



Local Action, National Impact:

A Practical Guide to Affirmative Litigation for Local Governments

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I. What is a local affirmative litigation practice?



Civil public lawyers typically provide litigation defense and advice to their government clients. They defend their clients in tort, civil rights, contract, employment, land use, and other matters. They respond when a city department asks for legal counsel. They also write contracts and draft legislation. On the criminal side, district attorneys work with their police departments and other law enforcement colleagues to prosecute criminal matters. These are critical functions of local government public lawyers.

Yet across many jurisdictions, both civil and criminal public lawyers can also act as civil plaintiffs. Those same lawyers can initiate actions to address violations of local, state, and federal laws that harm their communities. In so doing they can proactively protect the rights of their residents. Through affirmative litigation, local government public law offices can act both in their own interests and those of the public.¹ Localities can enforce laws that protect individuals' abilities to take out a mortgage, gain equal access to housing or a job,

¹ Throughout this guide, when we use the terms affirmative law enforcement and affirmative litigation, we are referring to a government entity's proactively addressing violations of laws meant to protect its residents. This can take the form of investigating potential legal violations or filing lawsuits as plaintiffs. We also refer to cities, counties, municipalities, and localities interchangeably.

invest in their education, drink clean water, and breathe clean air. But the potential for local affirmative law enforcement remains largely unrealized because many city and district attorneys see their role as "primarily or exclusively responsive."²

We believe cities and counties can do more. And we join the growing chorus of scholars and advocates³ encouraging city, county, and district attorney's offices to embrace a broader sense of mission: as not only the attorney for the city or county as an institution, but also as the attorney representing the interests of its residents.

This guide aims to help municipalities build their own affirmative litigation programs by:

- ▶ making the case for affirmative litigation as a tool at the local level,
- ▶ providing specific case examples of how this tool has worked for local jurisdictions nationwide,
- ▶ offering suggestions for local offices seeking to develop affirmative litigation practices, such as partnering with law schools to enhance capacity, and
- ▶ providing suggested resources for offices ready to jump into this work.

² Kathleen Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in *WHY LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY* 51, 53-54 (2008).

³ See, e.g., Kathleen Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, in *HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE AND ECONOMIC INEQUALITY* 189 (Ray Brescia & John Travis Marshall eds., 2016); Kathleen Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 *FORDHAM URB. L.J.* 1903 (2016); cf. Heather K. Gerken, *Federalism All the Way Down*, 124 *HARV. L. REV.* 4 (2009).



II. Why should local governments pursue affirmative litigation?

A local public law office is unique in its ability to pursue litigation to vindicate the public interest. Affirmative cases offer at least four major benefits for public law offices and the communities they serve.

First, affirmative litigation provides an avenue for localities to protect vulnerable residents from predatory conduct, especially where protective laws are underenforced. Whether because of state or federal inaction⁴ or barriers to lawsuits brought by private or nonprofit parties⁵, residents do not always get the benefit of laws on the books. As a result, residents may be harmed and bad actors—including corporations, individuals, and state or federal governments—may engage in



unchecked wrongdoing. Localities can fill this enforcement gap.

Second, affirmative litigation offers an opportunity for localities to proactively address their own interests and the interests of their communities. Local governments can stop ongoing harms and provide restitution to victims, push state and federal actors to better protect residents, and force companies to uphold their legal obligations. They represent their communities' interests by investigating wrongdoing and addressing legal violations through the court system.

Third, by bringing cases as plaintiffs, local offices retain autonomy to address local problems in the way they believe will be most effective. As a plaintiff, the local office can set the agenda for solving problems in its community by articulating the legal theories to address illegal practices harming residents and proposing specific remedies for those harms. As the level of government closest to its residents, localities are often in the best position to articulate these theories and potential remedies, and to know which local problems are the most in need of resolution.

Finally, affirmative litigation can help localities recover significant revenue. As discussed in more detail below, local offices may be able to recover money in the form of restitution as well as penalties that the cities can then reinvest in further public rights enforcement for their communities.

⁴ See Donna Edwards, *100 Days of Civil Rights In The Trump Administration*, NBC News (April 29, 2017), <https://www.nbcnews.com/storyline/president-trumps-first-100-days/100-days-civil-rights-trump-administration-n752536> (finding diminishing civil rights enforcement under the Trump administration, including housing discrimination and voting rights); Charlie Savage, *Report Examines Civil Rights During Bush Years*, N.Y. TIMES (Dec. 2, 2009), <http://www.nytimes.com/2009/12/03/us/politics/03rights.html>; Patricia J. Williams, *Predatory Scapegoating*, THE NATION, Nov. 3, 2008, <https://www.thenation.com/article/predatory-scapegoating/>; Avalon Zoppo, et al. *Here's the Full List of Donald Trump's Executive Orders*, NBC NEWS, Feb. 14, 2017, <https://www.nbcnews.com/politics/white-house/here-s-full-list-donald-trump-s-executive-orders-n720796>; see also S.J. Res. 47, 115th Cong. (2017) (nullifying rule submitted by the Bureau of Consumer Financial Protection, which regulated the use of arbitration agreements in contracts for specific consumer financial products and services).

⁵ A series of Supreme Court cases and congressional action have made it increasingly difficult for private individuals to vindicate their rights in court. Without the power to access the courts because of mandatory arbitration or to organize their claims through class actions, it is often neither logistically feasible nor cost effective for consumers or workers to secure relief through individual arbitration proceedings. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (holding in gender discrimination suit that class could not be certified because it did not satisfy commonality requirement); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempted state law that prohibited contracts from disallowing class-wide arbitration).



III. Examples of Local Affirmative Litigation in Action

Cities and counties across the country use affirmative litigation to address direct harms to the governmental entity; public health and environment; and predatory business practices, including fair lending violations; as well as to challenge the constitutionality of state and federal laws. Indeed, the problems local governments could address through affirmative litigation are as varied as the ways that laws can be violated and people can be harmed. This section highlights cases that illustrate the diverse claims and remedies local law offices have pursued and summarizes the impact of those cases. Although the resources required to prosecute these cases, the investigation and litigation timelines, and monetary recoveries varied greatly in these matters, the results demonstrate the value of public rights-oriented local government attorneys who protect their residents from illegal misconduct.



HARMS TO THE GOVERNMENT ENTITY

When a locality itself is harmed, it can file suit to redress that injury and recover lost revenue resulting from the misconduct. **Localities have tackled harms resulting from anti-competitive practices, false claims made to the government, tortious misconduct, and regulatory violations.**

Preventing Patient Dumping

In 2013, San Francisco sued the state of Nevada for handing one-way bus tickets to psychiatric patients from Las Vegas to San Francisco without making prior arrangements for patients' care, housing, or medical treatment.⁶ San Francisco argued that Nevada required the city to spend millions of dollars on healthcare for individuals improperly discharged from mental hospitals in Nevada and bused to San Francisco. Ultimately, San Francisco reached a settlement with Nevada to assure the well-being of psychiatric patients, including transportation to an identifiable home or medical facility. The settlement also included a reporting requirement on traveling psychiatric patients and a monetary payment to San Francisco.⁷

⁶ Complaint, City of San Francisco v. Nevada, No. CGC-13-534108 (Cal. Super. Ct. Sept. 10, 2013).

⁷ Press Release, S.F. City Attorney, Herrera Praises Nevada Accord Assuring Care, Dignity of Transported Psychiatric Patients (Oct. 27, 2015), <https://www.sfcityattorney.org/wp-content/uploads/2015/10/PRESSKIT-Herrera-praises-Nevada-accord-assuring-care-dignity-of-transported-psychiatric-patients.pdf>.



Local governments are also significant **market participants** as purchasers of numerous products and services. When companies engage in price fixing or other anti-competitive practices, local governments are often direct victims of those practices, and accordingly may have standing to sue under federal and state antitrust laws. **Examples include suits against electricity providers, natural gas suppliers, computer chip manufacturers, and software companies.**⁸

Local governments can additionally sue to address direct harm under **false claims theories**. The Federal False Claims Act prohibits submitting false claims for payment to the federal government and withholding money owed to the federal government.⁹ Many states have corollary false claims statutes.¹⁰ False claims cases provide a powerful remedy against those who seek to defraud the government. For example, cities and counties have filed a number of high profile false claim cases alleging fraud by pharmaceutical companies for charging excessive amounts for drugs under the Medicare program and similar state programs.¹¹

In some situations, local governments may be damaged by an industry's **tortious misconduct** and can vindicate their interests through affirmative litigation. For example, San Francisco sued the tobacco industry alleging that tobacco companies defrauded both their customers and the city by covering up the lethality and addictiveness of their products.¹²

Holding Big Tobacco Accountable

Localities have also used affirmative litigation to ensure regulatory compliance. New York City has enforced tobacco and cigarette tax laws. Tobacco companies deliberately refused to pay the city millions of dollars in tax revenues that would have gone to city services and other vital expenses, and the city's multi-fronted affirmative litigation efforts have recovered millions of dollars.¹³ For example, the city claimed that FedEx "knowingly" transported, possessed, and distributed contraband cigarettes and committed "racketeering acts" under the federal RICO statute.¹⁴ In 2013, FedEx agreed to pay \$2.4 million to resolve part of the city's claim for delivering untaxed cigarettes.¹⁵ UPS settled a similar case with New York City for \$5 million.¹⁶ The city also filed a \$19.5 million lawsuit against the purveyor of the untaxed cigarettes themselves.¹⁷

⁸ See, e.g., *In re Microsoft Corp. Antitrust Litig.*, 2005 WL 906364 (D. Md. 2005); see also *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010); *In re Liquid Aluminum Sulfate Antitrust Litig.*, 2017 U.S. Dist. LEXIS 115294 (D.N.J. 2017).

⁹ 31 U.S.C. §§ 3729-3733 (2012).

¹⁰ See, e.g., CAL. GOV'T. CODE §§ 12650-56 (2013); MASS. GEN. LAWS ch. 12, §§ 5-5(O) (2018); N.Y. STATE FIN. §§ 187-194 (2018).

¹¹ See, e.g., *In re Generic Pharms. Pricing Antitrust Litig.*, No. 2724, 2017 U.S. Dist. LEXIS 151228 (E.D. Pa. filed Aug. 3, 2017).

¹² See *City & Cty. of San Francisco v. Philip Morris, Inc.*, 1998 U.S. Dist. LEXIS 3071 (N.D. Cal. 1998).

¹³ Complaint at 1, *City of New York v. FedEx Ground Package Sys. Inc.*, No. 1:13-cv-09173-ER, 2016 U.S. Dist. LEXIS 51053 (S.D.N.Y. Dec. 30, 2013).

¹⁴ *Id.* at 23, 26; Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c)-(d) (2012); Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341-2346 (2012).

¹⁵ *New York City Announces Settlement with FedEx Ground Over Cigarette Deliveries*, NEW YORK CITY LAW DEPARTMENT (Mar. 15, 2013), <http://www.nyc.gov/html/law/downloads/pdf/Fed-Ex%20Cigarette%20Settlement.pdf>.

¹⁶ *State of New York v. United Parcel Service, Inc.*, 131 F. Supp. 3d 132 (S.D.N.Y. 2015).

¹⁷ NYC: \$5 Million Settlement in Cigarette Case, WASHINGTON EXAMINER (Sept. 24, 2014, 8:22 PM), <https://www.washingtonexaminer.com/nyc-5-million-settlement-in-cigarette-case>.





PUBLIC HEALTH AND THE ENVIRONMENT

Cities and counties have brought multiple cases to address serious public health concerns and environmental hazards in their communities. **They have successfully relied on a number of statutory and common-law theories, including public nuisance, hazardous waste, products liability, and toxic tort laws.**

Removing Lead Paint

In 2000, Santa Clara County, the City and County of San Francisco, and other counties across California sued paint manufacturers for knowingly marketing lead paint for use inside homes, despite knowing the paint was harmful to children.¹⁸ According to the complaint, nearly 350 children under six years old suffered lead poisoning in Santa Clara County.¹⁹ Public health officials and doctors testified to the irreversible brain-damaging effects of lead poisoning on children. Over the course of six years, several other counties joined the case. By the end of 2013, the cities and counties secured a \$1.15 billion judgment, including \$99 million specifically allocated to Santa Clara.²⁰ The judge, in a groundbreaking move, issued the ruling against the paint companies based on a public nuisance theory.²¹ In November 2017, the California Court of Appeal for the Sixth Appellate District upheld much of this verdict.²² The substantive and monetary impact of the case remains: companies are liable for these egregious harms and must pay to abate the nuisance.

Cities have also confronted illegal disposal of **hazardous waste**. Using the California Hazardous Waste Law²³ in 2014, for example, the Orange County District Attorney's Office sued Albertsons LLC, alleging it had improperly handled and disposed of hazardous waste—such as pharmaceutical products, batteries, and aerosol products—at its grocery stores.²⁴

¹⁸ The claim included allegations of (1) false representation, concealments, and nondisclosures about the hazards of the paint leading to unfair competition; (2) strict product liability; (3) negligence; (4) fraud and concealment; and (5) unjust enrichment. Complaint at 24-32, *City of Santa Clara v. Atl. Richfield Co.*, No. 1-00-CV-788657, 2012 Cal. Super. LEXIS 408 (Cal. Super. Ct. 2012).

¹⁹ The City Attorney claimed that there were over 27,000 children with elevated blood lead levels within the ten counties included in the litigation. Christina Aanestad, *Santa Clara County Fights Back Against Lead Paint Contamination*, METROACTIVE (Aug. 28, 2013), https://www.sccgov.org/sites/cco/overview/impact/Documents/082813_Metro_Active_Santa_Clara_County_lead_paint_contamination.pdf.

²⁰ The ruling was subsequently upheld on appeal with respect to pre-1951 homes and remanded to the trial court for a determination about the appropriate dollar judgment for lead-paint abatement. Eric Kurhi, *Lead Paint Lawsuit: Billion-dollar Ruling in Santa Clara County-led Suit Against Manufacturers*, MERCURY NEWS (Dec. 16, 2013), <http://www.mercurynews.com/2013/12/16/lead-paint-lawsuit-billion-dollar-ruling-in-santa-clara-county-led-suit-against-manufacturers/>.

²¹ This ruling was made based on a finding that the companies promoted the lead paint in addition to their knowledge of the hazards it would create. *Id.*

²² The appeals court upheld the verdict for pre-1951 homes tainted with lead paint, overturned it as to homes built between 1951-1980, and remanded the case to the trial court for further proceedings to limit the \$1.15 billion abatement fund to an amount sufficient to address the problems lead paint poses in pre-1951 housing. That amount will be determined in court. Press Release, S.F. City Attorney, Statement from City Attorney Dennis Herrera on California Supreme Court Denying Review of Lead Paint Case, Feb. 15, 2018, <https://www.sfcityattorney.org/2018/02/15/statement-city-attorney-dennis-herrera-california-supreme-court-denying-review-lead-paint-case/>.

²³ CAL. HEALTH & SAFETY CODE §§ 117600-118360, 25100-25259, 25500-25547.8.

²⁴ Complaint at 2, *People v. Albertsons, LLC*, No. 30-2014-00725802-CU-TT-CJC (Cal. Super. Ct. May 19, 2014).



The improper disposal of hazardous waste can cause toxic environmental and public health threats to local residents. Just weeks after filing, the county reached a \$3.4 million settlement with Albertsons which required the company to pay \$2.7 million in civil penalties, \$300,000 for the cost of the investigation, and \$350,000 for supplemental environmental projects.²⁵ The settlement also required the company to develop and enforce new compliance efforts and that they train their staff on the pertinent laws and submit progress reports for five years.²⁶ Thus, the settlement benefited both the community and the office that pursued the case.

Other California localities have used the state hazardous waste law to address **illegal dumping**. In 2014, the district attorneys of Alameda and Orange Counties sued Safeway, which ultimately settled the case for almost \$10 million²⁷ and agreed to environmental compliance measures to fix its waste disposal processes. The following year, the Los Angeles City Attorney's Office sued the 99 Cents Only store and eventually reached a settlement of more than \$2 million.²⁸ Finally, several city attorneys, in conjunction with the California Attorney General, reached a \$22.5 million settlement with Target on another hazardous waste dumping case.²⁹ Significant monetary portions of each of these settlements represent civil penalties paid to the prosecuting cities.

Cities have also addressed other environmental hazards to protect the air that their residents breathe. In 2015, the Los Angeles City Attorney's Office sued the Southern California Gas Company over how it handled a natural gas leak that lasted over a month, harming residents and causing them to have to leave their homes.³⁰ Los Angeles' complaint alleged a public nuisance and violations of the state unfair competition law.³¹ The city subsequently reached an agreement with the company to ease the process for residents to be able to safely return to their homes.³² More recently, the Oakland City Attorney filed a lawsuit against a debris hauling company for intentionally blowing toxic dust into a neighborhood, allowing contaminated water to flow into the city's storm water system, and operating in violation of the city's zoning laws.³³

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

26 See Claudia Koerner, *Albertsons Settles Hazardous Waste Lawsuits for \$3.3 Million*, Orange Cty. Register (June 25, 2014), <https://www.ocregister.com/2014/06/25/albertsons-settles-hazardous-waste-lawsuit-for-33-million/>.

27 See Shan Li, *Safeway to Pay Nearly \$10 Million in Hazardous Waste Settlement*, L.A. Times (Jan. 5, 2015), <http://www.latimes.com/business/la-fi-safeway-settlement-20150105-story.html>.

28 See Shan Li, *99 Cents Only to Pay Over \$2 Million to Settle Hazardous Waste Charges*, L.A. Times (Jan. 6, 2015), <http://www.latimes.com/business/la-fi-99-cents-environment-20150106-story.html>.

29 See Shan Li, *Target to Pay \$22.5 Million to Settle Hazardous-Waste Dumping Case*, L.A. Times (Feb. 4, 2011), <http://articles.latimes.com/2011/feb/04/local/la-me-target-settlement-20110205>.

30 Emily Alpert Reyes, *L.A. city attorney sues SoCal Gas over gas leak affecting Porter Ranch*, L.A. Times (Dec. 7, 2015), <https://www.latimes.com/local/lanow/la-me-ln-gas-leak-porter-ranch-lawsuit-20151207-story.html>.

31 Complaint at 33-44, *People v. Southern California Gas Company*, No. BC 602973 (Cal. Super. Ct. Dec. 7, 2015).

32 See Press Release, L.A. City Attorney, City Attorney Mike Feuer and SoCal Gas Reach Agreement; Gives Porter Ranch Residents More Time to Move Back Into Homes After Assurances the Leak has Been Stopped (Feb. 8, 2016), <https://www.lacityattorney.org/single-post/2016/02/08/City-Attorney-Mike-Feuer-and-SoCal-Gas-Rreach-Agreement-Gives-Porter-Ranch-Residents-More-Time-to-Move-Back-Into-Homes-After-Assurances-the-Leak-has-Been-Stopped>.

33 See Press Release, City Attorney Barbara J. Parker, City Attorney files environmental justice lawsuit against debris hauling company that blew dangerous dust into West Oakland neighborhood (Feb. 1, 2018), <http://www.oaklandcityattorney.org/News/Press%20releases/Lead%20Paint%20Court%20of%20Appeal%20Decision.html>; Complaint, *People v. Santos Engineering Santos Pavers, Inc.*, No. 18869670 (Cal. Super. Ct. Jan. 18, 2018).





FINANCIAL SERVICES

Cities and counties have successfully held financial services companies accountable for illegal behavior and recovered funds on behalf of defrauded residents. Given the many barriers to private individual and class action litigation for consumers,³⁴ government action on these issues is particularly critical to hold institutions accountable for harming consumers, return money to consumers, and deter future misconduct.

In 2007, the San Francisco City Attorney's Office sued Check 'n Go and Money Mart, two large payday lenders.³⁵ Both companies marketed payday loans with annual percentage rates over 400%, more than eleven times greater than California's 36% maximum allowable interest rate for such loans.³⁶ **These installment loans typically targeted low-income and working class families living paycheck to paycheck.**³⁷ Although payday loans are marketed as short-term loans to be paid when the borrower receives her next paycheck, the price of the loan and the short repayment period mean that borrowers are rarely able to pay off the loan and are forced to "roll over" into another high-interest loan, quickly compounding debt they will be unable to pay off. In settling the two matters, San Francisco recovered \$7.7 million in restitution for consumers.³⁸

In 2008, the San Francisco City Attorney's Office sued the National Arbitration Forum (NAF) and FIA Card Services (FIA), the credit card subsidiary of Bank of America, for violating California's Unfair Competition Law.³⁹ The city alleged that FIA required consumers to adjudicate disputes through arbitration, that FIA routinely selected NAF as an arbitration forum, and that NAF was biased in favor of FIA and against consumers.⁴⁰ NAF's actions effectively ensured that banks would prevail over consumers in binding arbitration proceedings.⁴¹ NAF also engaged in other practices that stacked the deck against

34 See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that arbitration agreements providing for individualized proceedings in the employment context must be enforced); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); see also S.J. Res. 47, 115th Cong. (2017)

35 *People v. Check 'n Go*, 2007 Cal. Super. LEXIS 10112 (Cal. Super. Ct. 2007). At the time of the suit, Money Mart operated more than 100 California payday loan storefronts, while Check 'n Go operated almost 200. Press Release, S.F. City Attorney, Herrera Sues Storefront 'Payday Lenders' for Illegal Business Practices, Deceptive Marketing (Apr. 26, 2007), <https://www.sfcityattorney.org/2007/04/26/Herrera-sues-storefront-payday-lenders-for-illegal-business-practices-deceptive-marketing/>.

36 See Press Release, S.F. City Attorney, Herrera's Payday Lender Case Nets \$7.7 Million for Borrowers – At Zero Expense to Taxpayers (Aug. 5, 2013), <https://www.sfcityattorney.org/2013/08/05/herrerass-payday-lender-case-nets-7-7-million-for-borrowers-at-zero-expense-to-taxpayers/>.

37 See *id.*

38 *Id.* The City Attorney's office created a viral video parody to spread the word to the public about who was entitled to refunds as a result of the lawsuit. It reached thousands of claimants. 'Less Miserable' Parody Video Showcases S.F. City Attorney's Check 'n Go Refund Drive, CITY ATTORNEY OF SAN FRANCISCO (Feb. 20, 2013), <https://www.sfcityattorney.org/2013/02/20/less-miserable-parody-video-showcases-s-f-city-attorneys-check-n-go-refund-drive/>.

39 CAL. BUS. & PROF. CODE § 17200 (Deering 2018); Complaint, *People v. Nat'l Arbitration Forum*, 2008 Cal. Super. LEXIS 8971 (S.F. Cty. Sept. 5, 2008).

40 *Herrera Secures \$5 Million Settlement, Consumer Safeguards Against BofA Credit Card Subsidiary*, CITY ATTORNEY OF SAN FRANCISCO (Aug. 22, 2011), <https://www.sfcityattorney.org/wp-content/uploads/2015/08/Bank-of-America-FIA-Card-Services-settlement-presskit.pdf>.

41 In fact, statistics showed that consumers prevailed in only 30 of 18,000 cases, meaning they lost 99.8% of the time. *Id.*



consumers.⁴² In addition, NAF allowed inflated awards to lenders in arbitration, further exacerbating the harm to consumers.⁴³

Three years after initiating litigation, San Francisco secured a \$5 million settlement with FIA that included an injunction banning FIA from arbitrating credit card collections in California for two years. In addition, FIA agreed not to use NAF in arbitrations for at least five years and not to enforce “unconfirmed arbitration awards” that were obtained through NAF.⁴⁴ In a separate agreement, NAF agreed to pay \$1 million in civil penalties, to permanently stop arbitrating debt collection cases in California, and to stop arbitrating employment disputes for three years.

These cases had an impact well beyond San Francisco. In 2009, after Minnesota’s Attorney General settled a similar case with NAF⁴⁵, NAF announced it would cease handling consumer credit card arbitration matters. Bank of America subsequently agreed to drop its requirement that consumers with credit card disputes enter into binding arbitration.⁴⁶

Localities have also brought multiple successful fair housing cases in the aftermath of the 2008 financial crisis.⁴⁷ In 2008, for example, the City of Baltimore sued Wells Fargo for predatory and discriminatory lending practices that led to foreclosures harming the city. The city alleged that the bank’s practices led to more than 18,000 foreclosures in Baltimore from 2006 to 2010.⁴⁸ Their litigation, brought under the Fair Housing Act (FHA),⁴⁹ was eventually combined with a U.S. Department of Justice case that led to a \$175 million settlement in 2012, with \$7.5 million going to Baltimore specifically.⁵⁰ In 2017, the U.S. Supreme Court, in *Bank of America Corp. v. Miami*, affirmed the right of a city to bring suit as an “aggrieved person” under the Fair Housing Act, thereby strengthening cities’ ability to sue under the FHA on behalf of residents.⁵¹ Other cities and counties have brought similar lawsuits under the

42 *Herrera’s Suit Against Credit Card Arbitrator Featured in Cover Story of Current BusinessWeek*, CITY ATTORNEY OF SAN FRANCISCO (June 6, 2008), <https://www.sfcityattorney.org/2008/06/06/herrerassuit-against-credit-card-arbitrator-featured-in-cover-story-of-current-business-week/>.

43 *Id.*

44 CITY ATTORNEY OF SAN FRANCISCO, *supra* note 40.

45 Matthew R. Salzwedel, *National Arbitration Forum Settlement with Minnesota Attorney General*, FEDERALIST SOC’Y (Aug. 11, 2009), <https://fedsoc.org/commentary/publications/national-arbitration-forum-settlement-with-minnesota-attorney-general>.

46 CITY ATTORNEY OF SAN FRANCISCO, *supra* note 40.

47 See *Mayor & City Council v. Wells Fargo Bank*, 631 F. Supp. 2d 702 (D. Md. 2009); see also *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017); *City of Philadelphia v. Wells Fargo & Co.*, 2018 U.S. Dist. LEXIS 6443 (E.D. Pa. 2018); *Cnty. Of Cook v. Bank of Am. Corp.*, 181 F. Supp. 3d 513 (N.D. Ill. 2015); *City of Los Angeles v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047 (C.D. Cal. 2014); *City of Memphis v. Wells Fargo Bank*, 2011 U.S. Dist. LEXIS 48522 (W.D. Tenn. 2011).

48 Complaint, *Mayor and City Council of Baltimore v. Wells Fargo Bank*, 631 F. Supp. 2d 702 (D. Md. 2009) (No. 1:08-cv-00062-JFM); see also Gretchen Morgenson, *Baltimore Is Suing Bank over Foreclosure Crisis*, N.Y. TIMES (Jan. 8, 2008) (stating that half of Wells Fargo foreclosures in 2006 occurred in populations that were more than 80 percent black), <http://www.nytimes.com/2008/01/08/us/08baltimore.html>; Peter Rosenblatt & Katherine Newman, *The Impact of Foreclosure Waves on the City of Baltimore*, KRIEGER SCHOOL OF THE ARTS AND SCIENCES, JOHNS HOPKINS UNIVERSITY (2011), <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/JHU%20Report%20on%20Baltimore%20Foreclosures.pdf>.

49 42 U.S.C. §§ 3601-3619.

50 See Press Release, U.S. Dept. of Justice, *Justice Department Reaches Settlement with Wells Fargo Resulting in More than \$175 Million in Relief for Homeowners to Resolve Fair Lending Claims* (July 12, 2012), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief>.

51 137 S. Ct. 1296.



FHA, with varying degrees of success.⁵²

Combating Bank Misconduct

In 2016, the Los Angeles City Attorney, working with the Consumer Financial Protection Bureau and the Office of the Comptroller of the Currency, took action against Wells Fargo for its illegal and widespread practice of opening accounts without consumers' authorization. The Los Angeles City Attorney conducted an extensive investigation and filed a lawsuit against the bank in 2015. The complaint alleged that Wells Fargo opened banking and financial accounts, products, and services for customers without their consent and that, after discovering that this had happened, the bank failed to inform consumers of the conduct.⁵³ According to the bank's own analysis, employees opened roughly 1.5 million unauthorized deposit accounts nationwide.⁵⁴

Not only did consumers lose money (through fees for overdrafts or insufficient funds) and suffer other economic harms, but Wells Fargo's actions undermined consumers' trust in the bank.⁵⁵ Los Angeles was able to reach a settlement providing \$50 million in civil penalties that the City Attorney's Office must devote to future consumer protection.⁵⁶



CIVIL RIGHTS AND CONSTITUTIONAL PROTECTION

Localities can also protect their residents' constitutional rights. San Francisco helped catalyze the movement for marriage equality in 2004⁵⁷ by supporting citywide efforts to issue marriage licenses to same-sex couples and suing on behalf of residents to challenge discriminatory

52 See, e.g., *County of Cook v. Wells Fargo*, 115 F. Supp. 3d 909; *City of Los Angeles v. JPMorgan Chase & Co.*, No. 2:14-cv-04168-ODW, 2014 U.S. Dist. LEXIS 161164 (C.D. Cal. Nov. 14, 2014); *Mayor v. Wells Fargo Bank*, 677 F. Supp. 2d 847 (D. Md. 2010).

53 Complaint, *People v. Wells Fargo & Co.*, No. BC580778 (Cal Super. Ct. May 4, 2015).

54 See Press Release, L.A. City Attorney, Los Angeles City Attorney Mike Feuer Achieves Historic Result in Consumer Action Against Wells Fargo (Sept. 8, 2016), <https://www.lacityattorney.org/single-post/2016/09/08/Los-Angeles-City-Attorney-Mike-Feuer-Achieves-Historic-Result-in-Consumer-Action-Against-Wells-Fargo-Bank-to-Make-Restitution-to-Customers-Pay-50-million-in-Penalties-Unprecedented-Coordination-with-Federal-Regulators-to-Benefit-Consumers-Nationwide>; see also Press Release, Consumer Fin. Protection Bureau, Consumer Financial Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts (Sept. 8, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-wide-spread-illegal-practice-secretly-opening-unauthorized-accounts/>. This number was later revealed to be potentially much larger. See Stacy Cowley, *Wells Fargo Review Finds 1.4 Million More Suspect Accounts*, N.Y. TIMES (Aug. 31, 2017), <https://www.nytimes.com/2017/08/31/business/dealbook/wells-fargo-accounts.html>.

55 Complaint, *People v. Wells Fargo & Co.*, No. BC580778 (Cal Super. Ct. May 4, 2015). LA alleged that "[b]ut for Wells Fargo's quota-based business model, its customers would not have incurred wrongful fees, been put into collections, suffered derogatory references on their credit reports, or [been] forced to purchase identity theft protection." *Id.* at 38. In announcing the settlement, LA City Attorney Mike Feuer explained: "Consumers must be able to trust their banks. They should never be taken advantage of by their banks. We're holding Wells Fargo accountable and assuring the violations we've alleged never happen in the future. This extraordinary resolution sends a strong message—to big banks and consumers alike—that we'll be vigilant in protecting consumer rights." LA CITY ATTORNEY *supra* note 28.

56 Stipulated Final Judgment, *People v. Wells Fargo & Co.*, No. BC580778 (Cal Super. Ct. 2016).

57 See *Lockyer v. City of San Francisco*, 33 Cal. 4th 1055 (2004).



anti-gay statutes.⁵⁸ First, San Francisco sued in California state court arguing that California's statutes limiting marriage to opposite-sex couples violated the California Constitution's Equal Protection Clause, and its liberty and privacy interests. San Francisco's suit was consolidated with six others and led to the California Supreme Court's landmark ruling in 2008.⁵⁹ After California voters passed Proposition 8 in 2008 to bar marriage equality under California's constitution,⁶⁰ San Francisco intervened in *Perry v. Schwarzenegger* asserting due process and Fourteenth Amendment equal protection claims under the U.S. Constitution. **These efforts ultimately brought marriage equality to California.**⁶¹

More recently, after President Trump issued an executive order threatening to withdraw funding from **sanctuary cities**, many localities—from Chelsea, Massachusetts to Santa Clara County, California—responded proactively and sued the federal government to protect their autonomy and their residents.⁶² These cases sought to address the impossible choice the Executive Branch's coercive threats presented cities and counties: either compromise municipal values and risk residents' safety or lose critical federal funding and face further retribution from the federal government. Cities and counties argued that the federal decree caused significant constitutional, budgetary, and community harms and violated the separation of powers.⁶³ Less than three months after San Francisco filed the first lawsuit against the executive order, a federal district court issued a sweeping nationwide preliminary injunction that was subsequently made permanent.⁶⁴

IV. How Can Your City or County Begin Filing Affirmative Suits?

The cases discussed in the previous section all began with planning. Once a public law office commits to assuming the role of lawyer for the community, local affirmative litigation starts with several straightforward steps. This section outlines recommended first steps toward launching an affirmative litigation practice in your city or county.

58 See Press Release, S.F. City Attorney, San Francisco's Legal Fight for Marriage Equality (Feb. 12, 2004), <https://www.sfcityattorney.org/2004/02/12/san-franciscos-legal-fight-for-marriage-equality/>.

59 *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

60 See California Marriage Protection Act, 2008 Cal. Stat. A-298 (codified at CAL. CONST. art. I, § 7.5 (2008)), invalidated by *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); Bob Egelko & John Wildermuth, *Prop. 8 Foes Concede Defeat, Vow to Fight On*, SFGATE (Nov. 7, 2008), <http://www.sfgate.com/politics/article/Prop-8-foes-concede-defeat-vow-to-fight-on-3186844.php>; Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES (Nov. 5, 2008), <http://www.nytimes.com/2008/11/06/us/politics/06marriage.html>.

61 Order for Intervention, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); see also *Hollingsworth v. Perry*, 570 U.S. 693 (2013); *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

62 Exec Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states>.

63 First Amended Complaint for Declaratory and Injunctive Relief, *City & Cty. of San Francisco v. Trump*, No. 3:17-cv-00485-WHO (N.D. Cal. Feb. 27, 2017).

64 *City & Cty. Of San Francisco v. Trump*, No. 17-cv-00485-WHO, 2017 WL 5569835 (N.D. Cal. 2017); *City & Cty. of San Francisco v. Trump*, No. 17-cv-00485-WHO, 2017 WL 1459081 (N.D. Cal. 2017).



STEP ONE: Set Your Affirmative Litigation Goals

We believe it is important to be deliberate as you embark upon an affirmative litigation program. The following four goals should animate any local affirmative litigation effort.

- ▶ **Pursue cases that have a nexus to your residents.** At heart, the mission of your office is local: Whether you are investigating a national corporation or a local company, you should confront entities that cause harm to your residents. Thus, a key first step to establishing an affirmative litigation program is to generate cases by examining what issues cause harm both to the locality directly and also to the public—your constituency—more broadly. This will show your community that their local public law office is advocating on its behalf, building trust and a foundation for dialogue. Grounding litigation in local harm will also justify the affirmative litigation work that your office does. For example, in 2016, San Francisco used its affirmative litigation power to sue a for-profit university that was unlawfully skirting zoning laws and depriving San Franciscans of hundreds of rent-controlled dwellings.⁶⁵ Affordable housing issues exist in many cities, and a municipal public law office's efforts to protect those scarce resources have meaningful local impact.
- ▶ **Fill gaps in the private and public interest law markets.** Your office will not be the only one filing lawsuits on behalf of members of your community: legal aid clinics, nonprofits, and private plaintiffs' firms all file litigation to curtail practices that harm communities. Yet, as a public office, you can take advantage of tools that are not available to private plaintiffs. For example, many companies include binding arbitration clauses in their contracts that force employees and consumers to arbitration should a conflict arise. These arbitration clauses heavily favor defendants and can give companies impunity to violate the law knowing that conflicts will be resolved through arbitration rather than in open court.⁶⁶ Further, courts have restricted the abilities of private plaintiffs to bring class actions to challenge consumer contracts rendering many cases cost-prohibitive and ineffective.⁶⁷ These restrictions often do not constrain public enforcement. Thus, by using affirmative litigation to take cases that consumers cannot bring themselves, you can put your office's unique position to its best use.
- ▶ **Protect your community's most vulnerable residents.** Although legal clinics and nonprofits serve some of our most vulnerable communities, these organizations rarely have enough resources to sufficiently protect communities of color, low-income communities, immigrant communities, children, LGBT residents, and elderly persons. Your office can

⁶⁵ See Press Release, S.F. City Attorney, Herrera Sues One of City's 'Most Egregious Land Use Scofflaws'—Academy of Art University, May 6, 2016, <https://www.sfcityattorney.org/2016/05/06/herrera-sues-one-citys-egregious-land-use-scofflaws-academy-art-university/>.

⁶⁶ See generally Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (2015), <http://www.epi.org/publication/the-arbitration-epidemic/>.

⁶⁷ See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)



become a resource for communities that might not ordinarily have easy access to the legal system.

- ▶ **Tailor your cases to the scope of your authority and your tools.** Every city and county public law office has different tools available for affirmative litigation. In some situations, a public law office may realize that litigation is not the right tool to redress unlawful activity. Often sending a letter or initiating an investigation will be sufficient to encourage the business to comply with the law.⁶⁸ Alternatively, if your city or county has a contract with a company that is engaging in unlawful conduct, you can leverage that relationship to encourage the company to change its practices.

STEP TWO: Use the Full Scope of Your Local Authority

With your office's overarching goals in mind, evaluate the scope of your authority to ensure you undertake litigation consistent with that authority and that makes the best use of your available legal tools.

As the examples discussed earlier demonstrate, localities rely on a variety of legal authorities in affirmative litigation. For example, San Francisco and Los Angeles have relied primarily on their consumer protection authority to bring litigation—redressing a variety of unlawful, unfair, or fraudulent business practices using California's Unfair Competition Law.⁶⁹ New York City relies on aggressive enforcement of its municipal code and other tax laws to promote public health, safety, and welfare. Localities may also be able to proceed under federal law when they can demonstrate sufficient harm from the unlawful conduct to satisfy Article III standing requirements. This section highlights some of the most common sources of authority for local affirmative litigation.

▶ **Consumer Protection Authority**

Consumer protection laws give public law offices authority to stop predatory business practices. While all states have adopted their own consumer protection laws, most state statutes take their cues from the Federal Trade Commission Act.⁷⁰ The FTC Act broadly prohibits unfair and deceptive business practices.⁷¹ **Unfair business practices are those that cause or are likely to cause substantial harm to the consumer, that the consumer cannot reasonably avoid, and that are not outweighed by countervailing**

⁶⁸ In California, any city attorney, county counsel, or district attorney may write a letter to a business to provide evidence substantiating claims it makes in advertisements. See Cal. Bus. & Prof. Code § 17508.

⁶⁹ Cal. Bus. & Prof. Code § 17508 *et seq.*

⁷⁰ See Carolyn L. Carter, Nat'l Consumer L. Ctr., *Consumer Protection in the States: A 50-state Report on Unfair and Deceptive Acts and Practices Statutes 6* (2009), http://www.nclc.org/images/pdf/udap/report_50_states.pdf.

⁷¹ See 15 U.S.C. §§ 45, 55.



benefits to competition.⁷² Deceptive business practices are those that are misleading in a material respect, either by making a suggestion or omission that would deceive consumers.⁷³ Many states have not only adopted the FTC Act's prohibitions in their own consumer protection statutes, but have also expanded on federal protections. Many, for example, prohibit unconscionable business practices, generally defined as practices that are substantially one-sided and take advantage of the consumer's disadvantages in commercial transactions.⁷⁴ California has additionally classified any business practice that violates other federal, state, or local laws as an act of unfair competition—making any unlawful business act a consumer protection violation.⁷⁵

What makes consumer protection law especially valuable for impact litigation is its breadth and versatility. **When local law offices take full advantage of consumer protection law, they can engage in a wide range of public interest litigation.** They may engage in prototypical consumer protection cases—combatting deceptive sales tactics, false advertising, or unfair banking and lending practices.⁷⁶ But, local law offices can also use consumer protection laws to protect residents from business practices that cause other types of widespread harm or threaten residents' well-being.

Protecting Minors

In 2014, the San Francisco City Attorney's Office sued the mobile phone application MeetMe, alleging that the app's distribution of minors' locations to strangers, including sexual predators, was an unfair and deceptive business practice.⁷⁷ MeetMe eventually settled with the City Attorney's Office, agreeing to make "groundbreaking" changes to its business model that would better protect children's safety and privacy rights, in addition to paying damages, attorneys' fees, and other costs.⁷⁸ Though consumer protection law had not previously been used in this context, it could readily fit this situation, and the case illustrates how consumer protection laws can be leveraged to protect communities even as illegal practices vary and evolve.⁷⁹

To determine whether your office can use consumer protection law for affirmative litigation, evaluate whether your office has standing to enforce the relevant state statutes. **Every state consumer protection statute empowers the state's attorney general**

⁷² See 15 U.S.C. § 45(n).

⁷³ See 15 U.S.C. § 55.

⁷⁴ See, e.g., IDAHO CODE § 48-603C; MICH. COMP. LAWS ANN. § 445.903.

⁷⁵ See CAL. BUS. & PROF. CODE § 17200.

⁷⁶ See, e.g., Complaint, People of California v. Wells Fargo & Co., No. BC580778 (Cal. Super. Ct. 2016) (where the Los Angeles City Attorney's Office sued Wells Fargo under California's Unfair Competition Law for fraudulently opening bank accounts for consumers without their permission).

⁷⁷ See Complaint, People of California v. MeetMe, Inc., No. CGC 14-537126 (Cal. Super. Ct. 2014).

⁷⁸ Press Release, S.F. City Attorney, Herrera, MeetMe Settle Litigation with Industry-leading Protections for Minors (Aug. 19, 2015), <https://www.sfcityattorney.org/2015/08/19/herrera-meetme-settle-litigation-with-industry-leading-protections-for-minors/>.

⁷⁹ MeetMe was a corporation in the business of online dating; minors using the app were consumers of this business; and MeetMe's practice of collecting and distributing minors' geolocation data without obtaining valid consent was at the very least unfair. *Supra* note 77.



to enforce its provisions, and some states allow municipal or county authorities to enforce these provisions as well, independently or in cooperation with the attorney general.⁸⁰ Without an affirmative grant of authority by the state's consumer protection statute, it is less likely that a city or county could directly enforce state consumer protection laws without demonstrating a direct harm to the city itself.⁸¹

After evaluating your standing to proceed under a consumer protection theory, examine your state's consumer protection statute to weigh whether it is the best vehicle for affirmative litigation. Many states have adopted statutes that are purposefully broad and meant to be construed liberally.⁸² In a few states, the consumer protection statute limits unlawful conduct to an enumerated list of business practices or includes an intent requirement.⁸³ Thus, offices should evaluate whether the statute provides the best vehicle for affirmative litigation compared to other tools, including by assessing the facts of any particular potential law violation.

► Nuisance Authority

Public nuisance authority gives cities and counties the opportunity to address activities that threaten the health, safety, or welfare of their communities. **Unlike consumer protection law, public nuisance abatement has its origins in common law, making it a more widely available cause of action.** While the definition of a public nuisance varies by jurisdiction, the term is generally understood as “an unreasonable interference with a right common to the general public” such as “the public health, the public safety, the public peace, the public comfort or the public convenience.”⁸⁴

The main advantages of public nuisance law are its long history, broad availability, and flexible application. Public nuisance is a well-established cause of action that has been recognized by courts for over a century.⁸⁵ The U.S. Supreme Court has recognized that the right to abate public nuisances is inherent in the notion of territorial sovereignty.⁸⁶ Thus, the standing problems that municipalities may face when enforcing consumer protection laws do not typically apply in the public nuisance context.

80 See, Nat'l Consumer L. Ctr., *Consumer Protection Laws in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws* (2018), <http://www.nclc.org/images/pdf/udap/udap-report.pdf>; see also COLO. REV. STAT. §§ 6-1-103, 6-1-107, 6-1-108 (empowering district attorneys with power to investigate and litigate state consumer protection actions); MO. ANN. STAT. § 407.020 (vesting local and circuit attorneys with the power to enforce state laws against fraudulent business practices).

81 In states that allow individuals who suffer direct harm to bring consumer protection suits, municipal public law offices could attempt to argue that the municipality has suffered injury from predatory business practices requisite for standing. Recently, the Supreme Court allowed the City of Miami to file suit against banks targeting predatory lending tactics at African-American and Latino residents, finding that Miami had standing as an “aggrieved person” under the Fair Housing Act. See *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017). Municipalities should evaluate their state's standing jurisprudence to evaluate whether to test this strategy.

82 See, e.g., KAN. STAT. ANN. § 50-623; MD. CODE ANN., COM. LAW § 13-105.

83 See, e.g., COL. REV. STAT. ANN. § 6-1-105.

84 RESTATEMENT (SECOND) OF TORTS § 821B (1979).

85 See Paul J. Wahlbeck, *The Development of a Legal Rule: The Federal Common Law of Public Nuisance*, 32 L. & Soc'y Rev. 613, 617 (1998).

86 See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (“This [public nuisance suit] is a suit by the state for an injury to it in its capacity as quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens . . .”).



As a result of this broad authority, states and cities have been able to use the law of public nuisance to combat a variety of harms from air pollution, to the sale of diseased meats, to the dangerous storage of combustible materials.⁸⁷

For example, as noted in Section III, a coalition of ten cities and counties in California used their public nuisance authority to sue three major paint manufacturers for using toxic amounts of lead in their paint and endangering residents' (particularly childrens') health.⁸⁸ In this way, cities and counties can use public nuisance law similarly to consumer protection law as a tool to combat a wide range of practices that harm members of their communities.

Cities can also use public nuisance law in ways beyond the scope of consumer protection law. For example, in 1997, the Los Angeles City Attorney's office established the nation's first Citywide Nuisance Abatement Program (CNAP) to use civil nuisance abatement as a tool for public safety in collaboration with other municipal agencies like the Los Angeles Police Department and Los Angeles Department of Building and Safety.⁸⁹ In 2016, CNAP was responsible for shutting down a property used by a white supremacist gang for drug trafficking.⁹⁰ Through public nuisance affirmative litigation, the Los Angeles City Attorney's Office has combatted illegal drug, weapon, and human trafficking, as well as other violent activity.⁹¹

Public nuisance law can continue to evolve to meet local needs as cities and counties define its scope. **All states have adopted their own statutes defining public nuisance, but many states allow municipalities to define public nuisances as well.**⁹² If your city or county has the ability to expand the definition of public nuisance, you can also consider working with local legislators so that public nuisance doctrine can be tailored to fit your affirmative goals and the needs of your community—noting, of course, that the scope of your public nuisance authority will be limited by state and federal preemption norms.

▶ Code Enforcement Authority

All city and county offices have the authority to enforce local ordinances within their jurisdiction. While local ordinances may not prohibit as broad a range of harmful

87 See Wahlbeck, *supra* note 85, at 617.

88 Michael Hiltzik, *In Landmark Ruling, Court Orders Paint Companies To Pay To Clean Lead Paint out of California Homes*, L.A. TIMES (Nov. 15, 2017), <http://beta.latimes.com/business/hiltzik/la-fi-hiltzik-lead-paint-ruling-20171115-story.html>; see also text accompanying notes 18-22.

89 L.A. Cmty. Policing, *Citywide Nuisance Abatement Program*, <http://www.lacp.org/2003-Articles-Main/CNAPprogram.html>.

90 James Quedley, *L.A. Cracks Down on White Supremacist Gang Members in the San Fernando Valley*, L.A. TIMES (Dec. 13, 2016), <https://www.latimes.com/local/lanow/la-me-in-white-supremacist-gangs-20161213-story.html>.

91 See, e.g., Press Release, L.A. City Attorney, L.A. City Attorney Mike Feuer Secures Settlement with the Owner of Motel 6 to Curb Rampant Drug, Prostitution at Sylmar Location; Owner of Motel Chain to Also Pay \$250k for New Anti-Human Trafficking Program (Aug. 31, 2017), <https://www.lacityattorney.org/single-post/2017/08/31/LA-City-Attorney-Mike-Feuer-Secures-Settlement-with-the-Owner-of-Motel-6-to-Curb-Rampant-Drug-Prostitution-at-Sylmar-Location-Owner-of-Motel-Chain-to-Also-Pay-250k-for-New-Anti-Human-Trafficking-Program>; see generally Harriet K. Bilford, *A Fairer Way of Nuisance Abatement*, L.A. TIMES (Mar. 12, 2000), <http://articles.latimes.com/2000/mar/12/local/me-8189>.

92 RESTATEMENT (SECOND) OF TORTS § 821B, Comment c. (1979).

93 See, e.g., CAL. GOV. CODE §§ 38771, 38773.5.



conduct as state statutes or common law, local law offices can equitably enforce these ordinances to combat harms that businesses may inflict on the community. For example, as previously mentioned, New York City has effectively enforced its municipal code provisions to protect residents by, for example, aggressively enforcing its tax provisions against tobacco companies.⁹⁴ Oakland has successfully enforced its minimum wage ordinance to protect workers' rights to receive overtime pay and sick leave.⁹⁵ Additionally, as your office sets the goals for its affirmative litigation to address the greatest harms to your community, you can work with local legislators to enact ordinances targeting the misconduct you hope to combat—again keeping in mind state and federal preemption limitations.

▶ Federal Law Authority

Cities may also have the ability to enforce certain federal laws. For example, as discussed above, in *Bank of America Corp. v. City of Miami*, the U.S. Supreme Court held that the city of Miami had standing to enforce the Fair Housing Act as a standalone plaintiff against banks discriminating against people of color throughout the city.⁹⁶ Baltimore, San Francisco, and Oakland sued fossil fuel companies seeking to enforce the application of federal common law in a state public nuisance action.⁹⁷ **While it is uncommon for localities to enforce federal law, municipalities have been able to do so in some cases where there is concrete harm to the city.** Enforcing federal law through local affirmative litigation is in most cases a novel—and thus inherently uncertain—strategy, but it could also greatly benefit local residents.

▶ Remedies

The final issue to consider in evaluating the various potential bases of legal authority for your affirmative litigation are the remedies available under each approach. As discussed above, **the key goal of a local affirmative litigation practice is to benefit the community and the local jurisdiction.** Remedies to achieve that goal would include both injunctive relief to protect future victims and restitution to make past and current victims whole. **Civil penalties or attorney's fees can also help make an affirmative litigation practice sustainable for a local office.** Evaluating available relief under each potential statute or common law theory, along with the factors discussed in this section, will help your office determine the best approach in each case.

⁹⁴ Complaint at 1, *City of New York v. FedEx Ground Package Sys. Inc.*, No. 1:13-cv-09173-ER, (S.D.N.Y. 2014).

⁹⁵ Press Release, City Attorney Barbara J. Parker, Oakland City Attorney and Centro Legal de la Raza secure settlement with hotel owners who violated workers' rights (Nov. 2, 2018), <http://www.oaklandcityattorney.org/News/Press%20releases/Min%20Wage%20Settlement.html>.

⁹⁶ 137 S. Ct. 1296 (2017).

⁹⁷ See Rachel Becker, *Inside the Climate Change Lawsuit Pitting Big Oil Against San Francisco and Oakland*, THE VERGE (May 25, 2018), <https://www.theverge.com/2018/5/25/17386758/climate-change-lawsuits-san-francisco-oakland-fossil-fuel-alsup>. The claims brought by San Francisco and Oakland were dismissed by the federal district court and appeal is pending before the Ninth Circuit. Sabin Center for Climate Change Law, Climate Change Litigation Databases, <http://climatecasechart.com/case/people-state-california-v-bp-plc-oakland/>.



STEP THREE: Find Your First Cases

Once you have set your affirmative litigation goals and determined the scope of your enforcement authority, you can put them into action on behalf of your community. There are myriad ways to find cases and no universal set of instructions. **At the most basic level, this exercise involves identifying problems that exist in your community and applying the available laws to solve them.** This section offers some places to start, but your office should think creatively and strategically as it identifies cases.

- ▶ **Take advantage of the data you already have.** Cities and counties keep data on a variety of local phenomena. Especially useful is data on resident complaints or grievances filed with other city departments, including the city council and the mayor's office. For example, if workers complain of minimum wage violations, those complaints may provide clues for your office to begin investigating broader business violations. In addition to local data that your city collects, other sources like the Better Business Bureau and federal agencies make available information that can be useful to your case planning efforts. The Consumer Financial Protection Bureau currently keeps a public log of all consumer complaints that can be filtered by location, allowing your office to learn about complaints from your residents.⁹⁸ The Federal Trade Commission also maintains a free database of millions of consumer complaints related to a variety of potential law violations, including identity theft, telemarketing scams, advance-fee loans and credit scams, immigration services, and debt collection.⁹⁹ The FTC database is available to local law enforcement agencies who become members of its network.
- ▶ **Partner with local advocates.** Community-based organizations and other government entities likely know of issues or case ideas that you could address. Legal clinics see clients victimized by repeat bad actors. Community-based nonprofits and organizers that work with marginalized communities can shed light into the recurring difficulties they face as a result of unlawful and predatory conduct. Labor unions track employer abuses in different industries. State attorneys general and federal agencies possess numerous complaints and case ideas but often have insufficient resources to address or pursue them. And, of course, other cities that have already started affirmative litigation practices would be a great resource. Building partnerships with these local community-based organizations and coalitions will give you additional ideas on how to get started and help you establish your office as a trustworthy channel for advocating on behalf of the community. This visibility will also make it more likely that residents may reach out directly to your office with tips and complaints that might yield a case.
- ▶ **Follow the reporting.** As simple as it may sound, news reports often provide ideas for

⁹⁸ See Consumer Fin. Protection Bureau, *Consumer Complaint Database*, <https://www.consumerfinance.gov/data-research/consumer-complaints/>.

⁹⁹ See Fed. Trade Comm'n, *Consumer Sentinel Network*, <https://www.ftc.gov/enforcement/consumer-sentinel-network>.



new cases. Local reporters often have relationships in the community and scout for new stories, so their coverage can provide insight into unlawful conduct affecting residents. National news outlets—especially those that specialize in investigative reporting like Vox, ProPublica, or Mother Jones—may identify widespread practices that your office can investigate locally. In addition to scouring national and local news sources and following Twitter and other social media outlets, topical reports published by groups like the National Consumer Law Center can also alert your office to potentially unlawful conduct. Sign up for alerts from organizations and think tanks focused on the problems you have identified in your locality as a way to stay informed.¹⁰⁰

- ▶ **Encourage your staff to generate proactive work.** A key aspect of a successful affirmative litigation function is an entrepreneurial staff. Encourage the staff working in your office to take ownership of identifying local problems—or national problems existing at the local level—that your office can seek to address. Everyone in the office—lawyers and non-lawyers alike—should be encouraged to seek out problems requiring public protection and to suggest them for consideration. In addition to the sources outlined above, ideas can come from existing investigations, partner agencies, or conversations your employees have in their communities. They can also come from cases your office is defending that illuminate third-party misconduct the city could confront in a plaintiff capacity.

STEP FOUR: Sustain and Grow the Capacity for Affirmative Litigation

After your office has begun to investigate and file cases, it is important to establish the infrastructure to sustain a steady stream of impactful matters. Designate sufficient resources and personnel who focus solely on affirmative litigation. If possible, devote a portion of any civil penalties or other monetary recovery to future affirmative litigation so that successful cases can generate reinvestment in the public good. Finally, as the office works on active affirmative cases, be mindful of brainstorming ideas for litigation, so that a new case is ready to file when an old one concludes. Keep in mind that not every new idea results in litigation, so a pipeline of ideas and investigations is important for sustained impact. Particularly helpful to keeping a steady stream of litigation is maintaining partnerships with community groups, including local law schools, as discussed in the next section.

¹⁰⁰ See, e.g., The State Center Consumer Protection Report, <https://statecenterinc.org/cpi-newsletter/>



V. How Can Cities Partner with Law Schools to Begin an Affirmative Litigation Clinic?

Local government offices benefit immensely from formal partnerships with law schools to pursue affirmative litigation. These collaborations provide attorneys with help from law students eager for hands-on experience. **Students can directly support attorneys through every stage of the litigation process.** Creative and nimble, students can directly impact the success of a localities' affirmative litigation practice.

Yale Law School's San Francisco Affirmative Litigation Project

Over a decade, nearly 200 Yale law students clocked roughly 30,000 hours of work for the San Francisco City Attorney's Office.¹⁰¹ In turn, the students had the unparalleled opportunity to contribute to cutting-edge litigation, including a groundbreaking consumer-protection suit against the lead paint industry that won a billion-dollar judgment, California's marriage equality litigation, a case that made the cover of BusinessWeek, the first lawsuit in the nation challenging President Trump's sanctuary city executive order, and one of the most innovative climate-change cases in the United States.¹⁰² In each case, students were a critical "secret weapon" for the city.¹⁰³ The Yale-San Francisco clinic serves as a national model for law schools across the country, including partnerships developing between offices and law schools in Detroit and Los Angeles. Whether through a student study group, practicum, or law school clinic, collaboration with law schools can bolster the impact of cities' and counties' litigation for the public interest.



BENEFITS OF PARTNERING WITH LAW SCHOOLS

Partnering with a law school offers key benefits to local government offices. Students can provide critical assistance on active cases, permitting attorneys to focus on the highest priority issues. Students gain valuable experience, and local government offices benefit from students' talent and effort without the need for additional budgetary expenditure. **Law students are natural allies for an affirmative litigation practice.** Often interested in legal work that can have a broad public impact, law students bring commitment and creativity to the affirmative litigation project. Students bring ideological diversity and different perspectives;

¹⁰¹ See *SFALP Clinic Celebrates 10 Year Anniversary*, Yale Law Sch. (Aug. 25, 2016), <https://law.yale.edu/yls-today/news/sfalp-clinic-celebrates-10-year-anniversary>.

¹⁰² See *id.*; *Major Cases*, S.F. Affirmative Litig. Project, <https://law.yale.edu/sfalp/major-cases>. Students were instrumental to the successful litigation discussed in the text accompanying notes 6, 18-22, 31-34, 36-41, 56, and 58-60.

¹⁰³ See Stephanie Francis Ward, *Yale's Civil Litigation Clinic Aims to Train Law Students and Make a Difference*, ABA JOURNAL, Apr. 2018, http://www.abajournal.com/magazine/article/san_francisco_yale_civil_litigation_clinic.



while in law school, students take courses across disciplines, situating them differently than practicing attorneys. Law students can also help build a queue of new litigation ideas by supplying fresh perspectives as well as the energy and flexibility to brainstorm, a process in which attorneys may not have the bandwidth to regularly engage. Finally, these partnerships create a pipeline of junior attorneys who are trained in and passionate about local government service, supporting offices' long-term efforts to attract and retain talented attorney staff.

Collaborating with public law offices benefits law students, as well. It provides students an opportunity to advance innovative public interest cases. From brainstorming possible suits, to filing complaints, to motions practice, students can have a unique opportunity to work alongside local government attorneys at every stage of litigation. Law students receive not only hands-on experience with local government litigation work but also receive supervision and mentorship from seasoned litigators who can provide feedback on substantive work assignments and bolster students' professional development as future public interest attorneys.

On both sides, a local government/law school partnership imposes a relatively low administrative and financial burden. Local government offices need not devote significant resources, nor provide a physical space to work with law students. Because local government attorneys work directly with students, this kind of partnership functions similarly to an externship, insofar as it does not require law schools to devote significant resources to appointing dedicated staff solely to supervising student work. Indeed, at Yale Law School, in addition to a supervising faculty member for whom the clinic is only part of her responsibilities, there is only one clinical fellow who works to administer the clinic full-time.¹⁰⁴



BEST PRACTICES FOR ESTABLISHING A LAW SCHOOL PARTNERSHIP

Just as each local government office is different, so too are law schools. As a result, successful partnership models will vary. We recommend, however, several best practices for setting up a law school partnership that will better position your office to derive long-term benefits from the arrangement.

- ▶ **First, a faculty member who can champion a local jurisdiction's affirmative litigation work is critical to successfully establishing a formal partnership between a law school and a local government.** The faculty member should share your vision and aspirations for a local government/law school partnership. Ideally, this faculty member should have enough clout within his or her institution to push forward the establishment of a new

¹⁰⁴ See S.F. Affirmative Litig. Project, *About Us*, <https://law.yale.edu/sfalp/about-us>.



program within the school's administration. Equally important, there should be a point person in your office to liaise with the faculty member champion, ensure that students get appropriate assignments, and oversee their work. This will streamline the initial development and subsequent growth of the partnership.

- ▶ **Second, the program you set up should be repeatable for students, allowing them to obtain academic credit over multiple semesters.** Because investigations and litigation often extend beyond the length of an academic semester, your partnership will be stronger—and the value-add on both sides will be greater—if students are permitted to participate for three or four semesters, rather than just one. This will provide your office continuity of student support and also generate increased buy-in among students who will be able to engage more deeply in your work as a result of being involved for longer.
- ▶ **Third, it is helpful to have an application process for interested students to join the program.** The application need not be extensive, but it should help the law school and the local government office screen students for genuine interest in government practice and developing and pursuing litigation.
- ▶ **Finally, while framing the law school partnership is key, it is important to remain flexible about the different ways these programs can be structured.** The critical goal here is to institutionalize the partnership in some way, so that students can receive academic credit for their work with cities, but the particulars can vary. Potential models include:

1. Study group model

Members of the local government office can lead regular discussion sessions with interested students on topics germane to their office's affirmative litigation practice. During study group sessions, students can provide informal input on pending litigation or pitch new litigation ideas of their own.

2. Practicum model

A practicum can combine a doctrinal seminar on affirmative litigation and local government law with substantive opportunities for participating students, such as generating new ideas for litigation. The doctrinal seminar might also satisfy professional responsibility course requirements.¹⁰⁵

¹⁰⁵ See, e.g., Law 820 – California Unfair Competition Law, UCLA Law, <https://curriculum.law.ucla.edu/Guide/course/6455> (describing a course on building affirmative cases for the Los Angeles City Attorney's Office); see also Katie Vloet, *DLAW: Class Explores Affirmative Litigation Opportunities for Detroit*, THE LAW QUADRANGLE: NOTES FROM MICHIGAN LAW (Spring 2017), <https://www.quadrangle.law.umich.edu/spring2017/umichlaw/dlaw-class-explores-affirmative-litigation-opportunities-for-detroit/> (describing Detroit Litigation Advocacy Workshop, a "research-oriented class" in which students "explor[e] litigation options available to [Detroit] and produc[e] a white paper about how to tackle those opportunities").



3. Law school clinic model

In a formal clinic setting, in addition to a seminar component, students can be assigned to support attorneys on cases already in development or active litigation, or to receive supervision by attorneys to brainstorm or investigate ideas for new litigation.¹⁰⁶

Keeping these models in mind as you embark on conversations with potential law school partners will enable you to obtain the benefits of a law school partnership in a way that meets the needs of your office as well as those of your partner school.

VI. Getting Started – Help from the Authors

Inspired by the possibilities of what your city can achieve with affirmative litigation as a tool in your toolkit? Ready to get started? We know the process of launching an affirmative litigation practice may be daunting. We hope that the guidance and examples in this paper provide a useful roadmap for offices looking to begin this work or expand current efforts. This section includes additional resources that may be helpful for offices ready to launch or expand their efforts.

Public Rights Project

Public Rights Project is a nonpartisan, nonprofit dedicated to empowering state and local law offices to protect the core rights and freedoms that define us as Americans. PRP's vision is a future in which there is no gap between the values expressed in our laws and the lived reality of our most vulnerable communities. To reach that day, PRP is helping cities, counties, and states proactively enforce their residents' rights. Specifically, we recruit talented attorneys to serve as legal fellows in state and local law offices, and we work directly with offices to develop new cases and strategies for affirmative litigation. We are a force-multiplier for offices seeking to do affirmative work.

PRP works with local government offices—including city attorneys, county counsels, and district attorneys—that are looking to build, grow, or strengthen their affirmative litigation programs. Offices can engage with us in the following ways:

▶ **Join PRP's Network.**

We invite municipal offices to sign up for our newsletter and receive updates on our work

¹⁰⁶ See, e.g., S.F. Affirmative Litig. Project, *supra* note 104.



and ways to get involved. To sign up, visit our website at publicrightsproject.org.

▶ **Showcase Your Successes.**

PRP wants to share success stories from cities across the country engaged in affirmative work, so that others can learn from them and develop new ideas for their own cities. We are developing an affirmative litigation library to share with other cities and local governments. If you have cases you're particularly proud of or think would be useful for other cities to know about, please share them with us! PRP can help you get the word out about your work and enable other local offices to learn from your example.

▶ **Share Your Challenges.**

PRP is particularly interested in the challenges you face to help you address them. Have you hit roadblocks in your strategic planning on in a particular investigation or litigation matter? Are you looking to learn more about particular topics or hear from other cities about how they've overcome obstacles? Are there trainings and templates your team could benefit from that you don't have capacity to develop? PRP is looking to help cities solve these and other problems. Sharing your challenges will help us develop programming that is suited to your office's needs.

▶ **Partner with PRP.**

PRP also works directly with local offices to further affirmative litigation efforts. We serve as strategic partners on issues as broad as how to structure your affirmative litigation team and as narrow as developing arguments in a specific case as your co-counsel. In addition to the depth of experience on the PRP team, the organization has a network of low-cost and pro bono resources that we can deploy to help you find targeted solutions to achieve your legal and strategic goals.

▶ **Send Your Team to PRP Training.**

PRP's Affirmative Leaders Fellowship helps state and local government offices build capacity to protect the rights of vulnerable communities by focusing on their existing staff. PRP provides one year of training and professional development, plus access to a national network of public impact litigators, to current state and local government attorneys. This enables participants to initiate, expand, or deepen the impact of their office's affirmative work.

▶ **Host a Public Rights Project Fellow.**

PRP places skilled, public interest-minded attorneys approximately 3-5 years out of law school into state and city government law offices—city attorneys, district attorneys, and attorneys general—for two-year fellowships. Fellows work collaboratively alongside colleagues in their government offices on affirmative litigation, coalition building and community engagement, policy research, and other enforcement projects developed with their placement offices. PRP fellows help develop new cases and generate new ideas for their offices to expand public rights enforcement.



If your office is seeking to expand your affirmative litigation efforts, participation in PRP's Fellowship programs could be a perfect solution. You can learn more about the Affirmative Leaders Fellowship and about hosting a PRP Fellow on our website: <https://www.publicrightsproject.org/fellowships-1>.

Offices interested in partnering with PRP in any of the above ways can reach out to jill@publicrightsproject.org.

Justice Catalyst

Justice Catalyst is a nonprofit organization that supports nonprofits, firms doing public interest work, and governments engaging in affirmative litigation. Justice Catalyst believes in maximizing the ability to use litigation for public good by building partnerships across a wide array of fields. Justice Catalyst can help your municipality develop an affirmative litigation practice in the following ways:

▶ **Partner with Creative Lawyers and Activists.**

Justice Catalyst not only works with governments engaging in affirmative litigation, but also with lawyers and activists working in the public interest from a wide variety of backgrounds. Justice Catalyst can make the introduction between your office and an organization in your area to lay the foundation for future partnership and information sharing.

▶ **Brainstorm New Case Ideas.**

In dialogue with nongovernmental plaintiffs, Justice Catalyst has seen a number of potential cases that do not get filed because private plaintiffs face unique obstacles such as an arbitration clause. Justice Catalyst can share these case ideas with your Office so that important issues are addressed by the advocates best suited to do so.

▶ **Providing a Fellow for the Office.**

Justice Catalyst places talented law graduates with an interest in affirmative litigation in placements in law offices across the country. In 2017-18, Justice Catalyst placed one fellow in the Affirmative Litigation Division of the Los Angeles City Attorney's Office as well as one in the Labor Bureau of the New York Attorney General's Office. Justice Catalyst can work with your Office to come up with a project for a fellow and provide a talented new lawyer to help build your Office's capacity to engage in affirmative litigation.

For more information, visit justicecatalyst.org.



San Francisco City Attorney's Office

The San Francisco City Attorney's Office's Affirmative Litigation Task Force pursues public interest causes of action under California's Unfair Competition Law. Civil penalties recovered in those actions fund further consumer protection work.

The award-winning Task Force has secured important industry changes to protect consumer privacy, reformed discriminatory practices in health insurance and media metrics, shuttered unlawful immigration law practices, halted predatory evictions, ended fraudulent product marketing, and recovered wages and benefits for victims of wage theft. The San Francisco City Attorney's Office has also brought significant affirmative litigation in the areas of civil rights, constitutional, and public nuisance enforcement.

The San Francisco City Attorney's Office is happy to serve as a resource for public law offices looking to start or grow their affirmative litigation practice area.

For more information, visit sfcityattorney.org.

Yale Law School – San Francisco Affirmative Litigation Project

The San Francisco Affirmative Litigation Project (SFALP) is a clinical partnership between Yale Law School and the San Francisco City Attorney's Office. Co-founded by Yale Law School Dean Heather Gerken in 2006, SFALP works at the cutting edge of consumer protection, civil rights, and public health litigation. Students work directly with deputy city attorneys to conceive, develop, and litigate some of the most innovative public interest lawsuits in the country—lawsuits that tackle problems with local dimensions but national effects. The clinic serves as a national model for law schools across the country.

SFALP is available to advise public law offices and potential partner law schools on the law school side of launching and running a public law office/law school partnership.

For more information on SFALP's work and Yale Law School's longstanding partnership with the San Francisco City Attorney's Office, visit law.yale.edu/sfalp.





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