

# SUING FOR THE CITY: EXPANDING PUBLIC INTEREST GROUP ENFORCEMENT OF MUNICIPAL ORDINANCES

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## Introduction

American cities in the twenty-first century have shown an increasing appetite for regulatory power. More and more, they are stepping outside the traditional spheres of zoning and land-use regulations to create ordinances mandating living wages,<sup>1</sup> promoting gender equality,<sup>2</sup> and regulating emerging markets like ridesharing.<sup>3</sup> In many cases, cities' regulatory goals collide with issues that extend far beyond their borders, as they seek to actively engage in national issues like immigration<sup>4</sup> and even global issues like climate change.<sup>5</sup>

But as cities<sup>6</sup> look to increase their power to shape their communities through regulation, they often face strict budgetary limits

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1. See, e.g., Jennifer Medina & Noam Scheiber, *Los Angeles Lifts Its Minimum Wage to \$15 Per Hour*, N.Y. TIMES (May 19, 2015), <https://www.nytimes.com/2015/05/20/us/los-angeles-expected-to-raise-minimum-wage-to-15-an-hour.html> (on file with the Columbia Law Human Rights Law Review) (reporting on Los Angeles's intention to enact a 67% increase in the minimum wage by 2020).

2. See, e.g., Press Release, City of New York, Mayor de Blasio Announces Stronger Pregnancy Protections in the Workplace, Housing and Public Spaces (May 6, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/436-16/mayor-de-blasio-stronger-pregnancy-protections-the-workplace-housing-public-spaces> [<https://perma.cc/LBJ6-JZGC>] (informing the public of new guidelines providing increased clarity about the accommodations that must be made for employees based on pregnancy, childbirth, or a related medical condition).

3. Nick Wingfield & Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES (Dec. 14, 2015), <https://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html> (on file with the Columbia Law Human Rights Law Review) (describing Seattle City Council's unanimous vote to allow drivers for ride-hailing apps to form unions).

4. See, e.g., Press Release, City Attorney of San Francisco, Herrera Moves to Have Trump's Sanctuary Executive Order Ruled Unconstitutional (Aug. 30, 2017), <https://www.sfcityattorney.org/2017/08/30/herrera-moves-trumps-sanctuary-executive-order-ruled-unconstitutional/> [<https://perma.cc/5NTY-VEBQ>] (announcing the City Attorney's motion for summary judgment on the constitutionality of Executive Order 13786, which would have withheld federal funding from "sanctuary jurisdictions").

5. Ivo Daalder, *Why Cities Need Their Own Foreign Policies*, POLITICO MAG. (June 6, 2017), <https://www.politico.com/magazine/story/2017/06/06/why-cities-need-their-own-foreign-policies-215234> [<https://perma.cc/SC68-K9PL>] (describing how many U.S. mayors committed their cities to the goals of the Paris climate accord in the wake of the U.S.'s decision to leave).

6. Local governments in the United States go by a wide variety of names: city, county, township, parish, and village, to name a few. In some states, these

on how effectively they can enforce their own laws. To remedy this situation, some cities have sought to privatize the civil enforcement of their laws. If a minimum-wage worker can sue their employer for violating a wage ordinance, the city no longer has to commit as many of its own resources to regulate employers. Through the creation of private rights of action, cities can increase their enforcement capabilities without draining their coffers, which allows them to enact even bolder regulatory agendas.

However, the traditional private right of action is limited to those who have already been directly harmed by an illegal action, making it harder to utilize. To expand its scope, some cities have passed ordinances with private rights of action that grant parties the ability to sue violators even if the plaintiff was not directly affected by the violation of the ordinance. If adopted more widely, these third-party private rights of action could potentially recruit a wide range of non-profits and community groups as civil enforcers of municipal policies. But, as cities consider whether to implement third-party private rights of action, they must strain against the confines of a federalist system that relegates them to the bottom of the pecking order. It is not clear whether our federalist system allows cities to innovate in this way, and if it does, whether they should.

This Note proceeds in three parts. Part I explains the concept of a private right of action, demonstrates how it has been used in the municipal context, and describes a developing form of the private right of action: the third-party private right of action. Part II discusses the legal framework that allows cities to create third-party private rights of action, as well as the legal limitations that constrain cities should they attempt to do so. Part III addresses the policy considerations in support of municipal third-party private rights of action, as well as potential criticisms. It concludes that cities should experiment further with this method of enforcement and suggests legislative areas where cities could benefit from creating third-party private rights of action.

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distinctions meaningfully signify differences in the amount of power these governments possess, while in others they reflect quirks of history. For simplicity, this Note will use the terms city and municipality as shorthand for local governments with general powers.

## I. THE PRIVATE RIGHT OF ACTION AND MUNICIPAL CIVIL ENFORCEMENT

As with any regulatory regime, municipal ordinances require effective enforcement to achieve their desired results. But municipalities, especially smaller cities, often have fewer resources to devote to enforcing their regulations than their state and federal counterparts. Many cities have turned to the private right of action to aid in the enforcement of their legislative agendas.

A private right of action, also called a private cause of action, refers to an individual's right to file a lawsuit to enforce some legal claim.<sup>7</sup> In the regulatory context, it is a tool granting non-government plaintiffs the ability to sue for the enforcement of a statute or ordinance. Generally, private rights of action are included in laws that offer some form of protection to certain individuals, and grant those individuals the right to file suit if that protection is violated. They have long been used to supplement civil enforcement of regulatory regimes, especially in the civil rights context.<sup>8</sup> They frequently allow successful plaintiffs to receive damages, injunctive relief, or both.<sup>9</sup> Fee-shifting, the practice of requiring defendants to pay a portion of successful plaintiffs' legal fees, is also an important aspect of many private rights of action, as it often allows private parties to find legal representation when they could not otherwise afford it.<sup>10</sup> The private right of action's usefulness in enforcing regulatory regimes has led to it being used in myriad contexts by federal, state, and local governments. Part I.A will explain how the private right of action has been integral in many federal and state enforcement regimes. Part I.B will explore the private right of action in the municipal context and provides an example of how it can successfully effectuate municipal policies. Part I.C will describe

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7. *Private Right of Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

8. See JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 15 (1959) (including "private civil suit for damages or injunction by an aggrieved person" as a primary enforcement mechanism for civil rights laws).

9. NATIONAL COUNCIL ON DISABILITY, IMPLEMENTATION OF THE AMERICANS WITH DISABILITIES ACT: CHALLENGES, BEST PRACTICES, AND NEW OPPORTUNITIES FOR SUCCESS 166-67 (2007).

10. See Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 241 (observing the use of fee shifting where "private actions serve to effectuate important public policy objectives").

a potentially underutilized tool in cities' regulatory toolbox: the third-party private right of action.

#### A. Use in State and Federal Contexts: The Private Attorney General

In the state and federal contexts, private rights of action are closely related to the idea of the private attorney general.<sup>11</sup> The private attorney general is supposed to harness private litigants to “supplement[] what even an ideally constituted, well-funded, and vigorous public enforcement agency [can] do” in the realm of enforcement.<sup>12</sup> In addition to providing more legal resources for civil enforcement actions, it helps ensure more vigorous enforcement in instances where government officials may be reluctant to take on controversial cases.<sup>13</sup>

At the federal level, private rights of action have been instrumental in enforcing regulatory regimes. Environmental statutes like the Clean Air Act<sup>14</sup> and Clean Water Act<sup>15</sup> contain robust citizen-suit provisions. The Consumer Product Safety Act includes a private

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11. The first use of this term is generally attributed to Judge Jerome Frank, referring to non-government officials seeking to vindicate the public interest. *Associated Indus. of New York State v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated*, 320 U.S. 707 (1943).

12. Olatunde Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1347 (2012).

13. Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1442–47 (1998) (exploring the incentive structure for government attorneys charged with enforcement and how it can lead to conservative enforcement focused on clear, easy victories for government lawyers).

14. 42 U.S.C. § 7604(a) (2012) (“[A]ny person may commence a civil action on his own behalf . . . against any person . . . who is alleged to have violated . . . an emission standard or limitation.”).

15. 33 U.S.C. § 1365(a) (2012) (“[A]ny citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation.”). Professor Karl Coplan has traced how enforcement of the Clean Water Act through its citizen suit provision had the additional benefit of prompting regulatory change both within the Environmental Protection Agency and through congressional amendments to the Act. Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 61, 63–64 (2014).

right of action.<sup>16</sup> The Supreme Court has also recognized an “implied” private right of action for both Title VI and Title IX of the Civil Rights Act.<sup>17</sup> Private rights of action have been especially important in the civil rights context, as civil enforcers in many jurisdictions are either under-resourced, face significant local pressure against vigorous enforcement, or both.<sup>18</sup>

Similarly, state statutes frequently rely on private rights of action to bolster enforcement. Many states have civil rights laws that contain private rights of action and often offer more protections than the floor established by federal laws.<sup>19</sup> The scope of these civil rights and public accommodation statutes vary. Many are focused on broad classes of individuals such as race, gender, religion, or sexual orientation,<sup>20</sup> while some include private rights of action for very

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16. 15 U.S.C. § 2073(a) (2012) (“Any interested person (including any individual or nonprofit, business, or other entity) may bring an action in any United States district court for the district in which the defendant is found or transacts business to enforce a consumer product safety rule . . . and to obtain appropriate injunctive relief.”).

17. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979) (“We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.”). *See also* *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (characterizing the implied private right of action in Title VI as “beyond dispute”).

18. For a discussion of the centrality of the private right of action to civil rights enforcement, see Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (2003).

19. California’s Unruh Civil Rights Act, for example, creates a private right of action and allows a civil penalty of \$25,000 to be awarded in instances where violence or intimidation were part of the discrimination. CAL. CIV. CODE § 52 (West 2018). For other examples, see OHIO REV. CODE ANN. § 4112.02 (West 2016) (allowing individuals aggrieved under Ohio’s civil rights code to either file a complaint to the Ohio Civil Rights Commission or bring an action in civil court); MICH. COMP. LAWS ANN. § 37.2801 (West 2018) (permitting actions to be brought directly in state court). Some states do not allow potential litigants to file suit unless they have gone through a series of administrative procedures. *See, e.g.*, IOWA CODE ANN. § 216.16 (West 2016) (detailing how a complaint must be timely filed with Iowa Civil Rights Commission and under review for sixty days before an action can be brought in Iowa district court); FLA. STAT. ANN. § 760.11 (West 2018) (requiring a finding of a violation from the Florida Commission on Human Relations before a civil suit can be brought by an aggrieved party).

20. The National Conference of State Legislatures conducted a survey of state public accommodation laws and found that all but five states—Alabama, Georgia, Mississippi, North Carolina, and Texas—have public accommodations

specific classes of plaintiffs. For example, the state of New York offers protections specific to residents of nursing homes,<sup>21</sup> while Maine's Petroleum and Market Share Act only protects petroleum retailers from unfair trade practices.<sup>22</sup> In all of these contexts, state and federal legislators have determined that the existence or threat of private civil actions help effectuate their regulatory goals.

#### B. The Private Right of Action in the Municipal Context: The Private City Attorney?

The primary legal enforcer of municipal policies is generally the City Attorney.<sup>23</sup> The role of the City Attorney is often predominantly civil but can also involve the criminal prosecution of misdemeanors and crimes created by ordinance.<sup>24</sup> Generally, City Attorney offices' involvement with criminal enforcement is limited to relatively minor infractions.<sup>25</sup> The combination of the importance of civil enforcement in municipal law and the relative lack of funds compared to state and federal governments often makes private enforcement of city ordinances especially helpful in ensuring vigorous

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laws that prohibit discrimination on the basis of race, gender, ancestry, and religion. The survey did not include whether the statutes created private rights of action. *State Public Accommodation Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 13, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx#1> [<https://perma.cc/ZCU7-TC7F>].

21. N.Y. PUB. HEALTH LAW § 2801-d (McKinney 2017) (“Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation . . .”).

22. ME. REV. STAT. ANN. tit. 10, § 1680 (West 2016) (“A retailer, wholesaler or refiner who is injured as a result of a violation . . . may maintain a civil action in Superior Court . . .”).

23. The role of primary municipal civil enforcer goes by many names. In New York City, for example, the role is titled Corporation Counsel. NEW YORK, N.Y., CITY CHARTER § 391 (2018). In Cleveland, OH, it is called Director of Law. CLEVELAND, OHIO, CITY CHARTER ch. 15, § 83 (2018). To simplify, this Note refers to this role as City Attorney.

24. *E.g.*, LOS ANGELES, CAL., CHARTER AND ADMINISTRATIVE CODE art. II, § 271 (2018) (“The City Attorney shall prosecute on behalf of the people all criminal cases and related proceedings arising from violation of the provisions of the Charter and City ordinances, and all misdemeanor offenses arising from violation of the laws of the state occurring in the City.”).

25. *See, e.g.*, Ferdinand P. Palla, *The Role of the City Attorney*, 2 SANTA CLARA LAWYER 171, 171 (1962) (“Unlike the office of district attorney or of public defender, the functions of a city attorney have not been widely glamorized.”).



enforcement. The following example illustrates the usefulness of private rights of action for cities.

### 1. Municipal Private Right of Action in Use: SeaTac's Living Wage Ordinance

Larger cities like Los Angeles, San Francisco, and Seattle have dominated the news coverage of cities passing more aggressive living wage ordinances.<sup>26</sup> However, the first \$15 living wage ordinance in the United States was enacted in a city of fewer than 30,000 people: SeaTac, Washington.<sup>27</sup> In November 2013, this small municipality passed its living wage ordinance through a ballot initiative.<sup>28</sup> In addition to providing a \$15 minimum wage to hospitality and transportation workers, the ordinance mandated paid sick leave and requirements to prevent employers from circumventing protections by avoiding full-time employment through subcontractors.<sup>29</sup> SeaTac's small size belies the impact of this ordinance, as the city is home to Seattle-Tacoma International Airport, the ninth busiest airport in the United States<sup>30</sup> and a central hub of Alaska Airlines.<sup>31</sup> This means its ordinance regulated the wages of employees for many major companies, including global commercial airlines and shipping, baggage-handling, and rental car companies. Many of these companies challenged the legality of the ordinance and initially refused to pay

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26. See, e.g., Victor Luckerson, *Here's Every City in America Getting a \$15 Minimum Wage*, TIME (July 23, 2015), <http://time.com/3969977/minimum-wage/> [<http://perma.cc/5S37-T5LQ>].

27. CITY OF SEATAC, SEATAC, WA: BASIC POPULATION DEMOGRAPHICS (2015), <http://www.ci.seatac.wa.us/Home/ShowDocument?id=14865> [<https://perma.cc/G866-G8TC>].

28. Emily Jane Fox, *Washington City Votes to Raise Minimum Wage to \$15*, CNN (Nov. 7, 2013), <http://money.cnn.com/2013/11/06/news/economy/minimum-wage-seatac-new-jersey/index.html> [<https://perma.cc/X7QQ-ZWVN>]. The author of this Note worked on the campaign to pass this ordinance.

29. SEATAC, WASH., MUN. CODE ch. 7.45, §§ 20, 30, 50 (2018).

30. *Airport Basics*, PORT OF SEATTLE, <https://www.portseattle.org/page/airport-basics> [<https://perma.cc/4UG3-7KCX>].

31. Madeleine Johnson, *Airline Hubs: Which Carrier Dominates Your Airport?*, NASDAQ (July 19, 2017), <https://www.nasdaq.com/article/airline-hubs-which-carrier-dominates-your-airport-cm818339> (on file with the Columbia Law Human Rights Law Review); *Company Information*, ALASKA AIRLINES, <https://newsroom.alaskaair.com/company-information> [<https://perma.cc/XS2F-6SZF>].

wages at the new levels.<sup>32</sup> Once the law was upheld, the small city legal department, comprised of four attorneys,<sup>33</sup> was faced with enforcing the ordinance against large companies that had been willfully violating it during the years-long litigation. The city, however, did not have to overburden its legal staff with enforcement because the ordinance included a private right of action.<sup>34</sup> Taking advantage of this private enforcement mechanism, class actions brought by private law firms representing employees of companies that refused to pay the \$15 living wage resulted in over \$12 million in settlements in the three years after the ordinance went into effect.<sup>35</sup>

SeaTac's example demonstrates how a municipally created private right of action can be especially useful for municipalities with smaller populations and budgets. The New York City Law Department employs approximately 900 attorneys,<sup>36</sup> and Los Angeles has over 500 attorneys in their City Attorney's Office;<sup>37</sup> the size and budget of these offices makes public enforcement of ordinances much more feasible. For a small city, like SeaTac, this enforcement would be impracticable. With a private right of action in place, these under-resourced cities gain the potential to enact stronger regulatory frameworks that would otherwise be beyond their ability to enforce.

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32. Alaska Airlines, along with the Washington Restaurant Association and two airport vendors, challenged the legality of the initiative. The Washington State Supreme Court upheld the ordinance and its applicability to the airport. Plaintiffs did not object to, nor did the Court address the validity of, the private right of action as an enforcement mechanism. *Filo Foods, LLC v. City of SeaTac*, 357 P.3d 1040 (Wash. 2015).

33. CITY OF SEATAC, LEGAL DEPARTMENT STAFF, <http://www.ci.seatac.wa.us/government/city-departments/legal> [<https://perma.cc/ZJT4-VGQC>].

34. SEATAC, WASH., MUN. CODE ch. 7.45, § 100 (2018) ("Any person claiming violation of this chapter may bring an action against the employer in King County Superior Court to enforce the provisions of this chapter . . ."). Notably, this ordinance does not limit the right of action to employees who are not being paid, but instead focuses on "any person claiming violation." See *infra* Part I.B.2 for a discussion of the breadth of private rights of action.

35. Gene Johnson, *Settlements Totaling \$12M-plus Reached in Minimum Wage Cases*, AP NEWS (Sept. 1, 2016), <https://apnews.com/a7aae4df6b474bcda888c791235fc75f/settlements-totaling-12m-plus-reached-minimum-wage-cases> [<https://perma.cc/M9RU-AJUA>].

36. *About the Law Department*, NYC.GOV, <http://www.nyc.gov/html/law/html/about/about/about.shtml> [<https://perma.cc/6YNM-S3HR>].

37. *Careers*, LA CITY ATTORNEY, <https://www.lacityattorney.org/careers> [<https://perma.cc/FC4K-BU8K>].

## 2. Two Traditional Forms of Municipal Private Rights of Action: Limited and Expansive

When cities create private rights of action, they generally create one of two varieties: limited or expansive. The limited private right of action is restricted to the most immediately harmed individual. The most common examples are ordinances that create rights of action for tenants if their landlords violate housing codes.<sup>38</sup> These ordinances are drafted so that only a narrow class of plaintiffs can bring suit.<sup>39</sup> For example, Seattle's Housing Code says that landlords "shall be liable to such tenant [whose rights were infringed] in a private right of action," confining the class of potential plaintiffs to tenants who have a contract with the offending landlord.<sup>40</sup> Similarly, Wilmington, Delaware, in an attempt to maintain the city's supply of rental housing, created a private right of action for tenants whose homes were unlawfully converted to condominiums. Its ordinance restricted the private right of action to "[a]ny person who has been the object of an unlawful practice . . . ."<sup>41</sup>

In contrast, expansive private rights of action go beyond the most obvious, immediately harmed party. For example, Santa Fe's living wage ordinance creates a private right of action for "any individual . . . or *any entity the members of which* have been aggrieved by a violation of this section."<sup>42</sup> And while the previously referenced

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38. See, e.g., SEATTLE, WASH., MUN. CODE § 22.206.160(C)(7) (2018) (stating that landlords who engage in unlawful eviction practices "shall be liable to such tenant in a private right for action for damages up to \$2,000, costs of suit, or arbitration and reasonable attorney's fees"); CHI., ILL., MUN. CODE ch. 5-14-040(a)(1) (2018) ("If you are eligible as a qualified tenant and the owner fails to pay you the relocation assistance that is due, you may bring a private cause of action . . . ."); L.A., CAL., MUN. CODE ch.15, art. 1, § 151.10 (2018) ("Any person who demands, accepts or retains any payment of rent in excess of the maximum rent . . . in violation of the provisions of this chapter . . . shall be liable in a civil action to the person from whom such payment is demanded . . . .").

39. It should be noted that remedies in housing code violations are not limited to the offensive suits that private rights of action entail. Tenants are often able to use ordinances in a more defensive manner by pointing to violations by the landlord as a justification for withholding rent. See Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 23–26 (1979).

40. § 22.206.160(C)(7).

41. WILMINGTON, DEL., CODE OF ORDINANCES ch. 9-46 (2018).

42. SANTA FE, N.M., CITY CODE ch. 28-1.8 (2018) (emphasis added).

Seattle Housing Code's private right of action is limited, the city's anti-discrimination ordinance creates a more expansive private right of action for "[a]ny person who claims to have been injured by an unfair employment practice."<sup>43</sup>

Two aspects of the drafting make these Codes more expansive than the typical limited private right of action. First, the class of potential plaintiffs is defined more broadly. In the Seattle Code, "person" is defined to include individuals, partnerships, organizations, and corporations.<sup>44</sup> In the Santa Fe Code, *entities*, as well as individuals, are allowed to bring suit if their members are aggrieved. Both of these allow for a broader class of potential plaintiffs instead of restricting the plaintiffs to a narrower class such as "tenants" or "employees." Second, neither ordinance clearly defines the harm that the plaintiff must experience. Wilmington's Code specifies that the plaintiff must be "the object of an unlawful practice."<sup>45</sup> Santa Fe's and Seattle's ordinances, however, do not impose this same restriction. These statutes require the plaintiff to have been "injured by" or "aggrieved by" the action, respectively, which allows those who were not the object of the action, but who were nonetheless indirectly harmed by it, to bring suit. For example, one can imagine an environmental ordinance with a limited private right of action that only allows a land-owner to sue if waste was disposed of on their property. An expansive version of the ordinance might allow anyone harmed by the disposal, such as neighbors affected by the resulting blight, to file suit. These expansive private rights of action allow more potential plaintiffs to bring suit under the ordinances.

### C. The Third-Party Private Right of Action: A Third Category?

The third-party private right of action has the potential to open the class of plaintiffs beyond even that of expansive private rights of

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43. SEATTLE, WASH., MUN. CODE ch. 14, § 04.185 (2018).

44. *Id.* at ch. 14, § 04.030 ("Person' includes one or more individuals, partnerships, associations, organizations, trade or professional associations, corporations, public corporations, cooperatives, legal representatives, trustees, trustees in bankruptcy and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent or employee, whether one or more natural persons, and further includes any department, office, agency or instrumentality of the City.").

45. *Id.* at ch. 9-46.

action. It explicitly creates a right of action for certain organizations that may have no relationship with the violator of the ordinance but do have an interest in seeing the code enforced. The three most obvious examples are found in Los Angeles and San Francisco. Both cities have ordinances regulating the conversion of residential hotels to other forms of housing.<sup>46</sup> Both ordinances also create private rights of action that allow any “interested” party or person to bring a civil suit for violation of the ordinance.<sup>47</sup> Los Angeles’ law defines “interested party” to include nonprofits “organized for the purpose of maintaining or creating affordable housing.”<sup>48</sup> San Francisco’s ordinance defines “interested party” to include “any nonprofit organization . . . which has the preservation or improvement of housing as a stated purpose in its articles of incorporation or bylaws.”<sup>49</sup> San Francisco includes a similarly broad definition of “interested party” in its regulation of short-term property rentals through hosting platforms such as Airbnb and HomeAway.<sup>50</sup> These ordinances all acknowledge that non-profits and public interest groups often have institutional, mission-driven interests that are aligned with the city when it comes to enforcing these laws through civil actions.

These ordinances go beyond even expansive private rights of action by continuing to grow the pool of parties who can be considered injured by violations of the ordinances. They do this by tying the injury

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46. In California, residential hotels are defined as buildings containing six or more guestrooms which are rented for sleeping purposes by guests, and are also the primary residence of those guests. CAL. HEALTH & SAFETY CODE § 50519 (West 2018). Many elderly, disabled, and low-income persons live in residential hotel units. See L.A., CAL., MUN. CODE ch. 4, art. 7.1, § 47.72 (2018). Both Los Angeles and San Francisco passed their ordinances in response to a growing trend of residential hotels being converted to other forms of housing, thereby reducing the housing supply for these vulnerable populations. *Id.*; S.F., CAL., ADMIN. CODE ch. 41.2 (2018).

47. S.F., CAL., ADMIN. CODE ch. 41.20(e) (2018); L.A., CAL., MUN. CODE ch. 4, art. 7.1, § 47.81(E) (2018).

48. L.A., CAL., MUN. CODE ch. 4, art. 7.1, § 47.73(L) (2018).

49. S.F., CAL., ADMIN. CODE ch. 41.4 (2018).

50. S.F., CAL., ADMIN. CODE ch. 41A.4 (2018). As a caveat, this portion of the code restricts enforcement by third parties to instances where the city has already determined there was a violation, or, in some cases, if the interested party has filed a complaint with the city that the city has failed to address. S.F., CAL., ADMIN. CODE ch. 41A.5(d)(2) (2018). To address these complaints, the city created the Office of Short-Term Residential Rental Administration and Enforcement. S.F., CAL., ADMIN. CODE ch. 41A.7 (2018).

caused by the violator to the goals of certain mission-oriented non-profits. So far, however, the third-party private right of action appears to be a very limited phenomenon.<sup>51</sup> There is little doubt that, among the Neapolitan ice cream system of private rights of action, the third-party form plays the role of strawberry—less established than its peers and potentially polarizing.<sup>52</sup> The remainder of this Note explores the possible legal justifications for third-party private rights of action and the arguments in favor of municipal power to create more of them, as well as the policy pros and cons of including them in municipal regulatory regimes.

## II. THE LEGAL FRAMEWORK FOR THE MUNICIPAL THIRD-PARTY PRIVATE RIGHT OF ACTION

Cities are creatures of state law—they derive powers from their states' constitutions, statutes, and common law.<sup>53</sup> Because of this, there is rarely a clear answer to the question: “Is it within a city’s power to do X?” The answer will depend on the state in question, its constitution and laws, and how that state’s courts have interpreted these texts. In some jurisdictions, it may depend on the size of the city<sup>54</sup> or whether or not the city has elected to draft its own charter.<sup>55</sup> It should be no surprise then that the diversity of jurisdictions creates a problem of scope for any scholar of municipal law. Part II of this Note will focus on why cities in many jurisdictions are likely to have the power to create third-party private rights of action. Part II.A will briefly explain how municipal powers have generally evolved over time. Part II.B describes a concept called the private law exception which has been used to limit municipal creation of private rights of action.

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51. After extensive research of many major U.S. cities, the author was only able to identify three clear examples—in the Los Angeles and San Francisco codes. Ch. 4, art. 7.1, § 47.73(L); ch. 41.4; ch. 41A.4.

52. Ed Levine, *The Great Strawberry Ice Cream Debate*, SERIOUS EATS (June 26, 2008), <http://sweets.serious eats.com/2008/06/the-great-strawberry-ice-cream-debate.html> [<https://perma.cc/DME7-8SJY>]. See *infra* Part III.B for an analysis of the criticisms of third-party private rights of action.

53. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (“The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.”).

54. See, e.g., COLO. CONST. art. XX, § 6 (providing home rule powers to all cities and towns with a population of over 2,000 residents).

55. See, e.g., CAL. CONST. art. XI, § 3 (allowing cities and counties to choose to draft their own charters if they wish).

Part II.C explains why courts have looked beyond the private law exception in some jurisdictions to allow cities to create private rights of action. Part II.D will address two additional potential constraints on third-party private rights of action (one unique to *third-party* private rights of action and one not): preemption and standing requirements.

#### A. Municipal Powers: From Dillon's Rule to Home Rule

To understand the contexts in which cities can create third-party private rights of action, it is helpful to examine the general development of municipal powers over time. While states vary widely in the specifics of how they allocate powers to their cities, there have been broad trends in municipal powers throughout American history. One of the most significant and commented upon trends is the increase in the authority states ceded to cities starting in the late nineteenth century and continuing into the early twentieth: the transition from Dillon's Rule to home rule.

##### 1. Dillon's Rule: The Historical Baseline

For much of America's history, the principle referred to as Dillon's Rule sharply curtailed almost all cities' powers.<sup>56</sup> This common law principle limited municipal powers to three categories: "(1) those [powers] granted in *express words*; (2) those *necessarily or fairly implied* in or incident to the powers expressly granted; (3) those *essential* to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable."<sup>57</sup> A corollary to Dillon's Rule was a canon of strict construction: any ambiguity or doubt to the existence of a municipal power was to be resolved against the city.<sup>58</sup> Dillon's Rule meant that, absent specific grants from state legislatures, cities were powerless to act in a myriad of contexts. Courts used Dillon's Rule to force cities to allow railways

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56. John F. Dillon was a Justice of the Iowa Supreme Court, federal circuit judge, and Columbia Law Professor who authored a treatise on municipal law in the late nineteenth century. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1122 (2007). Dillon's view of the common law of municipal authority was endorsed by the Supreme Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907), which held that there was no federal constitutional right to form a local government beneath the state level.

57. RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 327 (8th ed. 2016).

58. *Id.* at 327–28.

through their streets;<sup>59</sup> prevent them from establishing minimum safety standards for dwellings;<sup>60</sup> and to strike down ordinances requiring bottle deposits,<sup>61</sup> among other things. But after a time, many states began shifting away from the Dillon's Rule model in favor of a less restrictive policy.

## 2. Home Rule: The New Normal

While Dillon's Rule remains in effect in some jurisdictions,<sup>62</sup> it has largely been supplanted by a doctrine called "home rule."<sup>63</sup> Home rule is a necessarily broad term, as it attempts to contain dozens of state regimes with varying constitutions and case law. In general, it refers to any shifting of the presumption against municipal powers, in the absence of a state law grant, toward a presumption in favor of municipal powers.<sup>64</sup> Home rule is generally divided into two categories of powers: municipal initiative—the authority to engage in policy-making without specific authorization from the state—and municipal immunity—autonomy from state power in certain limited areas that are determined to be under local control.<sup>65</sup> While states vary in how

59. *City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455, 478 (1868) (holding that the city of Clinton, as a "derivative and subordinate authority," had no ability to prevent a railway from passing through its streets).

60. *Early Estates, Inc. v. Hous. Bd. of Review*, 174 A.2d 117, 119 (R.I. 1961) (holding that Providence could not require access to heated water as part of ensuring homes were "fit for human habitation").

61. *Tabler v. Bd. of Supervisors*, 269 S.E.2d 358, 359 (Va. 1980) (striking down the ordinance because "Virginia follows the Dillon Rule of strict construction concerning the legislative powers of local governing bodies").

62. While eight states maintain some form of Dillon's Rule, most do so for only a subset of their local governments. For example, California uses it for cities and counties that have not elected to draft their own charter, while Alabama applies the rule to all of its counties. See JOHN D. RUSSELL & AARON BOSTROM, *AMERICAN CITY COUNTY EXCHANGE, FEDERALISM, DILLON RULE AND HOME RULE* 5 (2016).

63. The first explicit adoption of home rule occurred in Missouri, with the 1875 Constitution allowing St. Louis the ability to frame its own charter and government. MO. CONST. of 1875 art. IX, §§ 20–25. California followed in 1879, allowing chartered cities to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." CAL. CONST. of 1879 art. XI, § 11 (1879).

64. For a thorough exploration of the complications encountered while attempting to clearly define home rule, see Gary Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 674–76 (1973).

65. *Id.* at 676; BRIFFAULT & REYNOLDS, *supra* note 57, at 346.



much of each of these powers they allow their cities to possess, there have been two general waves of home-rule-based reform efforts, each with a different focus on what powers cities should possess.

The first wave of home rule reform focused on the *imperium in imperio* model. Often referred to as simply *imperio*, this regime for allocating power is centered on ensuring cities have the right to regulate activities of “local” concern.<sup>66</sup> Referring to a “government within a government,” *imperio* grants of power rarely offered specificity about how “local” concerns should be defined, leaving cities reliant on the good graces of state courts’ interpretation of what was properly covered.<sup>67</sup> To the frustration of advocates of municipal power, most courts defined these local concerns narrowly.<sup>68</sup>

In response to these limitations, a second iteration of home rule powers called legislative home rule gained traction in the 1950s and 1960s.<sup>69</sup> Instead of focusing on amorphously-defined local concerns, this conception of home rule allows a city to exercise any power the state can delegate, as long as the state government has not explicitly reserved that power for itself.<sup>70</sup> While this creates a large spectrum of potential powers depending on the relevant state’s legislature,<sup>71</sup> the presumption in favor of municipal power represents a dramatic shift towards allowing cities to pursue more aggressive policy agendas. The legislative home rule model is currently the majority rule<sup>72</sup> and undergirds many of the municipal policy innovations in recent decades.

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66. Diller, *supra* note 56, at 1124–25. As with many aspects of municipal law, states found numerous ways to express the concept. Many of these forms were catalogued by the Supreme Court of Louisiana in *City of New Orleans v. Board of Commissioners of the Orleans Levee District*, which described grants of municipal power over “all powers of local self-government,” “municipal affairs,” and “local affairs and government.” 640 So. 2d 237, 242 (La. 1994) (quoting OHIO. CONST. of 1851, art. XVIII, § 3 (adopted 1912); CAL. CONST. of 1875, art. XI, § 6 (adopted 1896); WIS. CONST. of 1848, art. XI, § 3 (adopted 1924)).

67. Terrance Sandalow, *The Limits of Municipal Power under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 660–61 (1963); BRIFFAULT & REYNOLDS, *supra* note 57, at 347.

68. Sandalow, *supra* note 67, at 661–62; Diller, *supra* note 56, at 1125.

69. Diller, *supra* note 56, at 1126; BRIFFAULT & REYNOLDS, *supra* note 57, at 348.

70. Diller, *supra* note 56, at 1126.

71. See *infra* Part II.D.1 and the discussion of preemption.

72. Diller, *supra* note 56, at 1126.

## B. The Private Law Exception: A Holdover from the Dillon's Rule Era

Although the overwhelming trend in the past century has been toward home rule, there is an important vestige of the pre-home rule era that restricts municipalities in many jurisdictions today: the private law exception. An early expression of this rule can be found in Howard McBain's treatise on Municipal Law:

By common understanding such general subjects as . . . domestic relations, wills and administrations, mortgages, trusts, contracts, real and personal property, insurance, banking, corporations, and many others have never been regarded by any one, least of all by cities themselves, as appropriate subjects of local control. No city has been so foolhardy as to venture generally into any one of these fields of law. It has simply been universally accepted that these matters are strictly of "state concern."<sup>73</sup>

This description came to be called the "McBain Nine."<sup>74</sup> Paul Diller's work "The City and the Private Right of Action" gives a thorough and excellent accounting of how the private law exception has been employed over time.<sup>75</sup> Specifically, he identifies a shift in many states from a subject-based view of the private law exception to a complainant-based view.<sup>76</sup> Under the subject-based view, courts prevented cities from legislating in a specific subject matter, such as contract law, because that subject matter was the province of the State.<sup>77</sup> The complainant-based view of the private law exception prohibits cities from passing ordinances that establish "legal rights and duties between and among private entities," or any laws that would substantively change the elements of an action brought by one private litigant against another.<sup>78</sup>

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73. HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 673–74 (1916).

74. Schwartz, *supra* note 64, at 690.

75. Paul A. Diller, *The City and the Private Right of Action*, 64 *STAN. L. REV.* 1109, 1121–28 (2012) (identifying several instances where the private law exception has been used to invalidate ordinances).

76. *Id.* at 1117.

77. *Id.*

78. *Id.*

Despite McBain's powerful admonition against cities legislating about the McBain Nine, many cities have indeed been "foolhardy" enough to legislate in these areas.<sup>79</sup> And while the private law exception has declined as a check on municipal power, it is by no means extinct, especially in the complainant-based form.<sup>80</sup> It has been used as a justification to stop localities from regulating areas ranging from mortgage lending markets<sup>81</sup> to same-sex marriages.<sup>82</sup> Most significantly for this Note, it has also been used to prevent cities from creating private rights of action to assist in the enforcement of their ordinances.

Professor Diller identifies three categories of states with regard to their courts' treatment of municipal private rights of action: skeptical, ambiguous, and permissive.<sup>83</sup> Skeptical and ambiguous states have seen their courts reject municipal creation of private rights of action or failed to address the issue, respectively.<sup>84</sup> Permissive states have either seen their courts explicitly allow municipal creation of private rights of action<sup>85</sup> or implicitly approve them by allowing such

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79. See *infra* Part III.C, offering several examples of cities regulating in areas generally seen as falling within the category of "private law." Historically, most action in these areas has been tied to municipal regulation of land use within city borders. Examples include zoning, which clearly impacts real property, and housing codes, which can affect contracts between tenants and landlords. *But see* Schwartz, *supra* note 64, at 756 (explaining how some areas, like wills and trusts, have remained outside the ambit of any local control and rest squarely with state legislatures).

80. Diller, *supra* note 75, at 1117.

81. *Am. Fin. Serv. Ass'n v. City of Oakland*, 104 P.3d 813, 822 (Cal. 2005) (holding that Oakland could not pass an ordinance regulating predatory mortgage lending because this was historically an area of state law).

82. *Li v. State*, 110 P.3d 91, 102 (Or. 2005) (invalidating an Oregon county's ordinance allowing same-sex marriage because the state had "exclusive authority" over marriage).

83. Diller, *supra* note 75, at 1129.

84. *Id.*

85. See, e.g., *Priore v. New York Yankees*, 761 N.Y.S.2d 608, 613 (N.Y. App. Div. 2003) (recognizing explicitly the New York City Council's ability to create a private civil right of action for "persons in the City who are aggrieved by . . . discriminatory practices" that violate the Administrative Code of the City). The ordinance in question in *Priore* was the New York City Human Rights Law, which tracked the equivalent state statute, but also went beyond it by providing protection for individuals facing discrimination based on their sexual orientation. *Id.* at 614.

suits to proceed.<sup>86</sup> Diller identifies nine states in this permissive category: California, Colorado, Florida, Hawaii, Maine, New Mexico, New York, Oregon, and Washington.<sup>87</sup> While comprising fewer than one fifth of states, these jurisdictions include almost one third of the population of the United States,<sup>88</sup> as well as New York City and Los Angeles, the two most populous cities in the U.S.<sup>89</sup> Notably, they also include many cities that have enacted ambitious ordinances in policy areas including anti-discrimination, living wages, and housing.<sup>90</sup>

Professor Diller also observes that “case law and municipal practice are not always in harmony.”<sup>91</sup> In states he has labeled “ambiguous” and even “skeptical,” there are still many examples of cities with private rights of action in their ordinances.<sup>92</sup> This suggests that even when state courts have precedent against municipal private rights of action, they often turn a blind eye to the question when confronted by litigants. To better understand how courts could approve third-party private rights of action, it is useful to examine how they have explicitly upheld more traditional municipal private rights of action.

### C. Judicial Approval of Municipal Private Rights of Action

When municipal private rights of action have been approved by state courts, the courts generally uphold them using reasons that are equally applicable to third-party private rights of action. Even in Professor Diller’s permissive states, however, most courts have not

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86. See, e.g., *Deo v. King Broad. Co.*, No. 52626-0-I, 2004 WL 1598862, at \*3–4 (Wash. Ct. App. July 19, 2004) (noting that the Seattle Municipal Code provided a private right of action that allowed the case to proceed in state court, but not engaging in meaningful analysis of whether Seattle had the power to create this right of action).

87. Diller, *supra* note 75, at 1133 n.117.

88. U.S. CENSUS BUREAU, NST-EST2017-ALLDATA, ANNUAL POPULATION ESTIMATES, ESTIMATED COMPONENTS OF RESIDENT POPULATION CHANGE, AND RATES OF THE COMPONENTS OF RESIDENT POPULATION CHANGE FOR THE UNITED STATES, STATES, AND PUERTO RICO (2017), <https://www2.census.gov/programs-surveys/popest/technical-documentation/file-layouts/2010-2017/nst-est2017-alldata.pdf> [<https://perma.cc/T4E4-GEZH>].

89. *The 30 Most Populous Cities*, NAT’L LEAGUE OF CITIES, <http://www.nlc.org/the-30-most-populous-cities> [<https://perma.cc/5MM2-9DPE>].

90. See *infra* Part III.C.

91. Diller, *supra* note 75, at 1131.

92. *Id.* at 1130–31.

engaged directly with the question of whether a city has the power to create a private right of action, instead engaging in implied affirmation.<sup>93</sup> This section will focus on cases in New Mexico and Oregon where the intermediate courts approved the municipal private rights of action. Each court engaged in a particularly clear analysis of whether and when cities in their jurisdictions are allowed to create private rights of action.

### 1. Santa Fe and Living Wage Ordinances

When New Mexico's intermediate appellate court recognized a municipally created private right of action in Santa Fe's living wage ordinance, it focused on two criteria. First, did the private right of action violate the general rule against municipalities creating private or civil law governing civil relationships between citizens?<sup>94</sup> Second, if it did, was the city able to use the exemption in the New Mexico Constitution for ordinances that are "incident to the exercise of an independent municipal power"?<sup>95</sup> The Court answered both questions in the affirmative, defining independent municipal power broadly.<sup>96</sup> It used this definition to shape a two-part test for the valid creation of a private right of action by a municipality: (1) the private right of action must be "reasonably 'incident to' a public purpose that is clearly within the [city's] delegated power"; and (2) the ordinance must "not implicate serious concerns about non-uniformity in the law."<sup>97</sup> The latter point was primarily concerned with non-uniformity in the subjects outlined in McBain's private law exception—a desire to avoid cities reshaping fundamental areas of law such as contracts, trusts, and criminal law.<sup>98</sup> So long as cities avoid disrupting these areas, however, the New Mexico courts' ruling is a permissive standard for private rights of action in areas like wages, housing, employment, and anything else that can be viewed as a municipal concern.

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93. See *supra* note 85 and accompanying text.

94. *New Mexicans for Free Enter. v. The City of Santa Fe*, 126 P.3d 1149, 1160–61 (N.M. Ct. App. 2005).

95. *Id.*; see also N.M. CONST. art. X, §§ 6(D)—(E) (creating the "independent municipal power" exception and directing courts to construe it liberally).

96. *New Mexicans for Free Enter.*, 126 P.3d at 1161 ("We take the view that as long as a municipality can point to a power that the legislature has delegated to it, and the regulation of the civil relationship is reasonably incident to, and clearly authorized by that power, the exemption can apply.").

97. *Id.*

98. *Id.*

## 2. Portland and Sexual Orientation Employment Protections

Oregon's intermediate appellate court's *en banc* examination of the issue of private rights of action provides an example of two different ways for courts to approve municipal private rights of action. In a challenge to Portland's ordinance granting employment protections based on sexual orientation, five of the ten appellate judges, a plurality, recognized a city's ability to create a private right of action unless the legislature affirmatively enacted laws to preempt the ordinance in question.<sup>99</sup> Four concurring judges, however, preferred a three-step analysis that should be applied to ordinances, asking (1) does the ordinance address a legitimate municipal goal concerning the health and welfare of municipal residents?; (2) do the means chosen reasonably achieve this goal?; and (3) is the ordinance preempted?<sup>100</sup> The relevant ordinance's private right of action satisfied the concurring judges' three-pronged analysis.<sup>101</sup> If Oregon adopted the reasoning of the five-judge plurality, a municipality's power to create a third-party private right of action could only be curtailed by preemption. But even if it adopted the test applied by the concurrence, it is not difficult to imagine a third-party private right of action surviving scrutiny, as long as it dealt with an issue involving the health or welfare of municipal residents.

To a city hoping to enact a third-party private right of action, these cases offer potential frameworks that could support their legislation. All three standards used to approve standard private rights of action—the one adopted by the New Mexico court and the two espoused in the Oregon ruling—are easily adaptable to a third-party private right of action in a variety of policy areas. The focus of the standards is on curtailing private rights of action in laws that extend beyond the traditional sphere of local control. So long as a city stays within these bounds, none of these standards suggest a third-party private right of action would be inappropriate. While these standards

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99. *Sims v. Besaw's Cafe*, 997 P.2d 201, 203, 211 (Or. Ct. App. 2000). The plurality reviewed cases spanning over a century to reach the conclusion that cities in Oregon can enlarge common law duties among their citizens, and that this necessarily extends to ordinances if there is no conflict with state law. *Id.* at 208–11. The concurrence found the plurality's ruling too expansive and developed its framework as an attempt to ensure that any ordinance was tied closely to the police power exercised through home rule. *Id.* at 216. (Linder, J., concurring).

100. *Id.* at 216 (Linder, J., concurring).

101. *Id.*

are most likely to be adopted by courts that already view municipal private rights of action favorably, they are theoretically just as applicable in state courts that have shown some skepticism or not addressed the issue at all. However, even if state courts accept a city's inherent power to create traditional private rights of action, there are some restrictions that could curtail cities should they attempt to use this power to create third-party private rights of action.

#### D. Additional Potential Restraints on the Third-Party Private Rights of Action

Aside from judicial skepticism due to the private law exception,<sup>102</sup> there are two major restraints that could curtail cities hoping to use the third-party private right of action. The first is preemption, which state legislatures could use to remove a city's power to either legislate in a given policy area or, more generally, prohibit cities from creating private rights of action of any variety. The second is state court standing requirements, which could preclude a plaintiff from bringing a claim even if an ordinance purports to allow suit. Each of these restraints offer different ways to limit cities' ability to use third-party private rights of action.

##### 1. Preemption

Preemption refers to when a government's ability to regulate a given area is overridden by another government's action. Because cities exist at the bottom of the federalist totem pole, municipal attempts to regulate can be preempted by both federal<sup>103</sup> and state<sup>104</sup>

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102. See *supra* Part II.B.

103. The source of federal preemption is the Supremacy Clause. See *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (“[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.”).

104. The source of state preemption is usually contained in the grant of home rule power to municipalities. These grants often contain a limiting phrase that courts have construed as allowing state laws to preempt local ones. See, e.g., MASS. CONST. amend. LXXXIX, art. 2, § 6; (“Any city or town may . . . exercise any power or function which the general court has power to confer upon it, *which is not inconsistent* with the constitution or laws enacted by the general court.” (emphasis added)); CAL. CONST. art. XI, § 7 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws.*” (emphasis added)).

laws. Preemption generally takes two broad forms: express and implied. Express preemption occurs where a superseding government has prohibited another government from legislating on a particular issue,<sup>105</sup> whereas implied preemption occurs when the superseding government's regulatory regime is considered so thorough that it occupies the entirety of the regulatory space and any intrusion in the area would undermine the superseding government's ability to regulate.<sup>106</sup> Relevant here are state efforts to preempt municipal law.

While state courts vary in their willingness to use implied preemption to strike down ordinances, express preemption is uniformly regarded as a reason to deny a city the right to legislate in the relevant policy area.<sup>107</sup> In recent years, statehouses have not stood idly by as cities flex their regulatory muscles.<sup>108</sup> Twenty-eight states currently either preempt minimum wage ordinances or never gave cities the power to regulate wages in the first place, and twenty-three states currently have at least partial preemption over paid leave ordinances.<sup>109</sup> While many of these preemption regimes are a result of how cities' powers have evolved since the heyday of Dillon's Rule, some states have actively used preemption to retaliate against municipal

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105. *E.g.*, IDAHO CODE § 44-1502(4) (West Supp. 2018) ("No political subdivision of this state . . . shall establish by ordinance or other action minimum wages higher than the minimum wages provided in this section.")

106. *E.g.*, *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 134 (2010) (invalidating Myrtle Beach's ordinance requiring motorcyclists to wear helmets because state law thoroughly covered the policy area).

107. For a thorough, thoughtful exploration of modern trends in state preemption of local laws, see Richard Briffault, Nestor Davidson, Paul A. Diller, Olatunde Johnson & Richard C. Schragger, *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, American Constitution Society Issue Brief (2017).

108. *Id.*

109. NATIONAL LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 6, 8 (2018), <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [<http://perma.cc/G5EW-UXJ7>]. State laws preempting minimum wage laws are often motivated by concerns about the cost of lack of uniformity to firms that operate in many different locations. When Iowa passed a living wage preemption law in March of 2017, its Governor praised the act because "[d]ifferent county minimum wages create confusion, especially for cities that are in more than one county. This bill provides uniformity through the state on Iowa's minimum wage." Rod Boshart, *Gov. Branstad Signs Bill to Roll Back Minimum Wage*, THE GAZETTE (Mar. 30, 2017), <http://www.thegazette.com/gov-branstad-signs-bill-to-roll-back-minimum-wage-20170330> [<https://perma.cc/V746-UP8F>].



policy innovations. After Austin passed an ordinance requiring background checks for ride-share drivers, for example, the Texas legislature passed a law explicitly preempting the ordinance.<sup>110</sup> In response to Charlotte passing an anti-discrimination ordinance offering protection to its LGBT population, North Carolina passed a law preempting any such ordinances.<sup>111</sup> While this law was later repealed,<sup>112</sup> it is a stark example of a state explicitly overruling a city's local ordinance on political grounds. California similarly preempted its cities from requiring E-Verify checks for employees in 2011.<sup>113</sup>

## 2. Issues of Standing for Third-Party Private Rights of Action

Statutory private rights of action still require a plaintiff to have standing to bring a lawsuit. Third-party private rights of action can potentially separate the pre-requisite for individualized harm from the right to sue. This presents standing problems that traditional private rights of action do not have to confront. In the federal context, standing requires that plaintiffs satisfy the case or controversy requirement of the federal constitution by asserting “that [they] personally [have] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.”<sup>114</sup> State courts, however, are not beholden to the case or controversy requirement of the federal Constitution.<sup>115</sup> While each state's court system has its own

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110. *Uber and Lyft Return to Austin After Texas Law Kills the City's Fingerprint Rule*, L.A. TIMES (May 29, 2017), <http://www.latimes.com/business/technology/la-fi-tn-uber-austin-20170529-story.html> [<https://perma.cc/ER4F-QG7B>].

111. Michael Gordon et al., *Understanding HB2: North Carolina's Newest Law Solidifies State's Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016), <http://www.charlotteobserver.com/news/politics-government/article68401147.html> [<https://perma.cc/U9MS-J4B2>].

112. Angelica Alvarez et al., *Governor Cooper Signs North Carolina's HB2 Compromise Bill*, ABC 11 (Mar. 30, 2017), <http://abc11.com/politics/north-carolinas-hb2-compromise-bill-passes-1825584/> [<https://perma.cc/PDR7-9SX7>].

113. Paloma Esquivel, *New California Law Bars E-Verify Requirement for Employers*, L.A. TIMES (Oct. 16, 2011), <http://articles.latimes.com/2011/oct/16/local/la-me-e-verify-20111017> [<https://perma.cc/6KVC-TJ8P>].

114. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979); see also *Lujan v. Def. of Wildlife*, 504 U.S. 555 (1992) (holding that plaintiffs lack standing if they are seeking relief that would benefit them no more than it would benefit the general public).

115. See, e.g., *Grosset v. Wenaas*, 175 P.3d 1184, 1196 n.13 (Cal. 2008) (“There is no similar requirement [to Article III] in our state Constitution.”); N.M.

standing requirements, many map onto federal standing requirements with some conceptual congruence, though they are often less stringent than federal requirements. Professor Wyatt Sassman conducted a survey of constitutional standing requirements in all fifty states and determined that an overwhelming majority of states apply some version of standing that resembles federal standing requirements, but that most states either provide discretionary exceptions for their courts or explicit exceptions for taxpayer suits or cases of public importance.<sup>116</sup> Alaska's Supreme Court, for example, has described standing requirements in flexible terms as "a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions."<sup>117</sup> New York also provides a good example of the loosened requirements for state standing. While the state has adopted language similar to the federal requirements, the state's highest court insists that standing determinations "rest[] in part on policy considerations" and "should not be heavy-handed."<sup>118</sup> Keeping in mind that state courts generally have less restrictive requirements for standing, it is helpful to examine two doctrines that have been used to broaden access to courts: third-party standing and associational standing.

### i. Third-Party Standing

To understand state court third-party standing requirements, it is useful to briefly examine the doctrine of third-party standing in the federal context, which is generally more stringent than in the state context. The Supreme Court has noted a general rule against third-party standing in federal court, but allows it when a litigant demonstrates three criteria: (a) an injury-in-fact demonstrating a sufficiently concrete interest; (b) a close relationship to the third party whose rights the litigant is asserting; and (c) the existence of a barrier

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Right to Choose/NARAL, *Abortion & Reprod. Health Servs.*, Planned Parenthood of the Rio Grande v. Johnson, 975 P.2d 841, 847 (N.M. 1998) ("New Mexico state courts are not subject to the jurisdictional limitations imposed on federal courts by Article III, Section 2 of the United States Constitution.").

116. Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 349, 353 (2015).

117. Trustees for Alaska v. State, 736 P.2d 324, 327 (Alaska 1987).

118. Ass'n for a Better Long Island, Inc. v. N.Y. State Dep't of Envtl. Conservation, 11 N.E.3d 188, 192 (N.Y. 2014) (quoting Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals of N. Hempstead, 508 N.E.2d 130, 133 (N.Y. 1987)).

to the third party protecting their own interest.<sup>119</sup> Third-party standing has been granted to defendants challenging the exclusion of potential jurors due to race,<sup>120</sup> professional fundraisers alleging violations of their clients' First Amendment right to pay the fundraisers,<sup>121</sup> and children alleging violations of the equal protection clause through gender discrimination against their fathers.<sup>122</sup>

Since every state treats standing slightly differently, it is difficult to generalize about third-party standing requirements among them. However, some examples provide clearer explanation of how third-party standing limitations, like standing limitations generally, could be a relatively easily surmountable barrier in state court. If state courts chose to treat municipal legislative grants of standing with the same legitimacy as state legislative grants, then many jurisdictions would be compelled to recognize municipal grants of standing.<sup>123</sup> In Oregon, for example, the Supreme Court has held that "standing is not a matter of common law but is, instead, conferred by the legislature."<sup>124</sup> If combined with the Oregon Court of Appeals plurality's desired rule in *Sims v. Besaw's Café*,<sup>125</sup> this view of standing would potentially allow municipalities to grant a right of action to anyone they desired, so long as they reside within the jurisdiction of the city and are not preempted by the state legislature.

In states that do not allow for municipalities to create standing, but that do not have constitutional standing requirements, municipalities can use state laws granting standing to broad categories of people, such as taxpayers, to allow for standing for third parties. For example, California does not have constitutional standing requirements, and its Code of Civil Procedure generally requires that civil actions "must be prosecuted in the name of real party of interest,

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119. See *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991).

120. *Id.* at 415.

121. *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984).

122. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1688–89 (2017).

123. For a description of how state courts have differed on their willingness to recognize municipalities' ability to legislate in areas traditionally subject to the private law exception, which a municipal grant of standing may be subject to, see *supra* Part II.B.

124. *Kellas v. Dep't of Corr.*, 145 P.3d 139, 142 (Or. 2006) (quoting *Local No. 290, Plumbers & Pipefitters v. Oregon Dep't of Env'tl. Quality*, 919 P.2d 1168, 1171 (Or. 1996)).

125. *Sims v. Besaw's Cafe*, 997 P.2d 201, 203, 211 (Or. Ct. App. 2000).

*except as otherwise provided by statute.*<sup>126</sup> One statewide statute that obviates this requirement is the state's taxpayer suit provision, which grants standing to citizens and corporations in certain public interest cases.<sup>127</sup> When determining the limits of this statute's grant of standing, California's Supreme Court took an opportunity to explain standing more generally. The court first noted that the legislature is empowered to "create judicial access for parties that would not otherwise be able to seek relief" under general state civil procedure statutes.<sup>128</sup> The court proceeded to delve into the legislative intent behind the statute to determine how much of a departure from the common law of taxpayer standing the legislature intended to enact.<sup>129</sup> The importance of legislative intent to this analysis bodes well for proponents of municipal expansions of standing.<sup>130</sup> If a court is willing to apply the same legislative intent analysis to city ordinances that grant standing, then they too can take advantage of the statutory exception to the real-party-of-interest standing requirement. Under this reasoning, if a city's lawmaking body intends to create standing with its third-party private right of action, then a court using this standard would be bound to respect that intent.

In states that do have constitutional standing requirements, municipalities may still be able to argue that state-law exceptions should lead state courts to allow the third parties that the municipalities have empowered to have standing. For example, Washington State's constitutional standing requirements resemble those of the federal system, but provide a key tool of judicial discretion: "Where a controversy is of serious public importance and immediately

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126. CAL. CIV. PROC. CODE § 367 (West 2018) (emphasis added).

127. CAL. CIV. PROC. CODE § 526a (West 2018) ("An action to obtain a judgment, restraining and preventing any illegal expenditure of . . . the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay . . . a tax therein.").

128. *Weatherford v. City of San Rafael*, 395 P.3d 274, 279 (Cal. 2017). While the statute in this case generally concerned writs of mandamus in suits against city officials, the court described the statute as an exception to the general requirement that suits be brought by a real party of interest. *See* CAL. CIV. PROC. § 367.

129. *Weatherford*, 395 P.3d at 279–81.

130. Two Justices took the step of urging the California legislature to clarify exactly to whom they intended to grant standing when they enacted the statute in question. *Id.* at 282.

affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally, questions of standing to maintain an action should be given less rigid and more liberal answer.”<sup>131</sup> State courts could view municipal ordinances that purport to grant standing as a significant factor in the Washington-style analysis of whether a case involves a matter of “serious public concern.” Municipalities could include language in their third-party private right of action ordinances stating that they view the issue at hand as of significant public importance to encourage state courts to pursue this line of reasoning.

These examples demonstrate that many state courts have the tools in place to allow third-party standing if they choose. Indeed, if state courts chose to treat municipal legislative grants of standing with the same legitimacy as state legislative grants, then many jurisdictions would be compelled to recognize municipal grants of standing. For jurisdictions like Oregon, where standing is purely legislative, state courts could recognize cities’ legislative power as equally able to create standing absent preemption from the state legislature. This is especially true for laws like Los Angeles and San Francisco’s residential hotel ordinances, as both create causes of action for non-profits and community groups that arguably suffer injuries whenever these statutes are violated.

Third-party standing is not the only option though, as potential plaintiffs in third-party private rights of action also have another avenue to assert standing in state court: associational standing.

## ii. Associational Standing

Associational standing stems from the idea that it is sometimes appropriate to allow an organization to defend or exercise the legal rights of one or several of its members. In the federal context, the Supreme Court has long recognized associational standing for organizations on behalf of their members.<sup>132</sup> Associations can have standing in federal courts if: (a) their member(s) would have standing; (b) they seek to protect interests relevant to their mission or purpose;

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131. *Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 459 P.2d 633, 635 (Wash. 1969).

132. *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (“Even in the absence of injury to itself, an association may have standing solely as the representative of its members.”).

and (c) neither the claim nor the requested relief requires individual member to participate in the lawsuit.<sup>133</sup> Traditionally, associational standing has been limited to organizations whose actual members have been injured, but it could potentially be used to provide standing for organizations whose interests are more abstract and ideological; some state courts have begun to move in this direction.

California is a good example of this. California courts have recognized the ability of organizations to achieve standing through their expenditures of resources. In 2015, a California appellate court recognized that a non-profit could acquire standing through the use of “organizational resources to combat” the defendant’s outlawed actions.<sup>134</sup> More directly on point, a trial court and, on review, an appellate court in California allowed associational standing to be used in a third-party suit brought through an ordinance.<sup>135</sup> In 2000, a non-profit housing clinic brought a suit against a violator of San Francisco’s residential hotel code, which contains a third-party private right of action, and obtained an injunction and award of attorneys’ fees from the trial court.<sup>136</sup> Though the injunction and award of attorney’s fee were overturned on appeal, neither the trial nor appellate court questioned the standing of the non-profit under the cause of action created by the ordinance.<sup>137</sup> However, it should be noted that state courts have generally followed a similar pattern to federal courts when it comes to associational standing, and California’s approach is an exception to that general rule.<sup>138</sup>

The flexibility exhibited in some state courts with regard to standing requirements demonstrates that these requirements do not pose an insurmountable hurdle to third-party private rights of action. Especially when combined with the standards applied by the courts in

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133. *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

134. *Animal Legal Def. Fund v. LT Napa Partners LLC*, 184 Cal.Rptr.3d 759, 766–67 (Cal. Ct. App. 2015). The plaintiff in this case was an animal rights group who, in an attempt to ensure California’s ban on foie gras was being enforced, used resources to publicize the law, investigate whether the law had been violated by the defendant, and alerted the authorities of its findings. *Id.*

135. *Tenderloin Hous. Clinic, Inc. v. Astoria Hotel, Inc.*, 98 Cal. Rptr. 2d 924, 926 (Cal. Ct. App. 2000).

136. *Id.*

137. *Id.*

138. See Christopher J. Roche, *A Litigation Association Model to Aggregate Mass Tort Claims for Adjudication*, 91 VA. L. REV. 1463, 1465 n.3 (2005) (collecting cases).

New Mexico and Oregon in finding traditional private rights of action not to violate the private law exception, state-court flexibility bodes well for proponents of the third-party private right of action. Whether state courts would allow actions to be brought under third-party private rights of action, however, is a very different question than whether cities should seek to implement such private rights of action in their ordinances.

### III. THE POLICY FRAMEWORK FOR THE THIRD-PARTY PRIVATE RIGHT OF ACTION

While cities in many jurisdictions have strong arguments in favor of their ability to create third-party private rights of action, this is separate from the question of whether it is a good idea to do so. Part III of the Note addresses whether, and in what contexts, cities should seek to include third-party private rights of action. Part III.A focuses on the potential benefits of enacting third-party private rights of action. Part III.B examines the most likely criticisms that could be levied against their enactment. Part III.C identifies several policy areas where third-party private rights of action could be particularly effective.

#### A. The Benefits of the Third-Party Private Right of Action

While Part I focused on the benefits that private rights of actions can have in general, there are certain benefits that are particular to the third-party private right of action. These benefits include the ability to combat underenforcement issues and target slow violence problems that only become apparent after many small violations have occurred over a long period of time.

##### 1. Combatting Underenforcement

A key benefit of the third-party private right of action is the reduction of costs in the search for plaintiffs who are willing and able to participate in a lawsuit. This is especially useful in contexts where potential private plaintiffs are transient, indigent, distrustful of the legal system, or hesitant to be involved in a legal battle, even if by name only.<sup>139</sup> Immigrant communities, homeless individuals, and

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139. See, e.g., Arthur H. Travers, Jr. & Jonathan M. Landers, *The Consumer Class Action*, 18 U. KAN. L. REV. 811, 814 (1970) (noting issues of reluctant plaintiffs

criminal defendants out on bail are all examples of potential plaintiffs that might be unable or unwilling to serve as plaintiffs in a suit, even if there has been a clear violation of an ordinance.<sup>140</sup> Other examples include situations where cities want to preclude private bargaining between violators and potential plaintiffs to avoid enforcement of ordinances. In the housing context, this could be a landlord paying an evictee to avoid a suit stemming from a code violation.<sup>141</sup> For environmental ordinances, it could involve neighbors bargaining to avoid municipal involvement in the emission of pollutants.<sup>142</sup>

Third-party private rights of action also have the potential to reduce the costs of enforcement for cities. Any suit brought by a private party represents an investment of time and resources the city no longer has to make. This is especially important for the many municipalities that are in dire fiscal straits. Some cities, like New York and San Francisco, have the budgets to maintain administrative agencies to handle the first wave of enforcement for ordinance violations.<sup>143</sup> Many cities, however, do not have the funds to maintain these departments

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in consumer protection claims); Comment, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROBS. 411, 424 (1970) (describing barriers that may prevent plaintiffs from joining class action suits).

140. See, e.g., *New ACLU Report Shows Fear of Deportation is Detering Immigrants from Reporting Crimes*, ACLU, <https://www.aclu.org/news/new-aclu-report-shows-fear-deportation-detering-immigrants-reporting-crimes> [<https://perma.cc/BU6N-8J46>] (describing how courthouse arrests have stopped many undocumented immigrants from participating in court proceedings); David Migoya, *Homeless Court Offers Hope to Indigents*, THE DENVER POST (Mar. 29, 2007), <https://www.denverpost.com/2007/03/29/homeless-court-offers-hope-to-indigents/> [<https://perma.cc/9HCR-QZFP>] (describing how a program to help clear the court records of individuals experiencing homelessness had far fewer participants than supporters hoped for).

141. Lisa Napoli, *My Landlord Offered Me \$35k To Move Out*, CURBED (July 26, 2018), <https://la.curbed.com/2018/7/26/17608272/cash-for-keys-tenant-buyout-offer> [<https://perma.cc/AMV9-VHWC>].

142. Thalia Gonzalez and Giovanni Saarman, *Regulating Pollutants, Negative Externalities, and Good Neighbor Agreements: Who Bears the Burden of Protecting Communities?*, 41 ECOLOGY L. Q. 37, 63 (2014) (describing how Good Neighbor Agreements between communities and polluters often include agreements to forgo lawsuits).

143. See S.F., CAL., ADMIN. CODE ch. 41.A.7 (2018) (creating an Office of Short-Term Residential Rental Administration and Enforcement); N.Y.C. ADMIN. CODE § 8-103 (2018) (creating a Commission on Human Rights responsible for investigating and bringing claims against violators of city's human rights law).



or engage in vigorous civil enforcement on their own. SeaTac, WA is a prime example of a small city benefiting from embracing private civil enforcement.<sup>144</sup> But larger cities like Cleveland, OH, and Philadelphia, PA, are not immune to issues of limited resources.<sup>145</sup> The third-party private right of action is the tool that offers the widest net of potential plaintiffs, and thus the most opportunities to effect regulatory goals without draining city coffers.

## 2. Targeting Slow Violence Problems

In *Plaintiff Cities*, Sarah Swan argues that there is a type of harm that cities are particularly well-equipped to deal with in relation to other litigants: slow violence.<sup>146</sup> Slow violence problems are issues that develop gradually, with a series of incidents dispersed in both time and space.<sup>147</sup> While each discrete incident may not be worth filing suit from an individual private party's perspective, when they are aggregated and accreted, they can develop into serious issues.<sup>148</sup> Examples of policies working against slow violence include environmental laws dealing with situations where one-off polluting incidents are minor but become serious over time, or laws designed to maintain the character or accessibility of a neighborhood through regulating individual homes and buildings. A standard private right of action, then, would not necessarily assist with enforcement of these ordinances since individual litigants gain too little from filing suit. Mission-driven non-profit groups, however, are more likely to see how granular violations work against their overarching goals. A housing rights or environmental group may be willing to file suit when a renter or property owner would not. By empowering them to sue violators directly, a third-party private right of action could do for slow-violence issues what a standard private right of action does for more distinct and obvious harms.

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

145. See Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L. J. 1118, 1164 (2014) (explaining how budgetary crises resulted in Cleveland cutting 466 city staff positions and Philadelphia drastically reducing its staffing, hours, and acquisition in its library system).

146. Sarah Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1249–50 (2018). Swan contends that localities, as the governments that are closest to the people and interact most directly with their constituents on a daily basis, are best equipped to recognize these slow violence issues. *Id.* at 1251.

147. *Id.* at 1250.

148. *Id.*

## B. Criticisms of the Third-Party Private Right of Action

While the still-nascent municipal third-party private right of action has yet to attract scholarly criticism, there are two veins of critique that are likely to be raised. The first is an extension of a critique of many exercises of municipal power and is skeptical of any increase in cities' power to create law. The second is tailored to private enforcement of government policies more generally.

### 1. Criticisms Against Municipal Power

The first flavor of criticism of the municipal third-party private right of action stems from the idea that it extends too much power to cities.<sup>149</sup> Historically, this criticism has manifested itself most clearly in the private law exception.<sup>150</sup> However, even in jurisdictions that have moved past the private law exception, there are still reasons to be wary of too much municipal power. A frequent critique of city power is rooted in the seemingly arbitrary nature of many municipal borders. Especially in larger metropolitan areas, suburban communities end and begin with little rhyme or reason.<sup>151</sup> If each city can create its own regulations, the resulting “crazy quilt”<sup>152</sup> can lead to a daunting task for regulated entities that want to know which ordinances they need to adhere to at a given location. This non-uniformity objection has been raised by several courts and commentators who oppose aggressive

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149. The question of whether cities have too much or too little power has long served as fodder for municipal scholars' debates. *See, e.g.*, Gerald E. Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1057, 1150 (1980) (arguing that “real power must be given to cities” and suggesting the creation of city-run banks and insurance companies); Richard Briffault, *Our Localism, Part II: Localism and Legal Theory*, 90 COLUM. L. REV. 346, 446 (1990) (asserting that “local autonomy . . . should be seen as normatively ambiguous”); Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91, 132 (2017) (noting a deep “political and economic malaise” in American political culture that works against any movements to empower cities).

150. *See supra* Part II.B.

151. Richard Briffault has elaborated on the problem with local borders that “cut across densely packed and economically and socially intertwined metropolitan areas,” and the inevitable externalities that occur when localities' regulations impact their neighbors. Briffault, *supra* note 149, at 426–27.

152. *See* *Nixon v. Mo. Mun. League*, 541 U.S. 125, 136 (2004) (noting that seemingly arbitrary distinctions in state and local law could create a “national crazy quilt” in telecommunications policy).

municipal agendas.<sup>153</sup> While this critique is not specific to third-party private rights of action, these rights of action do have the potential to exacerbate issues of uniformity by reducing the cost of enforcement. Businesses that would feel safe avoiding enforcement of smaller cities' regulations could be exposed to more liability if private groups begin enforcing the policies more vigorously.

As noted in Part II.D, however, the third-party private right of action faces limitations that mitigate the worst impact of this criticism. In areas where the "crazy quilt" truly becomes too hectic, state legislatures have the ability to intervene and establish uniformity through preemption. State courts can also serve as a backstop, as evidenced by the New Mexico appellate courts' insistence that ordinances must not create serious issues of non-uniformity in the law.<sup>154</sup> Uniformity concerns are also mitigated by the nature of third-party private rights of action. They are inherently a tool of enforcement, rather than an actual regulatory policy. The existence of a third-party private right of action does not change what rules a regulated entity must follow to obey a city ordinance—instead, it expands the number of potential enforcers of the law. However, the enforcement-focused nature of the third-party private right of action opens it up to another family of critiques.

## 2. Criticisms Against Private Enforcement

The second family of criticisms likely to be levied against a third-party private right of action is skepticism of private enforcement of laws in general. This skepticism of private rights of action comes from two criticisms. First, critics argue that private rights of action can be ineffective. Litigation is expensive and time-consuming, and even with fee-shifting provisions, they may not generate enough plaintiffs to create a meaningful difference in enforcement.<sup>155</sup> Conversely, the second criticism is rooted in the idea that private rights of action provide incentives that are too high. Most frequently raised in the class-action context, this view argues that private rights of action cause

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153. See Diller, *supra* note 56, at 1152–53 (noting instances of this critique in the case of traditional municipal private rights of action).

154. See *supra* Part II.C.

155. See Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 790 (2011) (describing skepticism in potential plaintiffs as an issue with private enforcement of civil rights laws).

profit-driven attorneys to bring litigation that is motivated by money rather than the public interest, often with little benefit to their clients.<sup>156</sup> From this view, without a public agency driving enforcement decisions, litigation is determined by the market.

With the exception of large-scale wage cases like the City of SeaTac's, the majority of third-party private actions brought under municipal ordinances are likely to seek primarily injunctive relief or relatively modest damages, with fee-shifting provisions incentivizing attorney participation. While this may strengthen the first criticism of third-party private rights of action by making them less appealing to attorneys, it does not mean they will fail to create any litigation—traditional private rights of action have already resulted in a large amount of litigation despite operating with the same incentives. And even the threat of private litigation may serve to encourage would-be violators to adhere to municipal ordinances.

Both families of criticism against third-party private rights of actions also ignore one of the key benefits of municipal power: experimentation. Justice Brandeis declared the states in our federalist system to be laboratories of democracy: free to “try novel social and economic experiments without risk to the rest of the country.”<sup>157</sup> This argument applies to an even larger degree for municipalities. Paul Diller writes, “[i]n the sheer number of laboratories offered, local governments dwarf the mere 50 states: there are 15,000 municipalities and 3,000 counties, as well as 35,000 special-purpose districts.”<sup>158</sup> The key question then is, what do cities stand to lose by adding third-party private rights of action to their ordinances? These actions create no liability for the city, but offer the potential reward of regulatory enforcement through the conscription of private groups. With little downside and the potential for large gains, entrepreneurial cities may find third-party private rights of action an appealing way to ensure enforcement of existing and contemplated ordinances.

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156. See William B. Rubenstein, *On What A “Private Attorney General” Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2161–63 (2004) (outlining an argument most prominently made by Professor John Coffee that formulates this problem in terms of agency costs).

157. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

158. Diller, *supra* note 56, at 1114.

### C. The Road Forward

When cities choose to flex their regulatory muscle, the third-party private right of action has the potential to increase compliance through private enforcement. This right of action has the most potential benefits for cities when monitoring the regulated action is expensive or difficult and non-profits are likely to be aligned with the regulatory goals of the ordinance. Below is a sample of recent policy developments at the municipal level in the twenty-first century that have the potential to meet these criteria. Whether one agrees with cities' actions in these areas is often a matter of personal politics and the policy in question. Each, however, is an area where more aggressive use of private rights of action could assist cities in implementing their policies.

#### 1. Living Wage<sup>159</sup>

Before 2012, only five localities had minimum wage laws created by ordinance rather than state law.<sup>160</sup> As of September 2017, this number has increased almost eight-fold to at least thirty-eight.<sup>161</sup> While California municipalities dominate the list, it includes localities in Arizona, Illinois, Maine, Maryland, Minnesota, Missouri, New Mexico, and Washington State, as well as the District of Columbia.<sup>162</sup> As the example of SeaTac demonstrates, private rights of action can be invaluable in enforcing these ordinances, especially against large corporations that might be able to otherwise overwhelm city enforcers.<sup>163</sup>

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159. While authored before the rapid increase in local activity regarding living wages, Darin M. Dalmant, Note, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J. L. & SOC. PROBS. 93 (2005) provides an excellent overview and prescient analysis of the legal landscape surrounding these ordinances.

160. *Inventory of US City and County Minimum Wage Ordinances*, U.C. BERKELEY LAB. CTR. (Dec. 21, 2017), <http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/> [https://perma.cc/P4YL-B5SU].

161. *Id.*

162. *Id.*

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

## 2. Paid Leave and Employment Discrimination

There are no federal laws mandating that private employers offer paid sick leave and in 2014, only one state and four cities had laws requiring private employers to offer paid sick leave.<sup>164</sup> But, as of March of 2017, seven states and thirty-four cities have passed these laws.<sup>165</sup> These laws typically require a certain amount of guaranteed paid sick leave in proportion to the amount of hours an employee has worked.<sup>166</sup> In a similar vein, while federal and state laws offer general protection against private employer discrimination for certain classes of workers, many cities have expanded these protections through ordinances. The most common expansions of anti-discrimination protections are ordinances prohibiting discrimination based on sexual orientation<sup>167</sup> and gender identity.<sup>168</sup> Some cities have also included additional protections for pregnant women.<sup>169</sup> Third-party private rights of action could empower workers' groups, LGBTQ organizations, and immigrants' rights groups to better ensure vulnerable populations are actually receiving the protections of these ordinances.

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164. ROBERT J. NOBILE, GUIDE TO EMPLOYEE HANDBOOKS § 7:107 PAID SICK LEAVE LAWS AND ORDINANCES (2017).

165. *Id.*

166. *E.g.*, S.F., CAL., ADMIN. CODE ch. 12W.3(b) (2018) (mandating that employees accrue at least one hour of paid sick leave for every thirty hours worked).

167. HUMAN RIGHTS CAMPAIGN AND EQUALITY FEDERATION INSTITUTE, MUNICIPAL EQUALITY INDEX: A NATIONWIDE EVALUATION OF MUNICIPAL LAW (6th ed. 2017) (noting that in 2017 eighteen new cities extended their equal employment opportunity policy to expressly include sexual orientation). The Human Rights Campaign and Equality Federation Institute publish an annual assessment of municipalities' efforts to achieve LGBTQ equality. They score over 500 cities, including the 200 most populous cities in the United States and the five most populous cities in each state. A city's non-discrimination laws are the most heavily weighted factor in their analysis.

168. As of January 2016, over 200 cities and counties across 34 states had laws prohibiting private employers from discriminating on the basis of gender identity. *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUMAN RIGHTS CAMPAIGN (Jan. 28, 2017), <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> [<https://perma.cc/4ZAP-RB7Q>].

169. *See, e.g.*, Press Release, City of New York, Mayor de Blasio Announces Stronger Pregnancy Protections in the Workplace, Housing and Public Spaces (May 6, 2016) (announcing guidance defining violations of New York City's pregnancy discrimination statute).

### 3. Emerging Gig Economies<sup>170</sup>

Some cities have passed ordinances specifically aimed at regulating the emerging gig economies of short-term rentals and ride-sharing services. Reacting to companies like Airbnb and Home Away, municipalities have passed laws requiring short-term renters to register with the city and limiting the number of days properties can be rented throughout the year.<sup>171</sup> Ride-share regulating ordinances range from requiring background checks for driver services like Uber and Lyft<sup>172</sup> to granting these drivers the right to unionize.<sup>173</sup> Many public interest groups are concerned with how these new industries are changing cities' characters and removing traditional protections from workers. A third-party private right of action could offer a method of holding gig economy companies in check by allowing these organizations to bring their own enforcement actions against any violators of the city code.

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170. The term "gig economy" is frequently used to refer to digitally-enabled marketplaces that allow users to share both services, like rideshare companies such as Uber and Lyft, and property, like short-term rental companies such as Airbnb and HomeAway. It is also referred to as the sharing, on demand, peer, or platform economy. See Nathan Heller, *Is the Gig Economy Working?*, THE NEW YORKER (May 15, 2017), <https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working> (on file with the Columbia Human Rights Law Review); Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, BUREAU OF LABOR STATISTICS (May 2016), <https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm> [<https://perma.cc/3LNN-VXJ5>].

171. See, e.g., S.F., CAL., ADMIN. CODE ch. 41.A (2018); Frederick Melo, *St. Paul Approves Short-Term Rental Rules Related to Services Like Airbnb*, TWIN CITIES PIONEER PRESS (Oct. 25, 2017), <http://www.twincities.com/2017/10/25/st-paul-approves-short-term-rental-rules-related-to-services-like-airbnb/> [<https://perma.cc/C4G2-4STK>].

172. Mike McPhate, *Uber and Lyft End Rides in Austin to Protest Fingerprint Background Checks*, N.Y. TIMES (May 9, 2016), <https://www.nytimes.com/2016/05/10/technology/uber-and-lyft-stop-rides-in-austin-to-protest-fingerprint-background-checks.html> (on file with the Columbia Human Rights Law Review).

173. Nick Wingfield & Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES (Dec. 14, 2015), <https://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html> (on file with the Columbia Human Rights Law Review).

#### 4. Employment Verification

While many of these policies can be described as progressive actions taken by cities that tend to be more left leaning than their state legislatures, not all local innovations align clearly on this side of the political spectrum. Ultimately, third-party private rights of action are a tool that serves the wielder. For example, a number of localities require that their governments and companies with city-awarded contracts use E-Verify to ensure that their employees are not undocumented immigrants.<sup>174</sup> These include several cities and counties in Michigan, New York, Oregon, and Washington.<sup>175</sup> Third-party private rights of action could allow concerned citizens and non-profits to hold these employers accountable to these policies.

#### CONCLUSION

The third-party private right of action offers cities a tool to reduce constraints on private litigants. The potential benefits are widespread. Small cities could affirm their community goals through ordinances that would otherwise be unenforceable. Metropolises could better draw on the numbers and resources of their polity to reduce enforcement costs and potentially broaden their regulatory ambitions. Non-profits could gain a new strategy to help improve their communities. Public interest attorneys could gain a new source of clients as they attempt to do the same. While none of these benefits are guaranteed, the risks to cities of enacting these laws are low. And just as they have proven to be ground zero for the national debate on wages and immigration enforcement, cities have the potential to innovate in this area of the law in a way that will ripple across the country.

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174. GUARDIAN BY LAWLOGIX, E-VERIFY REQUIREMENTS: FEDERAL, STATE, COUNTY, AND MUNICIPAL LEVELS (2012), [https://fairus.org/sites/default/files/2017-08/E-Verify\\_Requirements\\_Dec.pdf](https://fairus.org/sites/default/files/2017-08/E-Verify_Requirements_Dec.pdf) [https://perma.cc/YSS3-8RFP].

175. *Id.*