GOVERNING FOR IMPACT

Municipal Standing in Regulatory Litigation

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Issue Brief

I. INTRODUCTION

During President Trump's first term, his opponents were frequently able to slow or stop his agenda in court, usually by seizing on his administration's procedural carelessness and disregard for the law. Now, as the incoming administration plans to redouble its efforts both to undo important federal programs and to issue new rules harming workers, families, and the environment, that strategy will prove crucial again.

Cities played a vital role in pushing back against some of the first Trump administration's worst policies—including the attempts to rescind DACA,[1] add a citizenship question to the Census,[2] and institute an abortion gag rule for federally funded health care providers,[3] among many others. This time around, municipalities should be at the heart of the legal effort to combat the Trump Administration.

Municipalities are essential litigants because they have often been on the front lines of adverse regulatory action. As the Trump Administration prepares to crack down on marginalized groups, cut important streams of federal funding, and reshape public education (among other initiatives), that will hold true.

As a matter of legal doctrine, municipalities are especially versatile litigants because, when it comes to challenging federal action, they often have what's called *standing*. To sue the government in federal court, a plaintiff—be it a person, corporation, or government—must show how it has been harmed by the action it is challenging. Municipal governments, which employ workers, own property, participate in commercial and financial markets, and operate public agencies and entities of all sorts, should be able to make that showing as to many Trump Administration actions. They are standing utility players. Municipalities should

[1] *See Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 279 F. Supp. 3d 101 (N.D. Cal. 2018).

[2] *See New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 528, 600, 615 (S.D.N.Y. 2019).

[3] *See Mayor and City Council of Baltimore v. Azar*, 973 F.3d 258 (4th Cir. 2020) (en banc).

therefore prepare to litigate frequently and aggressively against the Trump Administration's actions.

This issue brief gives an overview of municipal standing. It explores how a recent Supreme Court decision greatly expanding *state* standing — 2023's *Biden v. Nebraska* — should inform municipalities' litigation strategy. And it offers some strategic considerations as to why affirmative litigation by cities is so important.

II. MUNICIPAL STANDING

Standing in general. The Constitution limits federal courts' jurisdiction to "cases" and "controversies."[4] The Supreme Court has read those words to mean that a federal plaintiff must have what it calls "standing." There are three elements of standing:

1. **Injury in fact.** A plaintiff must be able to allege a concrete, nonspeculative, legally recognized injury that it has suffered or will suffer imminently.
2. **Causation.** That injury must be "fairly traceable" to conduct by the defendant.
3. **Redressability.** It must be likely that the relief the plaintiff seeks from the court would actually redress the injury, at least in part.[5]

The standing test is often indeterminate — or, to put it less charitably, manipulable.[6] The doctrine, as elaborated over the decades by the Supreme Court, can be complicated and confusing.[7] Beyond that, sometimes judges appear to glide past standing when they wish to decide a case's merits,[8] or analyze the elements of standing with special rigor when they are hostile to a plaintiff or a claim.[9] Consequently, it is often hard to predict how a standing analysis will turn out, especially in politically salient cases.

[4] U.S. Const. Art. III, cl. 2.

[5] *See generally Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

[6] *See* William Baude, Samuel L. Bray, *Proper Parties, Proper Relief*, 137 Harv. L. Rev. 153, 189 (2023); *Biden v. Nebraska*, 143 S. Ct. 2355, 2391 (2023) (Kagan, J., dissenting); *Massachusetts v. EPA*, 549 U.S. 497, 548 (2008) (Roberts, C.J., dissenting).

[7] *See* 13A Edward H. Cooper, Fed. Prac. & Proc. Juris. § 3531.4 (3d ed. Jun. 2024 update) ("In application, however, the injury requirement is often far more complex than these phrases and frequent easy cases might suggest."); *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1557 (2024) ("Unfortunately, applying the law of standing cannot be made easy, and that is particularly true for causation.").

[8] *See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 n.4 (1986).

[9] *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408–22 (2013).

Municipal standing. In general, municipalities suing in federal court are subject to the same standing rules that apply to private plaintiffs, like individuals and corporations. They must demonstrate that they themselves have been injured by the government action they are challenging — that they have sustained a "direct" or "proprietary" injury.[10]

But municipalities generally have more interests to protect than a typical individual or corporation does. Many municipalities operate, oversee, or control schools, universities, utilities, public authorities, special districts, and hospitals — in addition to agencies working in fields like law enforcement, public health, social welfare, and housing. A federal regulation's adverse impact on any of these arms should confer standing. Similarly, federal labor and employment regulations impact municipal operations; economic regulations can affect a municipality's participation in commercial or financial markets; and environmental regulations might affect a municipality's real property. The range of interests a typical municipality possesses can make it a versatile litigant.

The Supreme Court recently emphasized the range of direct injuries that a governmental plaintiff can assert in federal court. In 2023's *Biden v. Nebraska*, the Court held that a state could base standing on injury to a public, but functionally independent, corporation.

In *Nebraska*, the Supreme Court found that Missouri had standing to challenge the Biden Administration's plan to forgive student loan debt. Federal loan servicers — the entities that collect borrowers' payments and administer the terms and conditions of loan programs — earn an administrative fee for each account they manage. Forgiving loans would have reduced those fees. One major servicer of federal loans is MOHELA, the Missouri Higher Education Loan Authority. The Court held that MOHELA's impending loss of fees was an injury to Missouri itself, giving rise to standing.

MOHELA, the Court held, was a state "instrumentality."[11] It was a "government corporation," chartered by the state to serve an "essential public function."[12] Its governing board was principally composed of gubernatorial appointees, and all its members could be removed by the governor for cause.[13] It also submitted annual financial reports to the state.[14] Moreover, the state, having chartered MOHELA, retained the power to dissolve it.[15] Because of these connections, the loan forgiveness plan's "acknowledged harm to MOHELA in the performance of its public function" was "necessarily a direct injury to Missouri itself."[16]

[10] *See generally Town of Milton v. FAA*, 87 F.4th 91 (1st Cir. 2023); *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004).

[11] *Biden v. Nebraska*, 143 S. Ct. 2355, 2366 (2023).

[12] *Id.* at 2365–66.

[13] *Id.* at 2366.

[14] *Id.*

[15] *Id.*

[16] *Id.*

That was true even though, as Justice Kagan pointed out in dissent, MOHELA was, as a practical matter, "legally and financially independent" from Missouri.[17]

Nebraska, though a state standing case, is relevant to municipal litigation too. First, its rule — that a plaintiff government may assert the injuries of an independent public corporation in court — should apply to municipalities. Though state and local law technicalities will matter here, cities should search out independent corporations, authorities, and districts plausibly under their control as vehicles whose injuries they may assert in federal court. *Nebraska* itself makes clear that even relatively minimal and formalistic markers of public control are sufficient for a government to base standing on a functionally independent entity's harm. Second, and more generally, *Nebraska* should prompt municipalities to think broadly and creatively about how their many arms, agencies, and affiliated entities may be affected by federal regulation — and sue accordingly.

Organizational standing. Some plaintiffs — in particular, mission-driven organizations — have sought to prove standing on the grounds that the challenged action forced them to divert resources from one use to another.[18] Municipalities have used this theory in the past.[19] For two reasons, though, they should not rely on diversion-of-resources standing going forward.

First, some courts have held or suggested that municipalities categorically may not assert diversion-of-resources standing.[20] Second, the Supreme Court appears to have recently pared back diversion-of-resources standing overall. In *FDA v. Alliance for Hippocratic Medicine* — the case dismissing a challenge to the FDA's regulation of mifepristone — the Court made clear that an organization generally cannot challenge a regulation merely because it "incurr[ed] costs to oppose" it.[21] "[T]hat theory would mean that all the organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies."[22] The Court

[17] *Id.* at 2386 (Kagan, J., dissenting).

[18] The leading case for this theory is *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

[19] *Chicago v. Matchmaker Real Estate Sales Ctr.*, 982 F.2d 1086, 1095 (7th Cir. 1992) (finding standing because "the City's fair housing agency has to use its scarce resources to ensure compliance with the fair housing laws (including its own fair housing ordinances). The City's fair housing agency cannot perform its routine services — human relations training, community workshops, etc. — because it has to commit resources against those engaged in racial steering."); *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1017 (N.D. Ill. 2019) ("[M]unicipal entities and private organizations alike may rely on the need to divert resources to establish standing."); *Mayor & City Council of Baltimore v. Trump,* 416 F. Supp. 3d 452, 488 (D. Md. 2019); *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 603 (S.D.N.Y. 2019).

[20] *See, e.g.*, *Town of Milton v. FAA*, 87 F.4th 91, 98 (1st Cir. 2023) ("Inasmuch as the municipal government exists to support its citizens, any action that it takes inherently serves that purpose and cannot be an injury to it. Put another way, a municipality cannot claim that reallocating municipal resources to address one of its residents' concerns is an injury because this decision simply represents a policy preference to prioritize one government function over another."); *San Francisco v. Whitaker*, 357 F. Supp. 3d 931, 944 & n.3 (N.D. Cal. 2018) (casting doubt on whether cities can have diversion-of-resources standing but reserving the question).

[21] 602 U.S. 367, 393 (2024).

[22] *Id.* at 395.

specified that for an organization's reallocation of resources to give rise to standing, the challenged action must "directly affect[] and interefere[]" with its "core business activities."[23]

The implications of *Hippocratic Medicine* for the diversion-of-resources theory of organization standing are not yet fully clear,[24] but given the cloud of uncertainty over the doctrine as a whole—and doubt as to whether municipalities can use it at all—local governments should not plan to rely on it. Instead, they should focus on how an "alleged diversion of resources [may] also [be] argued as an economic injury."[25]

State standing distinguished. Another note of caution. Municipalities are not always the equivalent of states for standing purposes. States are sovereigns.[26] As a result, they are often allowed to assert in court sovereign interests (such as in enforcing state law) and so-called "quasi-sovereign" interests (a confusing term referring generally to a state's interest in the health and welfare of its citizens).[27] And, at least in some circumstances, they may sue in a representative capacity by bringing so-called "*parens patriae*" claims on their citizens' behalf.[28]

Municipalities, at least as a matter of federal law, are not sovereigns.[29] They therefore may not vindicate sovereign or quasi-sovereign interests in court. And many courts have held that municipalities may not bring representative actions either[30]—certainly not against the

[23] *Id.*

[24] For cases discussing the implications of *Hippocratic Medicine* for organizational standing, see *Ariz. All. for Ret. Ams. v. Mayes*, 117 F.4th 1165 (9th Cir. 2024) and *Republican Nat'l Comm. v. N.C. Bd. of Elections*, 120 F.4th 390 (4th Cir. 2024).

[25] *San Francisco*, 357 F. Supp. 3d at 944; *see also Baltimore*, 416 F. Supp. 3d at 488 (outlining harms that, though characterized as arising form a "need to divert resources," could also be described as "direct cost[s] of [a] rule"). At the very least, municipalities should ensure that they are suing in a jurisdiction that permits government plaintiffs to assert diversion-of-resources standing, and that they can make the showing of an injury to "core" activities that *Hippocratic Medicine* requires.

[26] *E.g.*, *Printz v. United States*, 521 U.S. 898, 918–19 (1997).

[27] Cases discussing sovereign interests include *Dep't of Labor v. Triplett*, 494 U.S. 715, 717 (1990) (interest in enforcement of law sufficient for Article III standing); *Kentucky v. Biden*, 23 F.4th 585, 602 (6th Cir. 2022) (federal vaccination regulation's effect on "sovereign interests and traditional prerogatives in regulating public health and compulsory vaccination" sufficient). Discussion of the quasi-sovereign interest, "a judicial construct that does not lend itself to a simple or exact definition," *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Berez*, 458 U.S. 592, 601 (1982), can be found in *Alfred L. Snapp & Son* and *Massachusetts v. EPA*, 549 U.S. 497 (2008).

[28] *See Alfred L. Snapp & Son, Inc.*, 458 U.S. 592, 600–08.

[29] *E.g.*, *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985).

[30] *E.g.*, *id.* ("[P]olitical subdivisions . . . cannot sue as *parens patriae* because their power is derivative and not sovereign."). Most courts to consider the issue likewise appear to agree that a municipality, unlike a private organization, cannot assert the injuries of their constituents under a so-called "associational standing" theory. *See City of Olmstead Falls v. FAA*, 292 F.3d 261, 267–68 (D.C. Cir. 2002) ("The City does not have 'members' who have voluntarily associated[.]")); *Town of Milton v. FAA*, 87 F.4th 91, 96 (1st Cir. 2023) ("Several cases from other courts of appeals have established that municipalities cannot assert that they have been injured because of an alleged injury to their residents."). At least the Seventh Circuit, however, has held that "there is no reason why the general rule on organizational standing should not be followed" for cities. *City of Milwaukee v. Saxbe*, 546 F.2d

federal government.[31] Consequently, municipal standing must be based on a direct injury that the municipality itself sustains.

But these doctrinal restrictions should not limit municipalities' litigation strategy.

For one thing, some courts, including the Supreme Court, have suggested that a municipality has some leeway to base standing on communal harms, at least to the extent the municipality itself is injured. For instance, courts have recognized that cities have cognizable interests in: (1) stabilizing home prices and preventing increased racial segregation,[32] (2) preventing neighborhood "stagnation and decline,"[33] (3) enforcing regulations, imposing taxes, and protecting natural resources,[34] and (4) protecting citizens from health and safety crises.[35] If raised by states, these might have been characterized as either sovereign or quasi-sovereign interests — which cities generally may not assert. But in these cases, cities were able to persuade courts to "broadly define [their] proprietary interests as encompassing community welfare in some way."[36] As the Ninth Circuit has put it, a municipality "may sue to protect its own proprietary interests that might be concurrent with those of its citizens."[37]

More generally, as discussed above, municipalities represent diverse interests. They and their components operate in a wide range of fields touched by federal regulation. In most cases, the rule that cities may only base standing on direct, proprietary injuries is hardly a limitation on their ability to challenge the Trump Administration's regulatory agenda.

693, 698 (7th Cir. 1976). For more on this topic, see Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 Conn. L. Rev. 59 (2014).

[31] *City of N. Miami v. FAA*, 47 F.4th 1257, 1277 (11th Cir. 2022); *City of Olmstead Falls*, 292 F.3d at 267; *Town of Milton*, 87 F.4th at 96.

[32] *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110–11 (1979) (village had Article III standing to sue real estate brokerage firms because, as alleged, their "racial steering" practices could cause "[a] significant reduction in property values," which "directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services" and give rise to "[o]ther harms flowing from the realities of a racially segregated community").

[33] *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 199 (2017) (city was "aggrieved" under Fair Housing Act — which establishes "standing as broadly as . . . Article III" — by bank's discriminatory practices causing "a concentration of foreclosures and vacancies" in certain neighborhoods, "hinder[ing] the City's efforts to create integrated, stable neighborhoods," and "diminishing the City's property-tax revenue and increasing demand for municipal services" (internal quotation marks omitted)).

[34] *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197–98 (9th Cir. 2004) ("The 'proprietary interests' that a municipality may sue to protect are as varied as a municipality's responsibilities, powers, and assets," including interests in "its ability to enforce land-use and health regulations," "its powers of revenue collection and taxation," and "protecting its natural resources from harm").

[35] *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1189 & n.15 (2020) (city has cognizable interest in "protect[ing] its residents from . . . public health and safety crises").

[36] Kaitlin Ainsworth Caruso, *Who and What is a City "For?" Municipal Associational Standing Reexamined*, 62 Wm. & Mary L. Rev. Online 105, 113 (2021).

[37] *Sausalito*, 386 F.3d at 1197.

III. STRATEGIC CONSIDERATIONS

Municipalities are powerful and useful litigants. They have resources and talent at their disposal. They represent important political constituencies. And they can open the federal courthouse doors more often than ordinary litigants. They should plan to aggressively challenge federal action in court.

Attention to the breadth of a municipality's legally protected interests should be at the heart of that strategy. For any adverse regulation, city attorneys should seek to identify city programs or agencies — or, in light of *Biden v. Nebraska*, independent city bodies or corporations — that have been harmed. That should often be straightforward. For instance, city school districts and universities will be impacted by any regulation that affects their funding, their enrollment, or the wellbeing and security of their student bodies.[38] Health care regulations can affect the operation and funding of public hospitals and health agencies.[39] Changes to federal spending programs could affect any number of city components or instrumentalities receiving federal funds. There are many possibilities. Though, as noted above, technicalities of state and local law will determine whether a public entity is "subject to [a municipality's] supervision and control" for Article III purposes.[40]

A few other points city attorneys should consider:

1. There is particular strategic advantage in large municipalities like cities asserting claims of subsidiary municipal entities or corporations that themselves are directly affected by federal regulation. Frequently, the direct subjects of federal regulation — public hospitals or universities, say — are repeat players reluctant to sue the government in their own names. That may hold especially true in the second Trump Administration in light of Donald Trump's threats to retaliate against political opponents.[41] Governments with more resources and

[38] *See Regents of Univ. of Cal. v. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1033–34 (N.D. Cal. 2018) (DACA "rescission has harmed the University in multiple ways," giving rise to standing).

[39] *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714, 7717 (Mar. 4, 2019) (Trump-era regulation prohibiting recipients of Title X funding "from referring for abortion as a method of family planning, or from performing, promoting, referring for, or supporting abortion as a method of family planning.").

[40] *Biden v. Nebraska*, 143 S. Ct. 2355, 2366 (2023). As an example, whereas the City University of New York is arguably under the joint control of New York City and New York State, *see* N.Y. Educ. L. § 6204(2)(a) (establishing a board of trustees composed of ten gubernatorial appointees and five mayoral appointees, among others), Chicago's City Colleges are held out as being under city control, *see* Office of the Board of Trustees, City Colleges of Chicago ("The City Colleges of Chicago Board is comprised of seven voting members serving three-year terms as appointed by the Mayor with the approval of the City Council of Chicago.").

[41] *See* David Smith, *Revenge: Analysis of Trump Posts Shows Relentless Focus on Punishing Enemies*, The Guardian (June 2, 2024).

firmer political constituencies should take up those claims where possible — lest they never be brought at all.

Nebraska illustrates this dynamic. There, MOHELA itself was "[a]s far from [Missouri's] suit as it [could] manage."[42] It was not a party, an *amicus*, or "even a rooting bystander."[43] Indeed, the Missouri attorney general could only obtain certain documentation from MOHELA through a formal records request.[44] "MOHELA had no interest in assisting voluntarily."[45] Missouri nevertheless was legally — and politically — empowered to assert MOHELA's injury as its own. Along these lines, during the first Trump Administration, public hospitals were reluctant to challenge federal regulations limiting prescription drug reimbursements under Medicare.[46]

2. Municipalities' role in challenging adverse federal action will be especially important now because of *Hippocratic Medicine*'s effect on the diversion-of-resources theory of standing. As noted, that theory has principally been used by mission-driven organizations. To the extent *Hippocratic Medicine* makes it harder for those prolific litigators to challenge federal action, governmental plaintiffs must take up the slack.

3. Municipalities should consider partnering with states and private organizations as co-plaintiffs to maximize the likelihood of demonstrating standing. As noted, states may articulate standing theories unavailable to other plaintiffs by, for instance, asserting sovereign and quasi-sovereign interests. Municipalities, like states, generally have more proprietary interests to protect than private plaintiffs. And organizations — even if *Hippocratic Medicine* affected their ability to prove that *they* have been injured — may frequently obtain standing to assert the injuries of their members, a standing theory unavailable to government plaintiffs.[47] Since only one plaintiff needs standing per claim,[48] assembling a coalition of plaintiffs increases the chances of success.

There is another good reason for multiple governments to band together in litigation. Some judges and advocates have suggested that district courts are not empowered to enter

[42] *Nebraska*, 143 S. Ct. at 2387 (Kagan, J., dissenting).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See generally Am. Hosp. Ass'n v. Azar*, 596 U.S. 724 (2022).

[47] *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purposes, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.").

[48] *E.g.*, *Nebraska*, 143 S. Ct. at 2365 (maj. op.) ("If at least one plaintiff has standing, the suit may proceed.").

universal, nationwide relief — at least not as often as they have in the past.[49] If party-specific injunctions become more common in the future, challengers will be able to maximize the scope of relief available to them by assembling plaintiff coalitions representing as many jurisdictions as possible.

4. Municipalities should apply this same reasoning in considering not only which federal actions to challenge but which to defend. It is likely that the Trump Administration will abandon the legal defense of important Biden Administration actions by, for instance, declining to take appeals of adverse rulings, asking courts to remand rules to agencies for reconsideration, or simply by acquiescing in the challengers' legal arguments. Municipalities, through the procedural mechanism of intervention, should be able to hinder these efforts to use courts as tools of deregulation by taking up the defense of important Biden-era rules. Key to that effort is identifying a prospective intervenor's legal interest in defending a particular action.[50] We at Governing for Impact have written elsewhere about the importance of this intervention strategy in the early months of the Trump Administration and have identified cases where an intervenor is needed.[51]

[49] *See, e.g., Labrador v. Poe*, 144 S. Ct. 921, 921–28 (2024) (Gorsuch, J., concurring); Mark Joseph Stern, *Why Roberts and Kavanaugh Got So Furious at Biden's Solicitor General*, Slate (Dec. 2, 2022). *But see Corner Post, Inc. v. Bd. of Govs. of Fed. Res. Sys.*, 603 U.S. 799, 826–42 (2024) (Kavanaugh, J., concurring).

[50] *See* Fed. R. Civ. P. 24; 7C Mary Kay Kane, Fed. Prac. & Proc. Civ. § 1908.1 (3d ed. Jun. 2024 update).

[51] *See* Proposed Action Memorandum: Intervention in Pending Public Litigation, Governing for Impact (Dec. 2024).