went to the Ohio

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60. 897 F. Supp. 2d 633, 640 (S.D. Ohio 2012).

61. 924 A.2d 484, 486–87 (N.J. 2007).

62. *Id.* at 508 (Zazzali, J., dissenting).

63. *Id.*

64. *Id.*

65. Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 ECOLOGY L.Q. 575, 597 n.165. New York and Kansas courts are examples of this. *Id.*

66. *See* Diller, *supra* note 54, at 1115 (noting that, with a few exceptions, for express preemption "the court's task is relatively simple: to determine whether the challenged ordinance falls within the subject matter that the legislature expressly preempted").

67. David J. Owsiany, *The Rise and Fall of Lead Paint Litigation in Ohio*, 1 STATE AG TRACKER (2009), https://fedsoc.org/commentary/publications/the-rise-and-fall-of-lead-paint-litigation-in-ohio [https://perma.cc/C7XE-V369].

68. *Id.*

Supreme Court, and "nearly resulted in a constitutional crisis."[69] In 2009, a new state attorney general chose to voluntarily stop the state lead paint litigation, thus ending the difficult preemption issue presented.[70]

That exceptional case illustrates just how expansive express preemption powers may be, but the much more common use of states' express preemption relates to *city* litigation. Express preemption was a frequent occurrence in the gun litigation context, where states passed legislation that explicitly preempted city litigation.[71] For example, after New Orleans filed a plaintiff city gun litigation suit in 1998, the Louisiana legislature passed La. R.S. 40:1799. That statute declared that:

> The governing authority of any political subdivision or local or other governmental authority of the state is precluded and preempted from bringing suit to recover against any firearms or ammunition manufacturer, trade association, or dealer for damages for injury, death, or loss or to seek other injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition. The authority to bring such actions as may be authorized by law shall be reserved exclusively to the state.[72]

In *Morial v. Smith & Wesson*, the Louisiana Supreme Court held that this statutory wording did indeed preempt New Orleans's

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69. *Id.*

70. *Id.*

71. Congress also passed the federal Protection of Lawful Commerce in Arms Act, which barred the vast majority of plaintiff city claims against the gun industry. 15 U.S.C. § 7901 (2018). There was, however, some minimal space to make claims. For example, in *City of N.Y v. Bob Moates' Sport Shop, Inc.*, 253 F.R.D. 237, 238 (E.D.N.Y. 2008),

> [t]he City of New York brought an equitable civil action against out of-state gun retailers for allegedly creating a public nuisance by illegally and negligently furnishing firearms to prohibited persons that were then trafficked into New York City. The court ruled that the PLCAA did not preempt the city's claim because the city had alleged and proffered evidence supporting the conclusion that defendants' participation in straw purchases violated predicate federal statutes specifically relating to the sale and marketing of firearms, as well as a predicate state statute declaring that any unlawfully possessed, transported or disposed handgun is a nuisance.

Gun Industry Immunity, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/ [https://perma.cc/S6AT-CK5Z].

72. LA. STAT. ANN. § 1799 (1999) (quoted in Morial v. Smith & Wesson, 785 So. 2d 1, 19 (La. 2001)).

existing suit.[73] In a similar vein, in *Philadelphia v. Beretta*, the Pennsylvania court found that a 1999 amendment to the state Uniform Firearm Act deprived Philadelphia of the power to sue because it specifically barred a variety of municipal suits against gun manufacturers.[74] In *Sturm v. Atlanta*, the Georgia Court of Appeals reached a similar conclusion based on Georgia's statutory language.[75]

In some cases, the statutory wording was focused on prohibiting localities from *regulating* guns, creating more ambiguity for the courts. Generally, though, if the statutory language is broad enough, many courts have held that the legislation could also preempt plaintiff city gun litigation.[76] There is an important exception: one ongoing case, *City of Gary v. Smith & Wesson*, has survived a preemption challenge. In that case, the City of Gary sued firearm manufacturers, wholesalers, and dealers, bringing claims for public nuisance, negligent distribution of guns, and negligent design.[77] At the trial level, the court held that the suit was barred by an Indiana statute

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73. 785 So. 2d at 21.

74. 126 F. Supp. 2d 882, 890 (E.D. Pa. 2000).

75. 253 S.E.2d 525, 530 (Ga. Ct. App. 2002). The amendment at issue in *Sturm* said:

> [t]he authority to bring suit and right to recover against any firearm or ammunition manufacturer, trade association, or dealer by or on behalf of any governmental unit created by or pursuant to an Act of the General Assembly or the Constitution, or any department, agency, or authority thereof, for damages, abatement, or injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition to the public shall be reserved exclusively to the state. This paragraph shall not prohibit a political subdivision or local government authority from bringing an action against a firearms or ammunition manufacturer or dealer for breach of contract or warranty as to firearms or ammunition purchased by the political subdivision or local government authority.

GA. CODE ANN. § 16-11-173 (2005). *Sturm* is also notable in that the State of Georgia filed an amicus brief, itself arguing that its state legislation had preempted the city litigation. 253 S.E.2d at 529. The court characterized the State's argument as follows: "[t]he State contends that under Georgia's Constitution and laws, it alone has the power to regulate the manufacture, sale, distribution, and promotion of firearms and the lawsuit is an attempt by the City to usurp the governmental power and authority of Georgia's General Assembly. We agree." *Id.*

76. *See, e.g.*, Ganim v. Smith & Wesson Corp., No. CV 990153198S, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999); Penelas v. Arms Tech., Inc., 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001).

77. 801 N.E.2d 1222, 1227 (Ind. 2003).

prohibiting localities from regulating guns.[78] The court of appeals, however, disagreed. The appellate court distinguished litigation from regulation, finding that although the relevant section of the Indiana Code prevented cities from regulating firearms, the City's lawsuit was not a form of regulation.[79] The court characterized the suit as seeking "redress under existing state law of nuisance and negligence,"[80] and held that since "Indiana statutes expressly authorize the City to seek relief against public nuisances," the plaintiff city claim could proceed.[81] In response, Indiana has threatened to enact legislation that would more explicitly prohibit the litigation, and bills to that end have been proposed, but to date none have actually passed.[82]

3. Super Preemption

Leaving aside the exception of *Gary*, the initial state preemption laws, along with the federal Protection of Lawful Commerce in Arms Act, effectively ended municipal gun litigation.[83] Thus, the new wave of firearm "super preemption" laws has little practical effect on the already essentially non-existent city firearms litigation. Nevertheless, these "super preemption" statutes, which threaten local officials with "fines, civil liability, or removal from office for enacting or enforcing firearms measures,"[84] may impact whether plaintiff city gun litigation could occur in the future.[85] Most gun super preemption laws make no specific reference to litigation; thus, arguments that they do not preempt litigation are at least theoretically possible. To be sure, in many instances there will be strong arguments that super preemption laws *do* preclude city firearms litigation—many super preemption laws seem designed to cast as wide a preemption net as possible, and,

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78. *Id.* at 1238.

79. *Id.* at 1239.

80. *Id.* at 1238.

81. *Id.* at 1239.

82. *See* Carole Carson, *Senate Bill Targets Gary Gun Lawsuit*, CHI. TRIB. (Feb. 16, 2015, 7:42 PM), http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-gary-gun-suit-bill-focus-st-0217-20150216-story.html [https://perma.cc/RUT4-TNUK].

83. "At present, 34 states provide either blanket immunity to the gun industry in a way similar to the PLCAA or prohibit cities or other local government entities from bringing lawsuits against certain gun industry defendants." *Gun Industry Immunity*, *supra* note 71. "Those states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and West Virginia." *Id.*

84. Briffault, *supra* note 4, at 2003.

85. *Id.* at 2004.

as already noted, many courts have held that words like "any activity" in regulatory preemption statutes include city litigation.[86] But other courts, like the court in *Gary*, have taken the opposite view.[87] Much turns on the specific statutory wording, and courts in the past have been sometimes certain and other times less convinced that litigation should be lumped in with general regulatory activities. [88]

One of the problems with super preemption, though, is that it may prevent these contestations from ever happening. Super preemption laws are likely to have a chilling effect on the ability of cities to test the boundaries of litigation preemption.[89] If a city considered testing the limits of the federal Protection of Lawful Commerce in Arms Act or state preemption legislation and engage in litigation against the firearm industry, the punitive consequences associated with "super preemption" would almost certainly be a formidable deterrent.[90] When the consequences of overstepping the preemption line are so severe, cities are unlikely to test where it lies.[91]

II. EXPLAINING LITIGATION NON-PREEMPTION

As the preceding section shows, states can and do engage in litigation preemption. However, on the whole, states have generally been relatively restrained in their approach to plaintiff city litigation. In fact, in recent disputes over opioid litigation, states have refrained from engaging in a number of potential confrontations with plaintiff cities.[92] Some states have publicly expressed displeasure with cities'

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86. *See, e.g.*, discussion of *City of Cleveland v. Ameriquest Mortgage Securities, Inc.*, at *infra* Section I.C.1.

87. *See City of Gary*, 801 N.E.2d at 1238–39.

88. *See infra* Section I.C.1.

89. Briffault, *supra* note 4, at 2022.

90. *Id.* at 2023.

91. ARIZ. REV. STAT. ANN. § 41-194.01 (2006) is a good example of this type of law and appears to be a disturbing overreach on the part of the state government. Section 41-194.01 provides that "[a]t the request of one or more members of the legislature, the attorney general shall investigate any ordinance, regulation, order or other official action adopted or taken by the governing body of a county, city or town that the member alleges violates state law or the Constitution of Arizona." ARIZ. REV. STAT. ANN. § 41-194.01 (2006). If the State Attorney General finds that there is indeed a municipal violation of state law, the local government has thirty days "to resolve the violation," or it "lose[s] all state funding." *Id.*

92. *See, e.g.*, *infra* text accompanying note 96. States have also not been overly-interested in engaging in litigation preemption in the climate change context. Many cities have recently engaged in environmental and climate change litigation, including Boulder, New York City, San Francisco, Oakland, and Richmond (California), as well as various counties. John Schwartz, *Climate Lawsuits, Once Limited to the Coasts, Jump Inland*, N.Y. TIMES (Apr. 18, 2018),

litigation efforts against opioid companies and turf wars have certainly developed, but states have thus far been reluctant to avail themselves of all the tools in their litigation preemption arsenals.[93]

A dispute between the City of Reno and the State of Nevada provides a good example of this dynamic. In the fall of 2017, the State Attorney General of Nevada sent a letter to the Mayor of Reno, stating that if Reno went ahead with its stated goal of initiating litigation against the opioid industry, this plaintiff city litigation would "undermine Nevada's position in the multistate investigation" and "thwart . . . any potential discussions with opioid manufacturers, and any potential agreements that could uniformly address the opioid crisis in Nevada."[94] The State Attorney General acknowledged that the City would be able to make certain exclusive legal claims that the State could not, but maintained that the State had "primary

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https://www.nytimes.com/2018/04/18/climate/exxon-climate-lawsuit-colorado.html [https://nyti.ms/2JTkYg8]. But between 2012 and 2017, only two states passed preemption laws directed at climate change – North Carolina in 2012 and Oklahoma in 2014 – and it is not clear whether these would encompass litigation. *See* Elizabeth Daigneau, *Will States Stop Cities from Combatting Climate Change?* GOVERNING (Jan. 2017), http://www.governing.com/topics/transportation-infrastructure/gov-climate-change-states-cities-preemption.html [https://perma.cc/5DGH-8HHN]. One scholar writing in 2018 noted that "state preemption with respect to local climate policy is still uncommon." Dorothy M. Daley, *Climate Change and State and Local Governments: Multiple Dimensions of Intergovernmental Conflict*, 51 PS: POL. SCI. & POL. 33 (Jan. 2018). However, at least in the opioid context, more conflicts could be coming. South Carolina, for instance, "commissioned an opinion from its attorney general on whether cities and counties had independent standing to file their own [opioid] suits." Fisher, *supra* note 36.

93. Sometimes, cities and states simply adopt different approaches, but do so amicably. *See* Swan, *supra* note 18, at 1272. For an example of differences in litigating perspectives that appears to be relatively amicable, in which the city of Dayton sued more opioid defendants, but Ohio seems to have not complained, see Alan Johnson, *Doctors, Cardinal Health Included in Cities' Lawsuits over Opioid Epidemic*, COLUMBUS DISPATCH (June 5, 2017, 10:39 PM), http://www.dispatch.com/news/20170605/doctors-cardinal-health-included-in-cities-lawsuits-over-opioid-epidemic [https://perma.cc/EZC6-EDLF]. Dayton's city suit came a week after the state suit that just targeted manufacturers. *See* Jackie Borchardt, *Dayton, Loraine to Sue Opioid Makers, Drug Distributors and Doctors*, CLEVELAND (June 5, 2017), https://www.cleveland.com/metro/index.ssf/2017/06/dayton_lorain_to_sue_opioid_ma.html [https://perma.cc/BZ4L-Q82P].

94. *See* Riley Snyder, *Laxalt to Schieve: Reno Lawsuit Against Opioid Manufacturers Could Undermine Ongoing State Litigation*, NEV. INDEP. (Nov. 9, 2017, 10:44 PM), https://thenevadaindependent.com/article/laxalt-to-schieve-reno-lawsuit-against-opioid-manufacturers-could-undermine-ongoing-state-litigation [https://perma.cc/AJN7-3EQ2].

jurisdiction" over deceptive trade practices litigation and resources that the City lacked.[95]

Reno's mayor was unmoved by the letter, instead issuing a statement suggesting that the State and City likely disagreed not only about how best to pursue opioid litigation, but also about how to use any settlement funds that might result.[96] In her view, the attorney general's proposed "unified front" and the mayor's proposed "multi-pronged attack" were "not mutually exclusive."[97] Reno voted in early 2018 to move forward with its litigation.[98] Later that year, the State of Nevada filed its own opioid litigation lawsuit against Purdue Pharma, but has not taken further actions opposing Reno.[99] Indeed, the State Attorney General faced significant political heat for the voiced opposition to the plaintiff city litigation, with an opponent in the gubernatorial race noting that the attorney general is "discouraging a City of Reno lawsuit against opioid manufacturers while taking thousands of dollars in campaign contributions from those companies."[100] Perhaps because of this dynamic, when Reno did file its suit in September 2018, Nevada's Attorney General's office issued a conciliatory statement, saying, "We welcome the city of Reno to the ongoing fight to curb Nevada's opioid epidemic."[101]

A similar turf war ensued between Tennessee and a group of Tennessee counties. Initially, the Republican State Attorney General

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95. *Id.*

96. *Id.*

97. Anjeanette Damon, *Opioid Lawsuit: Reno Lawyer Makes Bid for the Case If City Sues*, RENO GAZETTE J. (Nov. 7, 2017), https://www.rgj.com/story/news/2017/11/27/opioid-lawsuit-reno-lawyer-makes-bid-case-if-city-sues/899853001/ [https://perma.cc/2HXK-CUQJ].

98. Michael Scott Davidson, *Reno Follows Clark County in Using Las Vegas Law Firm for Opioid Lawsuit*, LAS VEGAS REV.-J. (Jan. 10, 2018, 6:24 PM), https://www.reviewjournal.com/news/politics-and-government/clark-county/reno-follows-clark-county-in-using-las-vegas-law-firm-for-opioid-lawsuit/ [https://perma.cc/6EY8-P4W8].

99. *See* Press Release, Adam Paul Laxalt, Nev. Att'y Gen., Nev. Att'y Gen. Website, Attorney General Laxalt Files Lawsuit Against Opioid Manufacturer to Combat Nevada's Opioid Epidemic (May 15, 2018), http://ag.nv.gov/News/PR/2018/Attorney_General_Laxalt_Files_Lawsuit_Against_Opioid_Manufacturer_to_Combat_Nevada E2 80 99s_Opioid_Epidemic/ [https://perma.cc/PX5A-7C5N].

100. Riley Snyder & Michelle Rindels, *Governor Candidate Schwartz Backs Reno Opioid Lawsuit, Criticizes Laxalt for Opposing It*, NEV. INDEP. (Nov. 14, 2017), https://thenevadaindependent.com/article/governor-candidate-schwartz-backs-reno-opioid-lawsuit-criticizes-laxalt-for-opposing-it [https://perma.cc/4BMN-UXWK].

101. *City of Reno Files Lawsuits Against Distributors, Manufacturers of Opioids*, MYNEWS4.COM (Sept. 18, 2018), https://mynews4.com/news/local/city-of-reno-files-lawsuit-against-distributors-manufacturers-of-opioids [https://perma.cc/ZE7K-QJ4L].

took issue with an opioid lawsuit initiated by forty-seven Tennessee counties, arguing that it would "impede [his] ability to prosecute all of the opioid litigation implicating the State's interests" and that the counties were wrong to use contingency-fee based private attorneys to help bring their case.[102] He brought a motion to intervene in a number of these lawsuits,[103] but later withdrew the motion with no explanation.[104]

In Oklahoma, Oklahoma City recently brought an opioid suit on its own, despite an earlier state suit. While the Oklahoma Attorney General cautioned that state laws regarding city recovery might impact the city's lawsuit, the state's counsel publicly "wished Oklahoma City well."[105]

Thus, although states have many tools at their disposal to stop plaintiff city litigation, including entering into their own settlements with defendants, directly suing cities for orders of dismissal, and enacting legislation that either expressly or impliedly preempts city claims, states, for the most part, have not interfered with plaintiff city litigation.[106] Unlike in the regulatory preemption context, states have

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102. Fisher, *supra* note 36. The County claims were filed by county district attorneys. Press Release, Herbert H. Slattery III, Tenn. Att'y Gen., Tenn. Att'y Gen. Website, Statement on Opioid Litigation (Mar. 21, 2018), https://www.tn.gov/attorneygeneral/news/2018/3/21/pr18-09.html [https://perma.cc/5CXU-P4PN].

103. *State Attorney General Intervenes in Opioids Lawsuit*, INDEP. HERALD ONEIDA (Mar. 27, 2018), http://ihoneida.com/2018/03/27/state-attorney-general-intervenes-in-opioids-lawsuit/ [https://perma.cc/RPS3-VRM9].

104. Rain Smith, *Tennessee Attorney General Backs off Challenge to Local Opioid Lawsuit*, KINGSPORT TIMES NEWS (Apr. 13, 2018, 10:58 AM), http://www.timesnews.net/Law-Enforcement/2018/04/13/Attorney-general-backs-off-challenge-to-local-opioid-lawsuit [https://perma.cc/Z85C-75WC]. In a different context, a city made a similar move—Lake Elmo intervened in Minnesota's suit against 3M. Nick Ferraro, *Lake Elmo Pulls out of Lawsuit Against 3M*, TWIN CITIES PIONEER PRESS (Aug. 13, 2013, 11:01 PM), https://www.twincities.com/2013/08/13/lake-elmo-pulls-out-of-lawsuit-against-3m/ [https://perma.cc/HU5P-D7P5]. Later, following a turn-over in the local government, Lake Elmo withdrew in order to "collaborate" with 3M on monitoring. *Id.* The State did not publicly take a position on the city's intervention, but 3M opposed it, on the basis that what Lake Elmo was doing was analogous to what Dover did in *State v. Dover*, 891 A.2d 524 (N.H. 2006). *Id.*; *see also* Josephine Marcotty, *Minnesota Settlement with 3M May Fix Drinking Water but Not the Environment*, STAR TRIB. (Mar. 3, 2018, 7:35 PM), http://www.startribune.com/minnesota-settlement-with-3m-may-fix-drinking-water-but-not-the-environment/475741593/ [https://perma.cc/HG33-GVKA].

105. William Crum, *Oklahoma City Council Moves Ahead with Opioid Litigation*, NEWSOK (Aug. 1, 2018, 5:00 AM), https://newsok.com/article/5603264/oklahoma-city-council-moves-ahead-with-opioid-litigation [https://perma.cc/2EDQ-JX3L].

106. *See supra* Part I.

generally not sought to confine or circumscribe city litigative power in a more punitive way than they have before. Neither the tenor nor the pace of states' approach to city litigation has tracked the massive upheaval evident in their overhauled approach to city regulation.

What accounts for the stark difference between state-city battles over city powers of regulation versus state-city battles over city powers of litigation? There are three main factors at work. The first is the states' history of bipartisan litigation. The second is the difference in the issues being litigated versus the issues being regulated. The third is the nature of litigation as a perceived form of governance.

A. Litigation Bipartisanship

There is almost unanimous scholarly agreement that the rise of regulatory hyper preemption is fueled by extreme partisan divide.[107] Specifically, "[t]he driving cause behind the recent preemption trend is a striking political phenomenon: Cities across the nation are becoming more Democratic, while state legislatures are becoming more Republican."[108]

In the litigation context, though, states have often been able to overcome such extreme partisan divide. The lubricant for this litigative flexibility has been financial—the prospect of refilling state coffers and recouping the losses caused by the litigated harms has historically tended to bridge state partisan gaps.[109] Indeed, much of the large-scale attorney general affirmative litigation against private industries has been bipartisan.[110] For instance, all fifty states were part of a 2012 settlement with a number of major banks for the wrongs committed in the aftermath of sub-prime mortgage crisis.[111]

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107. *See, e.g.*, Riverstone-Newell, *supra* note 7, at 407.

108. Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 136 (2017); *see also* Riverstone-Newell, *supra* note 7, at 406 (noting that "[i]f the surge of preemption litigation in recent years has been fueled in part by efforts of industry groups and conservative organizations to rein in cities, it can also be attributed to the growing Republican control of state legislatures, especially after the tide turned in Republicans' favor during the 2010 elections").

109. NOLETTE, *supra* note 22, at 28.

110. *Id.* (noting that "[p]revious research has indicated that coordinated litigation against private industries, at least coordinated consumer protection litigation, tends to attract largely bipartisan participation among AGs").

111. Jeffrey Stinson, *When States Win Lawsuits, Where Does the Money Go*, STATELINE (Feb. 19, 2015, 4:02 PM), https://www.usatoday.com/story/money/business/2015/02/19/stateline-states-lawsuits/23675241/ [https://perma.cc/2TMG-XSKM]. Nolette characterizes the settlement slightly differently, as a "$26 billion settlement in 2012 with the six largest

As scholar Paul Nolette writes in his study of bipartisanship in state litigation, this bipartisanship is somewhat surprising, given that Republican attorneys general could be expected to reject state-led litigation on the grounds that it works against their usual agenda of deregulation and decreased governmental involvement in private sector machinations.[112] Republicans put this concern aside when it comes to involvement in litigation, however, because litigation often results in corporations paying substantial amounts in settlements or judgments.[113] To get a piece of this compensation pie, state attorneys general must participate in the litigation.[114] Thus, even "conservative Republicans" like Alabama State Attorney General William Pryor, who decried most forms of state litigation, nonetheless participated in the tobacco settlement agreement in 1998.[115]

State litigation bipartisanship was also evident in the early acid rain cases and in pharmaceutical litigation.[116] In the acid rain cases in the 1980s, states tended to form litigation coalitions along "regional, rather than partisan lines."[117] Similarly, in pharmaceutical litigation, which makes up "more than one-fifth of all multistate litigation targeting private industry," there has been a norm of "bipartisan cooperation" among state attorneys general.[118] Republican buy-in has been attributed both to the fact that litigation is only "subtly regulatory" and to the reality that the possibility of participating in settlements and judgments provides state attorneys general with a "clear incentive" to join their democratic counterparts.[119]

These same two factors are also present in plaintiff city litigation. Cities often sue for damages, and compensation to cities means fuller

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national banks to settle investigations into the banks' role in the mortgage crisis of the late 2000s." NOLETTE, *supra* note 22, at 24.

112. NOLETTE, *supra* note 22, at 28.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 162.

117. *Id.* at 160. ("What stands out in AGs' earliest collaborations on acid rain issues is that these battles were fairly contained and fought more on regional rather than partisan lines. All of the AGs seeking stricter EPA regulation during the 1980s represented down-wind Northeastern states, with the exception of Minnesota's Hubert Humphrey III. All the AGs who sided with the EPA's position against new air pollution controls represented upwind Midwestern or Southern states, with AGs from other regions sitting on the sidelines. The litigation was bipartisan, as Democratic and Republican AGs from the Northeast joined in all eight of the multistate acid rain cases during this period, while they were opposed in two cases by Democratic AGs representing Midwestern and Southern states.").

118. *Id.* at 23–24.

119. *Id.* at 163.

municipal coffers, which can indirectly translate into less of a strain on state budgets.[120] Further, plaintiff city litigation is similarly only subtly regulatory.[121]

B. Political Divisiveness

Another factor that likely drives states' more tolerant approach to plaintiff city litigation is that the harms cities are litigating over attract almost universal condemnation. Lead paint poisoning, the sub-prime mortgage crisis, and the opioid epidemic are all widely acknowledged to be egregious harms which have caused significant damage to public health and safety, and which have demanded significant expenditures from states and cities in response.[122] Indeed, states themselves have also sued (often in bipartisan litigation) over many of these harms.[123]

In contrast, there is much less consensus regarding issues like the appropriate scope of the Second Amendment, whether anti-discrimination laws can include sexual orientation without infringing on religious liberty, and the impact of sanctuary cities on immigration.[124] While some of the city ordinances that have attracted state regulatory preemption seem ridiculously innocuous, like plastic bag bans, or sprinkler regulation, many are matters of hotly debated public contestation.[125] While there are many persuasive arguments for city regulation in these contested areas, city litigation over less-contentious issues raises substantially less state ire.

C. Litigation v. Regulation

The final factor softening states' response to plaintiff city litigation lies in the nature of litigation itself. While regulation is a quintessential power of governing, the link between litigation and governing is less obvious. First, anyone who has been harmed can litigate; it is not a uniquely governmental action, and thus is not often seen as necessarily an exercise of political power.[126]

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120. *See* Swan, *supra* note 18, at 1280.
121. *See id.* at 1269.
122. *See id.* at 1281–82.
123. *Id.* at 1253.
124. Hicks et al., *supra* note 10, at 26.
125. *See id.* at 1276.
126. State parens patriae litigation may be an exception to this, but cities lack parens patriae power. *See* Swan, *supra* note 18, at 1253.

Second, there is almost always a large amount of uncertainty associated with litigation.[127] What a court and a jury will ultimately decide is not under the control of the litigating party. In fact, the vast majority of plaintiff city litigation has actually thus far achieved only a few judicial victories.[128] The bulk of plaintiff city litigation has been dismissed on various doctrinal and standing grounds.[129] It is thus far from certain that bringing a claim means winning a claim. Unlike regulation, litigation is not a simple translation of the city's will into reality. Instead, that will is mediated by existing law, by courts, and by juries. Litigation can move the law forward in progressive ways, but it can also cause it to contract. Parties can try to "make" law through litigation, but whether or not they will achieve this goal as intended is always unknown. As a governance tool, then, litigation is unreliable and subject to the checks and balances of the law as interpreted and applied by other actors. So far, in the plaintiff city context, those checks and balances have largely stymied city litigation.

Ultimately, the precise nature of the relationship between litigation, regulation, and governing is deeply contested. Some forms of litigation have been linked to future general deterrence, but there is a dearth of research in this area.[130] And although one prominent scholarly argument insists that litigation is a form of regulation when industry defendants agree to settlement terms which govern their future actions, this argument has many detractors.[131] The connection, or lack thereof, between litigation and regulation is often contested in the implied preemption cases. In the majority of such cases, defendants in plaintiff city cases argue that, since cities lack the power

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127. Nevertheless, "[a]lthough the litigation by itself may not always produce immediate and sweeping results, it can function as part of an effective political strategy for achieving social reform." SUSAN GLUCK MEZEY, PITIFUL PLAINTIFFS: CHILD WELFARE LITIGATION AND THE FEDERAL COURTS 5–6 (2000).

128. *See* Swan, *supra* note 18, at 1231 (explaining that the expressive and political value of plaintiff city litigation, however, does not depend on the cases actually winning).

129. *Id.* at 1231.

130. *See, e.g.*, Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* 195 (Vanderbilt Univ. Law Sch. Legal Studies Research Paper Series, Working Paper No. 17-40, 2018).

131. *But see, e.g.*, Morial v. Smith & Wesson, 785 So. 2d 1, 20 (La. 2001) (Calogero, J., dissenting). *See generally* W. KIP VISCUSI, REGULATION THROUGH LITIGATION (2002).

to regulate in a particular area, they are impermissibly using litigation and courts as an end run around this obstacle.[132]

As one judge pointed out, the problem with this argument is that the regulatory effect of plaintiff city litigation is essentially equivalent to the regulatory effect of all litigation.[133] Thus, to equate plaintiff city litigation with regulation would be like saying "that an injured plaintiff is attempting to regulate the automobile industry when he sues to recover damages caused by faulty brakes, or that a survivor is attempting to regulate the airline industry when he sues the airline because his spouse was killed in an airplane crash."[134] However, other courts have held that this is just so—all private party common law actions are in fact regulatory.[135] Despite these debates, one thing that is clear is that litigation is not as obviously regulatory as regulation itself, and this fact seems to have contributed to the tolerance of plaintiff city litigation.

III. THE SPACE FOR PLAINTIFF CITY LITIGATION

Generally speaking, then, states have left cities with a significant amount of litigation leeway. Within this space, cities are able to achieve some of the same kinds of progressive ends as they seek to promote through regulation. Obviously, the many private plaintiffs' attorneys who often partner with plaintiff cities and pursue claims on a contingency fee basis[136] likely believe that plaintiff city claims can and will achieve success at some point, particularly because they can, and often do, serve as a source of revenue for the city.[137] But regardless of potential success, plaintiff city claims themselves have political value: They serve as a means by which cities express political values and define their polities.[138]

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132. Laura L. Gavioli, Comment, *Who Should Pay: Obstacles to Cities in Using Affirmative Litigation as a Source of Revenue*, 78 TUL. L. REV. 941, 952 (2004). To be sure, cities often explicitly indicate that they are looking to litigate because a governance gap has allowed the harm to flourish. *See, e.g.*, Swan, *supra* note 18, at 1269; *see also* Lisa Vanhala & Chris Hilson, *Climate Change Litigation: Symposium Introduction*, L. & POL'Y 141, 143 (2013).

133. *Morial*, 785 So.2d at 20.

134. *Id.*

135. *See* Riegel v. Medtronic, Inc., 552 U.S. 312, 325 (2008).

136. Swan, *supra* note 18, at 1280.

137. *Id.* at 1282 ("Plaintiff city claims can serve as a source of revenue . . . . Many of the parties targeted in plaintiff city claims significantly contributed to the city's distress: part of the very reason why many cities are in financial distress connects to the wrongs alleged in plaintiff city litigation.").

138. *See id.* at 1280, 1285.

Plaintiff cities tend to litigate issues that have their most detrimental impact on vulnerable populations.[139] For example, much of the plaintiff city activity has occurred in the areas of gun violence, lead paint poisoning, environmental harms, and the sub-prime mortgage crisis. These areas all have significant racial dimensions.[140] Gun violence is a public harm that disproportionately affects African American and Hispanic communities—members of both communities are statistically much more likely than whites to be the victims of gun violence.[141] Similarly, lead paint poisoning is a disease that has been "largely eliminated" in wealthy white neighborhoods, and now "primarily impacts African-Americans" in poorer areas.[142] Indeed, environmental harms more broadly are racialized, as a comprehensive study from Harvard University confirmed when it found that in America, "black people are about three times more likely to die from exposure to airborne pollutants than others."[143] The subprime mortgage crisis follows a similar pattern, with its heaviest impact on minority populations, specifically on African American homeowners.[144]

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139. *Id.* at 1246.

140. *Id.* at 1246–48.

141. *See* Roberto A. Ferdman, *The Racial Divide in America's Gun Deaths*, WASH. POST (Sept. 19, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/09/19/the-racial-divide-in-americas-gun-deaths/?utm_term=.4e4b25482a14 [https://perma.cc/6DK5-672C]. Ferdman notes that "[b]etween 2000 and 2010, the death rate due to firearm-related injuries was more than 18.5 per 100,000 among blacks, but only nine per 100,000 among whites." *See also* Josh Sugarmann, *Gun Violence Kills More than 3,000 Hispanics Per Year, New Study Finds*, HUFFINGTON POST (Aug. 6, 2015), https://www.huffingtonpost.com/josh-sugarmann/gun-violence-kills-more-t_b_7948560.html [https://perma.cc/UY25-BZXL].

142. *See* Alissa Scheller & Erin Schumaker, *Lead Poisoning Is Still a Public Health Crisis for African-Americans,* HUFFINGTON POST LIFE: WELLNESS BLOG (July 13, 2015), https://www.huffingtonpost.com/2015/07/13/black-children-at-risk-for-lead-poisoning-_n_7672920.html [https://perma.cc/SQ8N-Z3S6] ("According to the Centers for Disease Control and Prevention, children of color whose families are poor and who live in housing built before 1950 have the highest lead poisoning risk."); *see also* Michael Hawthorne, *Lead Paint Poisons Poor Chicago Kids as City Spends Millions Less on Clean Up*, CHI. TRIB. (May 1, 2015), http://www.chicagotribune.com/news/ct-lead-poisoning-chicago-met-20150501-story.html [https://perma.cc/G8SR-RUEF].

143. *See* Julia Craven, *Even Breathing Is a Risk in One of Orlando's Poorest Neighborhoods*, HUFFINGTON POST (Jan. 23, 2018), https://www.huffingtonpost.com/entry/florida-poor-black-neighborhood-air-pollution_us_5a663a67e4b0e5630072746e [https://perma.cc/DAL4-TADF].

144. David D. Troutt, *Disappearing Neighbors*, 123 HARV. L. REV. F. 21, 24 (2010); Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, *in* THE HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE

Additionally, another active area of plaintiff city litigation – opioid litigation – mostly impacts yet another vulnerable population: the disabled.[145] Patients experiencing pain and difficulty functioning are the most common victims of opioid addictions, and a recent study suggests that patients with certain mental disorders are significantly more likely to receive long-term opioid prescriptions, creating a situation where "[t]he very folks who are most vulnerable to opioids' deadliest effects are unusually likely to get a long-term supply of the drugs."[146]

In bringing litigation in these areas and demanding redress for harms impacting vulnerable and minority populations, cities are affirming the place and inherent value of these groups within the polity.[147] Plaintiff city litigation has specific, expressive value both to members of those harmed communities and beyond. Cities are signalling to impacted community members that they have not been abandoned or discarded, instead they are an important component of the "collective project of making the social world."[148] Rather than contributing to the "legal estrangement" that racial minorities and vulnerable communities experience on many fronts,[149] plaintiff city litigation promotes the progressive ideal of "democratic equality,"

FACE OF POPULATION FLOWS, CLIMATE CHANGE AND ECONOMIC INEQUALITY 195 (Ray Brescia & John Travis Marshall eds., 2016); *see also* Kathleen C. Engel, *Local Governments and Risky Home Loans*, 69 SMU L. REV. 609, 630 (2016) ("Communities of color have been hit hardest by foreclosures because many predatory and subprime lenders targeted people of color with the worst loans.").

145. Ironically, racism actually ended up protecting minority populations from opioid addiction. Put bluntly, "[b]lacks have been undertreated for pain for decades," since "physicians' prejudice leads many to prescribe opioids at a lower rate to black and Latino patients than to whites." Steven Ross Johnson, *The Racial Divide in the Opioid Crisis*, MOD. HEALTHCARE (Feb. 24, 2016), http://www.modernhealthcare.com/article/20160224/NEWS/160229947 [https://perma.cc/G3F4-W396]; *see also* Sophie Gilbert, *"Warning: This Drug May Kill You" Offers a Close-Up of the Opioid Epidemic*, ATLANTIC (May 1, 2017), https://www.theatlantic.com/entertainment/archive/2017/05/warning-this-drug-may-kill-you-opioid-epidemic-hbo/524982/ [https://perma.cc/2XN5-AGQM]. However, that gap is now closing. *See* Josh Katz & Abby Goodnough, *The Opioid Crisis Is Getting Worse, Particularly for Black Americans*, N.Y. TIMES (Dec. 22, 2017), https://www.nytimes.com/interactive/2017/12/22/upshot/opioid-deaths-are-spreading-rapidly-into-black-america.html [https://perma.cc/M8ES-8JTH].

146. Francie Diep, *We're Giving the Most Vulnerable People the Most Potent Opioid Painkiller Prescriptions*, PAC. STANDARD (Jan. 31, 2017), https://psmag.com/news/were-giving-the-most-vulnerable-people-the-most-potent-opioid-painkiller-prescriptions [https://perma.cc/HLB3-FLQP].

147. Swan, *supra* note 18, at 1287.

148. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2085 (2017).

149. *Id.*

broadcasting to corporate wrongdoers and the world outside the city's borders that "there is not a class or group of persons who are somehow entitled to mistreat another, 'lower' class or group."[150] Plaintiff city litigation is a "public action with political significance," a significance not necessarily determined by winning or losing, but by whether the litigation "widens the public imagination about right and wrong," "mobilizes political action behind new social arrangements," or both.[151]

Plaintiff city litigation is part of a larger struggle for local political ordering, and although it may not be able to achieve the exact same goals as local regulation, it can nonetheless serve some of the same broad purposes.[152] Many of the preempted ordinances are rooted in goals of equity, diversity, and democracy— plaintiff city litigation largely shares these goals.[153] And because states have been generally tolerant of plaintiff city litigation and have left a space for it, even as they aggressively attack local regulations, plaintiff city litigation offers an alternative path for cities seeking to advance progressive goals within these troubling state parameters.

CONCLUSION

Like the expressive meaning of plaintiff city litigation, regulatory preemption also has an important signalling function. The new regulatory preemption laws are "a signal to cities . . . that they are powerless to find their own solutions to issues that directly impact

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150. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 982 (2010).

151. John O. Calmore, *Chasing the Wind: Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization*, 37 LOY. L.A. L. REV. 1167, 1198–99 (2004) (quoting Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 758–59 (1988)).

152. For example, Birmingham's minimum wage ordinance, which Alabama preempted, also involved racial equality issues. As Max Rivlin-Nadar wrote:

> The racial optics are also hard to miss. Birmingham is almost 75 percent black; the state as a whole is 75 percent white. In preempting wage legislation, the state government is tamping down a movement led primarily by black service workers and perpetuating the inequality that has kept Birmingham among the most segregated cities in America.

Preemption Bills: A New Conservative Tool to Block Minimum Wage Increases, NEW REPUBLIC (Feb. 29, 2016).

153. These are the goals of the just city, as articulated in Susan S. Fainstein, *Planning and the Just City*, *in* SEARCHING FOR THE JUST CITY: DEBATES IN URBAN THEORY AND PRACTICE 19 (Peter Marcuse et al. eds., 2009). *See also* Swan, *supra* note 18, at 1288–90.

them."[154] But while it is true that the new preemption laws pose a significant problem for local governance, cities are not completely powerless. There is resistance.[155] Cities have directly challenged regulatory preemption laws in the courtrooms and there is hope for some success.[156]

And cities still have some space to maneuver in the litigation context. While states have been eager to preempt cities from engaging in regulation, they have been markedly less inclined to stop cities' litigative efforts. States have the ability to preempt city litigation through various means, including by entering into settlement agreements with industry actors, directly suing cities, or through legislation targeting city litigation; but they have not escalated their use of these tools, despite the hundreds of plaintiff city claims currently pending. Although plaintiff city litigation cannot resolve the highly contentious social issues which are on the frontline of new super or nuclear preemption laws, plaintiff city litigation still provides a parallel path for some cities to advance broad goals of urban social justice. It has expressive and political value, and even in this era of bitter divide between many cities and states, it remains a viable option for many localities.

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154. Franklin R. Guenthner, Note, *Reconsidering Home Rule and City-State Preemption in Abandoned Fields of Law*, 102 MINN. L. REV. 427, 429 (2017).

155. As Michel Foucault theorized, "[w]here there is power, there is resistance." 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 95 (1978).

156. Capps, *supra* note 12 (describing how the city of Cleveland challenged a state law that purported to preempt "a 12-year-old municipal law that requires contractors to hire locally" and how the city of Birmingham is challenging an Alabama law aimed at "preempting local minimum-wage increases").