

NOTE

POLITICIZATION OF STATE ATTORNEYS GENERAL: HOW PARTISANSHIP IS CHANGING THE ROLE FOR THE WORSE

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INTRODUCTION‡

The position of State AG has long been said to stand for ‘Aspiring Governor’ rather than Attorney General.¹ It is remarkable how the significance of that joke has changed as the

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‡ All references to current data are made as of December 4, 2021.

¹ Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS: J. FEDERALISM 597 (2010).

role has become one of the most influential in the country.² What began as insolent mockery is now a fearsome truth. State attorneys general (SAGs) have leaned into our nation's divisive partisanship – often as an integral part of a quest for higher office – and used their traditional roles and powers to grandstand and showcase their party loyalty on a national stage. While this partisanship may garner national attention and party approval for SAGs, it comes at the expense of their states and constituents, particularly those constituents that fall outside their voter block.

In this Note, I will look at how increasing polarization in our country's politics has impacted the SAG position for the worse. In Part I, I will provide a brief overview of the history of SAGs as well as discuss their broad powers, significant discretion, and the few checks on their authority. I will also show how SAGs' powers have been used for good through bipartisan efforts in healthcare. In Part II, I will look more directly at the impact of politicization on the SAG role, specifically on SAGs' duty to defend, involvement in multistate litigation, and participation in amicus curiae briefs before the Supreme Court. Finally, I provide a brief overview of the political impacts of the Republican Attorneys General Association (RAGA) and the Democratic Attorneys General Association (DAGA) on SAGs through partisanship, campaigning, and lobbying.

² See Alan Greenblatt, *State AGs Are Increasingly Powerful—and Partisan*, GOVERNING (Aug. 30, 2016), <https://www.governing.com/archive/gov-state-attorneys-general.html> [<https://perma.cc/4CSZ-DAA6>] (“State attorneys general may be the freest actors in the American political system.”); Mark Totten, *The Rise of State Attorneys General a Boon to Democracy*, THE HILL (July 6, 2017), <https://thehill.com/blogs/pundits-blog/state-local-politics/340841-the-rise-of-the-state-attorney-generals-is-boon-to?rl=1> [<https://perma.cc/57J9-7XXM>] (stating that SAGs are “well-positioned for national influence: they often have broad rights to bring a legal action, they have significant resources, and they carry the prestige of their office”); Paul Nolette, *State Attorneys General Have Taken Off as a Partisan Force in National Politics*, WASH. POST (Oct. 23, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/23/state-attorneys-general-have-taken-off-as-a-partisan-force-in-national-politics/> [<https://perma.cc/8PU2-Y468>] (finding that SAGs’ “rapid-fire legal actions reflect the growing influence of AGs on the national stage”).

I BACKGROUND

A. The History of State Attorneys General

The attorney general office originated in England and was quickly replicated in the American colonies.³ Each colony had an appointed attorney that served as a representative of the attorney general in England and represented the crown in colonial courts.⁴ After the American Revolution, these positions were recreated through state constitutions and statutes as SAGs.⁵ Unlike their colonial counterparts, the SAGs did not represent a central government. In fact, the federal government did not create its own attorney general position until 1789—many decades after some of the original thirteen colonies had established their attorneys general.⁶ Thus, the SAG position predates the federal attorney general and is wholly independent from the federal government.

Today, all fifty states have attorneys general that assume office in different ways. The vast majority of attorneys general are elected; however, a few are appointed by the governor of their state.⁷ The Maine attorney general is elected by the state's legislature, and the Tennessee attorney general is appointed by the state supreme court.⁸ While the powers of SAGs may differ somewhat between states based on statutory and constitutional mandates, their functions remain largely the same. According to the National Association of Attorneys General (NAAG), these powers and responsibilities include:

[i]ssuing formal opinions to state agencies; a)cting as public advocates in areas such as child support enforcement, consumer protections, antitrust and utility regulation;

³ Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 526–27 (1994).

⁴ *Id.*

⁵ *Id.*

⁶ See *150 Years of the Department of Justice*, U.S. DEPT JUST., <https://www.justice.gov/history/timeline/150-years-department-justice> [<https://perma.cc/ZN8H-Y5DK>] (last visited Jan. 13, 2023) (“The Judiciary Act of 1789 established the Office of the Attorney General”); *New Jersey Former Attorneys General*, NAT’L ASS’N OF ATT’YS GEN., naag.org/attorneys-general/past-attorneys-general/new-jersey-former-attorneys-general/ (listing the first New Jersey attorney general as Alexander Griffith from 1704-1714).

⁷ Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2002 (2001) (stating that state attorneys general are “popularly elected in forty-three states,” and “appointed by the governor” in the “five [] remaining states” including “Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming”).

⁸ *Id.*

p]roposing legislation[; e]nforcing federal and state environmental laws[; r]epresenting the state and state agencies before the state and federal courts[; h]andling criminal appeals and serious statewide criminal prosecutions[; i]nstituting civil suits on behalf of the state[; r]epresenting the public's interests in charitable trust and solicitations[; and o]perating victim compensation programs[.]⁹

Though different SAGs tend to possess similar powers and responsibilities, how they choose to wield that power and the responsibilities they prioritize can vary drastically. These variations can be compounded by the fact that SAGs “enjo[y] a significant degree of autonomy” and “typically may exercise all such authority as the public interest requires.”¹⁰ This then begs the question, what exactly does the public interest require? It appears, the determination is left up to SAGs.¹¹ Thus, not only is the statutory language limiting SAGs’ powers written broadly, but also its meaning is left open to interpretation by those it seeks to limit.

B. Potential Checks on SAGs and Their Shortcomings

1. Hierarchical Checks

The few checks that may exist on SAGs tend to be limited in their impacts. As aforementioned, most SAGs assume office via elections and, thus, are less subject to hierarchical checks by governors. Nevertheless, some governors have, largely unsuccessfully, attempted to exert their hierarchical authority over their SAGs. Because Governors and SAGs can be elected from different sides of the political aisle, the ensuing clashes in values and priorities help demonstrate just how little power governors have to check their SAGs.

In 2015 Colorado had a Democratic governor and Republican Attorney General, which led to policy disputes between the offices.¹² One such dispute arose when Governor John Hick-

⁹ *What Attorneys General Do*, NAT’L ASS’N OF ATT’YS GEN., <https://www.naag.org/attorneys-general/what-attorneys-general-do/> [https://perma.cc/5C54-L23Z] (last visited Jan. 1, 2023).

¹⁰ *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 (5th Cir. 1976).

¹¹ See *id.* at 268–69 (stating that “the attorney general has wide discretion in making the determination as to the public interest” and listing cases); *D’Amico v. Bd. of Med. Exam’rs*, 520 P.2d 10, 20 (Cal. 1974) (“In the great majority of such cases no conflict will result because in representing the interest of his ‘client’ the Attorney General will take a position consistent with what he deems to be in the public interest.”).

¹² See *State Government Triplexes: Conflicts Between Governors and Attorneys General*, BALLOTPEdia [hereinafter *Triplexes*], https://ballotpedia.org/State_government_triplexes:_Conflicts_between_governors_and_attorneys_general

enlooper sought to prevent AG Cynthia Coffman from joining a lawsuit led by Republican SAGs “seeking to block the implementation of the Clean Power Plan,” a regulation that went into effect under President Barack Obama.¹³ Gov. Hickenlooper supported the Clean Power Plan and claimed that the governor, not the AG, “should have th[e] final say” in filing lawsuits against the federal government.¹⁴ In an attempt to enforce his view, Gov. Hickenlooper filed a petition with the Colorado Supreme Court requesting a ruling requiring AG Coffman to “show cause regarding her legal authority to sue the United States without the Governor’s authorization.”¹⁵ While the Colorado Supreme Court did not specifically address the governor’s argument, it denied his petition stating that the governor had an “adequate alternative remedy.”¹⁶ In so stating, the court cited to a case listing such a remedy as “an action in a trial court or an appeal in an ongoing proceeding.”¹⁷ Gov. Hickenlooper chose not to pursue such a ruling, abandoning the effort there.

This example shows just how limited governors are in their abilities to check elected SAGs. Gov. Hickenlooper’s attempt to restrain AG Coffman was thwarted by the Colorado Supreme Court’s decision, and his choice to drop the matter might suggest that he feared his ability to succeed. Gov. Hickenlooper’s reasoning for not pursuing the matter further, however, is inconsequential. The most significant outcome was that he was deterred at all. And, as such, AG Coffman’s decision went unchecked. This is even more significant when looking at later disputes between the two officials.¹⁸ While Gov. Hickenlooper

[<https://perma.cc/FAK6-CQHA>] (last visited Jan. 5, 2023). See also, Susan Greene, *In Opposing Appeal of Landmark Oil-and-Gas Ruling, Hick Is More Talk Than Action*, COLO. INDEP. (May 20, 2017), <https://www.coloradoindependent.com/2017/05/20/hickenlooper-martinez-coffman-oil-and-gas-appeal/> (“The attorney general and I have had disagreements on [environmental issues] before. This isn’t the first time,” [Governor] Hickenlooper said Friday.”).

¹³ See *Triplexes*, *supra* note 12.

¹⁴ Jesse Paul, *Hickenlooper to Challenge Attorney General’s Clean Power Plan Lawsuit*, DENVER POST, <https://www.denverpost.com/2015/10/26/hickenlooper-to-challenge-attorney-generals-clean-power-plan-lawsuit/> [<https://perma.cc/TV59-DVUY>] (last updated Apr. 20, 2016).

¹⁵ Petition for Rule to Show Cause Under C.A.R. 21 at 1, *Hickenlooper v. Coffman*, No. 2015SA296 (filed Nov. 4, 2015).

¹⁶ *Hickenlooper v. Coffman*, No. 2015SA296 (Colo. Dec. 3, 2015) (en banc), https://www.courts.state.co.us/Media/Opinion_Docs/2015SA296.pdf [<https://perma.cc/J8GK-S3S3>]. [

¹⁷ *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1228 (Colo. 2003).

¹⁸ Only two years later, Gov. Hickenlooper and AG Coffman were once again at odds over an environmental lawsuit. See Greene, *supra* note 12. This time, Gov. Hickenlooper was opposed to the State appealing a court ruling that nega-

was willing to pay lip service to his opposition to AG Coffman's decisions, he was unwilling to do much more. It appears, then, that the SAG holds the higher ground in disputes between the two offices and, thus, the governor's ability to check the SAG is almost nonexistent.¹⁹

2. Electoral Checks

Another potential check on elected SAGs is their constituency. As many Members of Congress state to quell conversations on term limits, elections act as a check on those in elected office.²⁰ The argument goes: Members (or other elected officials without term limits) are effectively "term limited" every time they are forced to run for reelection because their constituency has the freedom to vote them out. While this argument totally ignores the known power of incumbency,²¹ elections remain

tively impacted the oil and gas industry. *Id.* However, despite Gov. Hickenlooper's claims that the decision to appeal was his, when AG Coffman went ahead with the appeal without his consent, the governor made no effort to challenge her decision. See Cathy Proctor, *Colorado Attorney General Appeals Oil and Gas Case in Defiance of Hickenlooper*, DENVER BUS. J., <https://www.bizjournals.com/denver/news/2017/05/18/colorado-ag-appeals-oil-and-gas-case-in-defiance.html> [<https://perma.cc/53HR-QQU9>] (last updated May 23, 2017).

¹⁹ In fact, it is often the other way around. The SAGs serve as the check on governors. See Nicholas Miras, *For Democratic Governors, It Pays to Have a Democratic Attorney General. Republicans, Not So Much.*, WASH. POST (Aug. 3, 2020), <https://www.washingtonpost.com/politics/2020/08/03/democratic-governors-it-pays-have-democratic-attorney-general-republicans-not-so-much/> [<https://perma.cc/7BCD-N2FR>] ("Many governors are limited by their state's attorney general.").

²⁰ Simply contact your Member of Congress and ask for their form letter on term limits to see this argument in action. For example, I wrote to my Member (Tom Reed for the 23rd District of New York) and received this reply:

Elections are the cornerstone of our democracy. I trust the citizens of the 23rd district to choose their representative in the U.S. House every two years. Our election system is the best form of term limits. Nothing replaces an engaged, well informed citizenry to choose who represents them in government.

²¹ See, e.g., Jenny Berg, *Why Didn't More Newcomers Oust Local Incumbents? Experts Explain the Power of Incumbency.*, ST. CLOUD TIMES (Nov. 6, 2020), <https://www.sctimes.com/story/news/local/2020/11/06/experts-explain-power-incumbency-and-what-means-st-cloud-city-council-school-board-candidates/6173433002/> [<https://perma.cc/VW4W-SQSU>] ("Incumbents generally have better name recognition and better access to fundraising, as well as the ability to take credit for projects completed during their tenure, according to Matt Lindstrom, political science professor at CSB/SJU and director of the Eugene J. McCarthy Center for Public Policy and Civic Engagement."); Aaron David Miller, *The Power of Incumbency: Four Two-Term Presidents in a Row?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 15, 2019), <https://carnegieendowment.org/2019/10/15/power-of-incumbency-four-two-term-presidents-in-row-pub-80072> [<https://perma.cc/PP2G-LNHA>] ("No matter how you cut it, three consecutive two-termers in command of the presidency demonstrate the vast power available to the modern-day incumbent.").

one of the only checks on elected SAGs. However, the power of this check depends on the political makeup of the state.

A state government triplex exists when one political party holds the offices of the governor, attorney general, and secretary of state.²² Currently, triplexes exist in thirty-nine of the fifty states, with twenty Republican triplexes and nineteen Democratic triplexes.²³ There are only seven states where the SAG and governor are of different parties.²⁴ The significance of this also harkens back to the effectiveness of the governor as a check on the SAG. As previously discussed, governors possess limited abilities to check SAGs when they do disagree. However, because most governors and their respective SAGs belong to the same party, governors are likely not even attempting to check their SAGs in the first place.²⁵

Beyond this, the triplex domination in most states poses a more significant problem as our nation becomes increasingly ideologically divided. In 2020, ten states held SAG elections and not one SAG office changed partisan control after the election.²⁶ Four states had margins of victory over +20, including Missouri, Utah, Vermont, and West Virginia.²⁷ Such high margins indicate political strongholds that make elections as a check somewhat of a fallacy.

As aforementioned, incumbents possess a serious advantage in elections.²⁸ Thus, SAGs in stronghold states are largely

²² See *Triplexes*, *supra* note 12.

²³ *Id.*

²⁴ *Id.* (current as of Nov. 2021).

²⁵ In fact, it appears that, at least for Democrats, when the SAG and governor are from the same party, they use the opportunity to push their political agenda further in their shared ideological direction. See Miras, *supra* note 19 (“[F]rom 1974 to 2019, Democratic governors saw significantly larger policy shifts in the liberal direction when the state AG was a fellow Democrat than when the AG was a Republican or independent.”).

²⁶ *Attorney General Elections, 2020*, BALLOTPEdia, https://ballotpedia.org/Attorney_General_elections_2020 [<https://perma.cc/XM6A-EJNS>] (last visited Jan. 7, 2023).

²⁷ *Id.* The margins were as follows: Missouri +21.5 (Republican), Utah +26.9 (Republican), Vermont +40.2 (Democrat), and West Virginia +27.6 (Republican).

²⁸ See Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECTION L.J. 315, 328 fig. 7 (2002) (finding SAGs had the highest incumbency advantage of other state officers and that SAGs had higher incumbency advantages than U.S. House Members); see also, Kyle Kondik, *House 2020: Incumbents Hardly Ever Lose Primaries*, UVA CTR. FOR POL. (May 30, 2019), <https://centerforpolitics.org/crystalball/articles/house-2020-incumbents-hardly-ever-lose-primaries/> [<https://perma.cc/52QC-8SP7>] (“Incumbent House members hardly ever lose primaries. In the post-World War II era, more than 98% of House members who have run for reelection have been renominated by their own parties.”).

protected from being checked through elections as their parties will likely keep electing them.²⁹ SAGs' constituencies are then limited in their abilities to check them unless there is a major party switch (which is unlikely in stronghold states like those mentioned), the SAG position is term-limited, or the incumbent SAG chooses not to run again. Given that only a third of states have term limits for their SAGs,³⁰ SAGs in stronghold states can operate with almost no checks on their actions for the reasons previously mentioned.³¹

C. The Benefits of SAG Discretion: Healthcare Victories for States and Constituents

Reducing red tape and allowing SAGs to respond to crises can be hugely beneficial. For example, in the 1990s private actors were failing in their suits against large tobacco companies due to insufficient resources and difficulty meeting legal causation standards.³² Fortunately, SAGs were not bound by the same limitations as the private actors and, instead, were able to bring lawsuits under their public interest umbrellas that had significant regulatory implications on tobacco companies.³³

²⁹ This problem, however, may be drawing to an end. For many years, RAGA and DAGA had a "handshake agreement" not to target seats held by incumbers from the other party. Alan Greenblatt, *State AGs Used to Play Nice in Elections. Not Anymore.*, GOVERNING (Nov. 14, 2017), <https://www.governing.com/archive/gov-state-attorneys-general-elections-2017-2018-raga-daga.html> [<https://perma.cc/2VWJ-242N>]. This agreement kept incumbents on both sides safe and kept RAGA's and DAGA's deep pockets out of each other's "territories" so to speak. *Id.* RAGA decided to end that policy in 2018. *Id.* In the 2018 election cycle, RAGA raised \$40.6 million and spent \$50.9 million. *Republican Attorneys General Association: Overview*, OPEN SECRETS, <https://www.opensecrets.org/527s/527cmtedetail.php?ein=464501717&cycle=2016> [<https://perma.cc/2W64-N346>] (last visited Jan. 13, 2023). In the 2018 election cycle, DAGA raised \$20.3 million and spent \$20.5 million. *Democratic Attorneys General Association: Overview*, OPEN SECRETS, <https://www.opensecrets.org/527s/527cmtedetail.php?ein=134220019> [<https://perma.cc/3TK9-PLPM>] (last visited Jan. 13, 2023).

³⁰ *Attorneys General With Term Limits*, BALLOTPEDIA, https://ballotpedia.org/Attorneys_General_with_term_limits [<https://perma.cc/5GLB-FRGR>] (last visited Jan. 13, 2023).

³¹ First, their governors are often powerless to check them. Second, their governors are likely to be of the same party and disincentivized to check them, even if they had the power to. And third, their unhappy constituents will face an uphill battle trying to vote them out of office. Therefore, SAGs in these states operate with incredibly wide discretion and little fear of repercussions.

³² Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 897–98 (2007).

³³ *Id.*

SAGs have an almost unparalleled ability to effect change within their states; however, there is an unfortunate dearth of information available that analyzes SAGs' positive impacts.³⁴ That said, SAGs have recently brought about positive health-care changes through litigation challenging the use of the Average Wholesale Price (AWP) as a reimbursement standard for pharmaceuticals acquired through Medicare and Medicaid and litigation against opioid manufacturers.³⁵

When it became apparent that the AWP was inflated and no longer accurately represented the providers' costs to acquire pharmaceuticals, legislative efforts began to do away with the use of the AWP.³⁶ But, these efforts failed (as too many do) due to lobbying pressure.³⁷ As a result, SAGs stepped in and filed their own suits alleging the use of the AWP was fraudulent as it applied to reimbursement in state Medicaid programs.³⁸ Due to the nature of the claims,³⁹ pharmaceutical firms were encouraged to settle, which led to significant recoveries by states as well as beneficial policy changes.⁴⁰

In the past decade, the severity of the opioid epidemic in this country has become increasingly clear.⁴¹ SAGs have played a crucial role in holding companies accountable for their roles in the opioid crisis by bringing *parens patriae* suits.⁴² Like in the tobacco cases, SAGs were able to bring and sustain claims private actors would have failed on because of the SAGs' expansive resources and public interest umbrellas.⁴³ And,

³⁴ See Lainie Rutkow & Stephen P. Teret, *The Potential for State Attorneys General to Promote the Public's Health: Theory, Evidence, and Practice*, 30 ST. LOUIS U. PUB. L. REV. 267, 290 (2011).

³⁵ Michelle M. Mello, Trish Riley, & Rachel E. Sachs, *The Role of State Attorneys General in Improving Prescription Drug Affordability*, 95 S. CAL. L. REV. 595, 611-12 (2022).

³⁶ *Id.* at 610.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 610-11 ("The nature of the [False Claims Act] claims strongly motivated pharmaceutical firms to settle rather than go to trial because one potential consequence of a criminal fraud verdict against the firms would be exclusion from Medicare and Medicaid, a serious financial penalty sometimes referred to as a 'corporate death sentence.'") (footnote omitted).

⁴⁰ *Id.* at 611.

⁴¹ See *Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE (Jan. 20, 2022), <https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis> [<https://perma.cc/68Z8-JM9H>] ("Opioid-involved overdose deaths rose . . . to 68,630 [in 2020].").

⁴² *Parens patriae* allows an SAG to bring a civil action on behalf of citizens in the state to secure monetary relief for harms suffered by the individual citizens, not the state as a whole. 15 U.S.C. § 15(c).

⁴³ See Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1121 (2014) ("[S]tate officials can

these suits are proving to be successful. In February 2021, a bipartisan coalition of SAGs reached a \$573 million settlement with the consulting firm McKinsey as a result of its role in the opioid crisis.⁴⁴ Only a few months later in July 2021 a bipartisan coalition of SAGs announced an agreement with Johnson & Johnson and three pharmaceutical distributors for a \$26 billion payout and injunctive relief requiring the companies to make beneficial changes in how they operate.⁴⁵

It is clear from the aforementioned cases that SAGs have unique powers to bring about positive changes for their states and constituents. These powers stem from SAGs' wide discretion and are strengthened by the few checks that exist on SAGs. As such, SAGs have often been able to act in the public interest without the fear of repercussions from governors or powerful industry leaders like tobacco and pharmaceutical companies.

II

THE POLITICIZATION OF SAGS

The broad discretion and unchecked power given to SAGs can, however, lead to highly partisan outcomes. In recent years, our country's political divide has widened further than it has in the last two decades (and maybe even in the last century).⁴⁶ At the same time, SAGs have become increasingly political.⁴⁷ These factors, combined with the use of the SAG

muster more effective legal resources than individual litigants[, and] governmental litigants are not subject to the conduct-based defenses that have been invoked to defeat individual plaintiffs in product misuse cases.”).

⁴⁴ *Opioids*, NAT'L ASS'N OF ATT'YS GEN., <https://www.naag.org/issues/opioids/> [<https://perma.cc/3EVK-FTLG>] (last visited Jan. 13, 2023).

⁴⁵ *Id.*

⁴⁶ *See Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/JC3H-QCWQ>] (“Republicans and Democrats are more divided along ideological lines – and partisan antipathy is deeper and more extensive – than at any point in the last two decades.”); Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POL'Y 411, 428 (2014) (“[T]he Democratic and Republican parties in Congress are more polarized than at any time since the end of Reconstruction . . .”).

⁴⁷ *See* Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 50 (2018) (“[T]he available evidence suggests that state litigation is indeed becoming more ‘political’ in the sense that Democratic and Republican AGs increasingly are pursuing different causes or are lining up on opposite sides of the same cases.”).

position as a political steppingstone,⁴⁸ have led to concerning results.

A. Duty to Defend State Laws

These political influences can shape SAGs' decisions to defend state statutes. The duty to defend is fairly straightforward: an SAG "owes the state and its citizens, as sovereign, a duty to defend its statutes against constitutional attack."⁴⁹ State constitutions and statutes often do not mention SAGs' duty to defend.⁵⁰ Thus, this duty falls into the wide discretion given to SAGs to exercise their powers as they see fit.⁵¹ In the absence of other driving forces, it appears, then, that the justifications for the laws they choose to defend are often political.⁵² One factor that helps reach this conclusion is comparing how Department of Justice (DOJ) attorneys and SAGs approach the duty to defend. DOJ attorneys are not elected, which means their incentives differ from SAGs. Rather than using their duty to defend to win favor with the electorate, DOJ attorneys use it to win favor with courts and maintain an elevated status.⁵³ As such, DOJ attorneys cling to the duty to defend.⁵⁴

SAGs, in theory, answer to their constituents. However, in reality, SAGs often answer to their voter block.⁵⁵ The duty to defend can be a powerful tool in currying favor with a political party. Given that SAGs often seek higher office, politics can significantly influence their decisions to defend state statutes.

⁴⁸ See Provost, *supra* note 1 at 597 (finding that fifty-four percent of SAGs who began their service between 1988 and 2003 went on to seek higher office).

⁴⁹ Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 515 (2015).

⁵⁰ See Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2103 (2015).

⁵¹ *Id.* at 2105–06.

⁵² *Id.* at 2105; Neal Devins & Saikrishna Prakash, *Op-Ed: Can a State's Attorney General Pick and Choose Which Laws to Defend?*, L.A. TIMES (Apr. 18, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-0418-devinsprakash-attorneys-general-refusal-to-defend-20160418-story.html> [<https://perma.cc/CYF4-AFEC>] ("In large part, refusing to defend is a byproduct of the sharp Republican-Democrat divide that pervades today's politics. . . . [R]efusals to defend can be a surefire means of currying favor with interest groups and voters who fiercely oppose some state laws, and attorneys general wield their control of litigation for political reasons.").

⁵³ See Neal Devins & Saikrishna B. Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 538–41 (2012) ("The DOJ's power, prestige, and ability to recruit top graduates who otherwise would gravitate to the nation's leading law firms is linked to its litigation authority, including the authority to decide what arguments to make in court.").

⁵⁴ *Id.*

⁵⁵ See *infra* section II.B.2. (discussing triplexes and political strongholds).

An example of this is Democratic SAGs failing to defend state laws banning same-sex marriage, while Republican SAGs actively defended those same laws.⁵⁶

To fully appreciate the political weight of these SAGs' decisions to defend or not defend their states' statutes, it is important to provide a timeline. The Defense of Marriage Act (DOMA) was passed in 1996 and defined marriage as a union between one man and one woman and a spouse as someone of the opposite sex.⁵⁷ In 2008, when President Obama took office, he was opposed to same-sex marriage.⁵⁸ However, around 2010 his opinions began evolving, and in 2011 he instructed the DOJ to stop defending DOMA in court stating that he believed the law was unconstitutional.⁵⁹ In 2012, the Democratic Party endorsed same-sex marriage as part of its party platform.⁶⁰ In 2013, the U.S. Supreme Court ruled that the federal DOMA was unconstitutional in *United States v. Windsor*,⁶¹ but it skirted the broader issue of states prohibiting gay marriage in *Hollingsworth v. Perry*.⁶²

The Court's decision in *Perry* is particularly relevant to SAGs refusing to defend state laws. The initial case was brought by same-sex couples challenging California's Proposition 8 (Prop. 8), a ballot initiative that amended the California constitution to define marriage as a union between a man and

⁵⁶ See Matt Apuzzo, *Holder Sees Way To Curb Bans on Gay Marriage*, N.Y. TIMES (Feb. 24, 2014), <https://www.nytimes.com/2014/02/25/us/holder-says-state-attorneys-general-dont-have-to-defend-gay-marriage-bans.html> [<https://perma.cc/2C3M-BH8J>] ("Six state attorneys general — all Democrats — have refused to defend bans on same-sex marriage, prompting criticism from Republicans who say they have a duty to stand behind their state laws, even if they do not agree with them."); Edith Honan, *State Attorneys General Forced Into Spotlight on U.S. Marriage Debate*, REUTERS (June 2, 2014), <https://www.reuters.com/article/usa-gaymarriage-attorneysgeneral-idUSL1N0O91TX20140602> [<https://perma.cc/TA3D-W7UF>] ("Republican attorneys general in six [] states . . . have actively defended same-sex marriage bans in their states.").

⁵⁷ Eyder Peralta, *Court Overturns DOMA, Sidesteps Broad Gay Marriage Ruling*, NPR (June 26, 2013), <https://www.npr.org/sections/thetwo-way/2013/06/26/195857796/supreme-court-strikes-down-defense-of-marriage-act> [<https://perma.cc/M3EX-3F7V>].

⁵⁸ See Katy Steinmetz, *See Obama's 20-Year Evolution on LGBT Rights*, TIME (Apr. 10, 2015), <https://time.com/3816952/obama-gay-lesbian-transgender-lgbt-rights/> [<https://perma.cc/KR3S-GCQZ>].

⁵⁹ *Id.*

⁶⁰ *Democratic Platform Endorses Gay Marriage*, NPR (Sept. 4, 2012), <https://www.npr.org/2012/09/04/160562404/democratic-platform-endorses-gay-marriage> [<https://perma.cc/43AH-LL9U>].

⁶¹ 570 U.S. 744, 752 (2013).

⁶² 570 U.S. 693, 693 (2013).

a woman.⁶³ In bringing the suit, the couples named then-governor Arnold Schwarzenegger and then-AG Jerry Brown as well as other California state officials.⁶⁴ However, the named officials, including AG Brown, refused to defend Prop. 8.⁶⁵ Without any state officials to defend the law, the district court allowed the official proponents of the Prop. 8 ballot initiative to defend the case.⁶⁶

After a bench trial, the district court struck down Prop. 8, but the proponents of Prop. 8 chose to appeal when the state officials refused.⁶⁷ When the case eventually reached the U.S. Supreme Court, the California AG still refused to defend it, and the Court dismissed the case on grounds that those defending the law lacked the standing to do so without reaching the merits of the case.⁶⁸ Because the Court was able to avoid deciding the question of whether a state ban on same-sex marriage was unconstitutional, the issue continued to hang in the balance until 2015 when the Court decided *Obergefell v. Hodges*.⁶⁹ As such, the years between *Perry* and *Obergefell* highlight the ideological bases of SAGs' decisions to defend.

In 2015 before the Court decided *Obergefell*, there were at least thirteen states with laws banning same-sex marriage.⁷⁰ SAGs were split ideologically in terms of enforcement with Democrat SAGs refusing to defend the laws and Republican SAGs actively defending them.⁷¹ This ideological split is even clearer when looking at a state with a Democratic SAG and a Republican governor. In Pennsylvania, when the Democratic SAG refused to defend the state's law banning same-sex marriage, the Republican governor stepped in to defend it.⁷² The

⁶³ *Id.* Prop. 8 was passed by state voters after the California Supreme Court held that "limiting marriage to opposite-sex couples violated the California Constitution." *Id.*

⁶⁴ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 921 (N.D. Cal. 2009).

⁶⁵ *Hollingsworth*, 570 U.S. at 693.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 694.

⁶⁹ 576 U.S. 644, 644 (2015).

⁷⁰ Faith Karimi & Michael Pearson, *The 13 States That Still Ban Same-Sex Marriage*, CNN, <https://www.cnn.com/2015/02/13/us/states-same-sex-marriage-ban> [<https://perma.cc/FK4R-GF4S>] (last updated Feb. 13, 2015).

⁷¹ See Honan, *supra* note 56 ("In recent months, the attorneys general in Virginia, Oregon, Nevada, Pennsylvania and Kentucky - all Democrats - have said they would no longer defend state laws excluding same-sex couples from the right to marry. . . . Republican attorneys general in six other states - Indiana, West Virginia, Wisconsin, Michigan and Utah, as well as Texas - have actively defended same-sex marriage bans in their states.")

⁷² Maryclaire Dale & Marc Levy, *Pa. Attorney General Won't Defend Gay Marriage Ban*, ASSOCIATED PRESS (July 11, 2013), <https://apnews.com/article/kath>

hyper-politicization of same-sex marriage provides a unique look at the partisan approaches many SAGs take to the duty to defend.

Because our political beliefs are often so heavily intertwined with our senses of self, it can be difficult to see partisanship in decisions we agree with. For instance, in the above example one might argue that the Democratic SAGs' were simply doing the right thing rather than aligning themselves with a party position—particularly because same-sex marriage is a human rights issue and widely supported in our country.⁷³ Thus, it is important to provide an example on both sides of the political aisle to fully appreciate when an SAG's decision not to defend is politically motivated.

Affirmative action has been a heavily partisan issue for many years and remains one to this day.⁷⁴ In 2014, more Republicans were against affirmative action programs than were for them, while seventy-eight percent of Democrats supported such programs.⁷⁵ Republican opposition to these programs has been on center stage lately in the Harvard admissions case currently before the Supreme Court, *Students for Fair Admissions v. Harvard*.⁷⁶ However, this is not the first

leen-kane-pennsylvania-kane-philadelphia-us-supreme-court-82b4124c0bc348c9834536cc05da6e39 [https://perma.cc/2C2G-PTFY].

⁷³ Justin McCarthy, *Record-High 70% in U.S. Support Same-Sex Marriage*, GALLUP (June 8, 2021), <https://news.gallup.com/poll/350486/record-high-support-same-sex-marriage.aspx> [https://perma.cc/U9MK-3847].

⁷⁴ See *The Partisan Divide on Political Values Grows Even Wider: 4. Race, Immigration and Discrimination*, PEW RSCH. CTR. (Oct. 5, 2017), <https://www.pewresearch.org/politics/2017/10/05/4-race-immigration-and-discrimination/> [https://perma.cc/5XCN-UNXW] (finding that in 2017, “52% [] of Republicans and Republican leaners say [affirmative action] programs are a good thing,” while “84% of Democrats and Democratic leaners view these programs positively”); see, e.g., Joan Biskupic, *Texas Attorney General Backs Challenge to Harvard's Affirmative Action Policies at Supreme Court*, CNN (Mar. 31, 2021) <https://www.cnn.com/2021/03/31/politics/affirmative-action-harvard-texas-paxton-supreme-court/index.html> [https://perma.cc/H7BH-WK3A] (“The state of Texas, along with an array of conservative advocacy groups such as the Pacific Legal Foundation, have urged the [Supreme Court] to overrule precedent that permits consideration of race as one of many factors in screening students for admission”).

⁷⁵ See *The Partisan Divide on Political Values Grows Even Wider: 4. Race, Immigration and Discrimination*, *supra* note 74.

⁷⁶ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020); see Vivi E. Lu & Dekyi T. Tsotsong, *Texas Files Amicus Brief Supporting SFFA in Harvard Admissions Lawsuit*, CRIMSON (Apr. 2, 2021), <https://www.thecrimson.com/article/2021/4/2/texas-supports-sffa-lawsuit/> [https://perma.cc/L59D-3XXL] (noting that Texas AG Ken Paxton spent most of his brief criticizing the University of Texas—a public university that he is supposed to represent as AG—for using race in its admission process); Benjamin Wermund, *GOP Courts Asian-Americans With Drive to End Affirmative Action*,

time an affirmative action case has made it to the Supreme Court. In 2012, the Court agreed to hear *Fisher v. University of Texas at Austin*.⁷⁷ In *Fisher*, a white woman who was denied admission to the University of Texas (UT) challenged the university's affirmative action program as unconstitutional.⁷⁸ Then-AG Greg Abbott (a staunch Republican) defended UT through the Fifth Circuit but refused to defend the school and its program at the Supreme Court.⁷⁹ UT was supported by a coalition of mostly Democratic SAGs that filed a brief in support of the program.⁸⁰ Interestingly, Abbott announced his official bid for governor about a month after the Supreme Court's ruling in *Fisher*.⁸¹ This example provides an opportunity to see a political decision not to defend from the other side of the aisle. As I will discuss shortly, Abbott allowed partisanship to drive many of his decisions as AG, not just his duty to defend.

B. Multistate Activism

The politicization of the SAG position has also impacted how SAGs attempt to influence national policy. SAGs have two primary means of engaging with each other on a national scale. First, they can join multistate litigation, where coalitions of SAGs act together as a united front against a common adversary. In recent years, the most common form of multistate litigation has been joint suits against the federal government.⁸² SAGs can also file amicus curiae briefs before the Supreme Court to indicate their opposition to or support for a particular

POLITICO (Oct. 14, 2018), <https://www.politico.com/story/2018/10/14/asian-americans-affirmative-action-898521> [<https://perma.cc/K3WM-B9ZD>] (“GOP candidates in at least two congressional races this year have railed against affirmative action in explicit bids for Asian-American voters.”).

⁷⁷ 570 U.S. 297 (2013).

⁷⁸ *Id.*

⁷⁹ See Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS: J. FEDERALISM 451, 458 (2014) (“In *Fisher v. University of Texas* . . . Republican Texas AG Greg Abbot[] refus[ed] to defend the university’s race-conscious program in the Supreme Court”) (internal citations omitted).

⁸⁰ *Id.*

⁸¹ See *Fisher*, 570 U.S. 297 (decided June 24, 2013); Will Weissert, *Abbot Announces Gubernatorial Run*, NBCDFW, <https://www.nbcdfw.com/news/local/ag-greg-abbott-set-to-formally-announce-gubernatorial-run/1952278/> [<https://perma.cc/M4FA-K33G>] (last updated Feb. 12, 2014).

⁸² *Suing the Federal Government Has Become the Most Prominent Form of Coordinated National AG Activism in Recent Years*, STATE LITIG. & AG ACTIVITY DATABASE, <https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/> [<https://perma.cc/4JN6-KGQP>] (last visited Jan. 13, 2023).

case.⁸³ While these means of working across state lines have existed for decades, only in recent years have politics become the driving force behind SAGs' decisions to engage in multistate litigation and file *amicus curiae* briefs.⁸⁴

1. *Multistate Litigation Against the Federal Government*

Multistate litigation⁸⁵ is a powerful tool in the belts of SAGs. While there is no doubt that SAGs have significant powers within their own states, multistate litigation provides an opportunity for SAGs to effect national change. In challenging the federal government, SAGs can have federal laws and policies struck down.⁸⁶ Thus, SAGs can act as a check both on Congress and the president. In serving as a check on Congress, they can exert a sort of veto power over federal laws—a power generally reserved to the president and judiciary. In checking the president, SAGs can challenge executive orders and other unilateral forms of presidential policy making. Although some might argue that the courts are serving as the check in their decisions, not SAGs in bringing the cases, this is misguided. SAGs, in bringing these suits, are effectively setting the courts' dockets. This is significant because SAGs (particularly large coalitions of them) have powers and resources not available to the public to challenge federal laws and policies.⁸⁷

⁸³ SUP. CT. R. 37(4). An SAG also does not need to obtain leave from the Court to file an *amicus curiae* brief on behalf of their state. *Id.* This is notable for reasons I will discuss *infra* section II.B.2.

⁸⁴ Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 PUBLIUS 469, 474 (2018) (finding that recent multistate litigation against the federal government has "followed a trend of rapidly increasing partisan conflict between states and the federal government" and that SAGs' *amicus* filings in federal court have "become significantly more polarized over time").

⁸⁵ Any mention of multistate litigation in this section will be in reference to litigation against the federal government.

⁸⁶ See Neena Satija, Lindsay Carbonell, & Ryan McCrimmon, *Texas vs. the Feds — A Look at the Lawsuits*, TEX. TRIB. (Jan. 17, 2017), <https://www.texastribune.org/2017/01/17/texas-federal-government-lawsuits/> [<https://perma.cc/D494-RFL3>] (discussing the number of lawsuits filed against the Obama Administration by former AG Greg Abbott and current AG Ken Paxton and noting that seven of their lawsuits have been successful, with one of the wins resulting in the Supreme Court striking down one of President Obama's executive orders "that would have provided relief from deportation to millions of people").

⁸⁷ See Lemos & Young, *supra* note 47 at 64 ("[SAG's] role [in bringing federal lawsuits] is not unique to states, of course—private litigants can bring federalism-based legal challenges as well. As we explain below, however, considerations of expertise, institutional capacity, and democratic accountability suggest that states may be particularly well-situated to spearhead such litigation. Indeed, states have been at the forefront of some of the most consequential challenges to federal policy in recent years") (footnote omitted).

Therefore, their cases are more likely to make it to the final stages and receive a ruling. However, sometimes SAGs do not even need a court's ruling to achieve their desired outcome—their lawsuits alone can offer enough incentive for a federal agency to change its challenged rule.⁸⁸ Thus, SAGs are uniquely positioned to effect national change through their lawsuits.

While this power to check may originate from genuine attempts to hold the federal government accountable, it has devolved into partisan grandstanding in recent years. Now, in serving as a check on the federal government through multistate litigation, SAGs have assumed a national policymaking power akin to those of Congress and the president.⁸⁹ However, this policymaking power is marred by extreme partisanship. Gone are the days when multistate litigation was largely bipartisan and focused on a small range of policies.⁹⁰ Now, multistate litigation runs the gamut in terms of policy and coalitions are typically partisan.⁹¹

Multistate litigation has become somewhat of a knee-jerk reaction to any major federal policy change.⁹² Partisan coalitions are jumping at the chance to challenge federal policies promulgated by the opposing party as well as defend federal policies promulgated by their own party.⁹³ For example, the Obama Administration was sued seventy-eight times during his presidency, sixty-five of which were led by Republican SAGs and only nine of which were bipartisan.⁹⁴ A notable example of a partisan lawsuit against the Obama Administration was the Republican SAGs' attack on the Affordable Care Act (ACA). On the same day the ACA was signed into law, a coalition of thir-

⁸⁸ See *Multistate Litigation Database*, STATE LITIG. & AG ACTIVITY DATABASE, <https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/list-of-lawsuits-1980-present/> [<https://perma.cc/4BY4-7HP9>] (listing *White Stallion Energy Center v. EPA* as a case where “[t]he EPA reconsidered the portion of the rule challenged in [the] case . . . and issued a new rule, and the petitioners voluntarily dismissed this case”).

⁸⁹ See Nolette & Provost, *supra* note 84, at 472.

⁹⁰ See Nolette, *supra* note 2. The early years of multistate litigation was aimed almost entirely at environmental issues. See Nolette & Provost, *supra* note 84, at 476.

⁹¹ See Nolette & Provost, *supra* note 84.

⁹² See Nolette, *supra* note 2.

⁹³ See, e.g., Paul Nolette, *The Dual Role of State Attorneys General in American Federalism: Conflict and Cooperation in an Era of Partisan Polarization*, 47 PUBLIUS: J. FEDERALISM 342, 356 (2017).

⁹⁴ See *Multistate Litigation Database*, *supra* note 88.

teen Republican SAGs filed a lawsuit challenging the law.⁹⁵ The original coalition was eventually joined by even more Republican SAGs.⁹⁶ Meanwhile, an “all-Democratic coalition of [S]AGs opposed these efforts by filing amicus briefs in support of [the challenged] ACA provisions.”⁹⁷

Republican SAGs also challenged various Obama Administration policies designed to combat climate change,⁹⁸ which led a coalition of almost entirely Democrat SAGs “to intervene in these cases on behalf of the Obama EPA’s position and against their Republican AG counterparts.”⁹⁹ This trend continued throughout President Obama’s time in office, and in some cases, Republican SAGs were successful in thwarting Obama Administration policies.¹⁰⁰ The significant problem posed by these lawsuits is their grandstanding nature. While Texas Governor Greg Abbott was serving as SAG, he once boasted that he had sued the Obama Administration twenty-five times.¹⁰¹ In that same conversation, Abbott described his role as AG by saying, “I go into the office, I sue the federal government and I go home.”¹⁰² This quote shows the partisan grandstanding nature of the suits filed by Republican SAGs against the Obama Administration. Abbott seemingly cared very little about the substance of his lawsuits and, likely, even the out-

⁹⁵ See *Health Care Lawsuit*, WASH. STATE OFF. ATT’Y GEN., <https://www.atg.wa.gov/health-care-lawsuit> [<https://perma.cc/P9WS-LRXP>] (last visited Jan. 13, 2023) (“On Tuesday, March 23, 2010, after further legal analysis and deliberation—and after notifying Governor Gregoire of his decision on March 22—McKenna joined fellow AGs in a multi-state lawsuit challenging those specific provisions [of the ACA] as an expansion of federal authority beyond that the states believe is allowed under the U.S. Constitution.”). A copy of the complaint can be found here: https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/About_the_Office/FloridavUSComplaint.pdf [<https://perma.cc/R562-JB4J>].

⁹⁶ See *State Attorneys General Against the Patient Protection and Affordable Care Act of 2010*, BALLOTPEdia, https://ballotpedia.org/State_Attorneys_General_Against_the_Patient_Protection_and_Affordable_Care_Act_of_2010 [<https://perma.cc/QV28-XWC8>] (last visited Jan. 13, 2023).

⁹⁷ See Nolette, *supra* note 79, at 457 (emphasis omitted).

⁹⁸ *Id.*

⁹⁹ *Id.* at 458.

¹⁰⁰ *Id.*

¹⁰¹ See Sue Owen, *Greg Abbott Says He Has Sued Obama Administration 25 Times*, POLITIFACT (May 10, 2013), <https://www.politifact.com/factchecks/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration/> [<https://perma.cc/N3DE-GB9N>].

¹⁰² *Id.* Note that another variation of the quote is “I go into the office in the morning. I sue Barack Obama, and then I go home.” Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS (Oct. 27, 2017), <https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump> [<https://perma.cc/YM8G-KZAD>].

comes.¹⁰³ His suits were about something more personal than combatting Democratic policies—they were a show of Republican partisanship that he would use to advance his career aspirations.¹⁰⁴ It is worth noting that at the time Abbott was quoted, he was roughly three months shy of his official bid for the Texas gubernatorial seat.¹⁰⁵

Unfortunately, the partisan approach to multistate litigation has only grown since Obama's presidency. The Trump Administration was sued by SAGs at least 156 times.¹⁰⁶ Of those lawsuits, all but four were led by Democratic SAGs and two of the four Republican-led SAG lawsuits were challenging Obama-era regulations.¹⁰⁷ Only one of the lawsuits was bipartisan.¹⁰⁸ These lawsuits challenged a variety of Trump Administration policies including: withholding Obama subsidies from states, rolling back environmental regulations, rescinding the Deferred Action for Childhood Arrivals (DACA) program, and instituting a travel ban that targeted Muslim countries.¹⁰⁹

While many of these lawsuits were combating important policy issues, the sheer volume combined with the lack of bipartisanship and complete dearth of suits filed by Republican

¹⁰³ Owen, *supra* note 101 (noting that Abbott had lost almost double the number of cases he had won).

¹⁰⁴ See Dan Frosch & Jacob Gershman, *Abbott's Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration*, WSJ (June 24, 2016), <https://www.wsj.com/articles/abbotts-strategy-in-texas-44-lawsuits-one-opponent-obama-administration-1466778976> [<https://perma.cc/9RS8-35T4>] (describing Abbott's "myriad lawsuits against the Obama administration" as "a trademark of his political career" that he has used to "burnish his conservative credentials in a state where the Tea Party holds considerable clout").

¹⁰⁵ It appears that Abbott now may have his sights set on presidency. See David Siders, *Tip of the Spear: Texas Governor Leads Revolt Against Biden*, POLITICO (June 21, 2021), <https://www.politico.com/news/2021/06/21/texas-abbott-immigration-biden-resistance-495172> [<https://perma.cc/S839-DA5Y>] ("[Abbott] is carving out a distinct lane in the GOP's presidential sweepstakes at a time when Florida Gov. Ron DeSantis is beginning to rise in stature among the party grassroots"). As such, he is once again leaning heavily into his Republicanism: "[i]n the span of a week, [Abbott] signed bills restricting the teaching of critical race theory and allowing Texans to carry handguns without a license." *Id.* It appears when Abbott wants higher office, he is willing to take rash actions to garner Republican support—even to the overall detriment of Texas.

¹⁰⁶ See *Multistate Litigation Database*, *supra* note 88; see also *Multistate Lawsuits Against the Federal Government During the Trump Administration*, BALLOTPEdia, https://ballotpedia.org/Multistate_lawsuits_against_the_federal_government_during_the_Trump_administration [<https://perma.cc/D5KK-JVG6>] (last visited Jan. 13, 2023) ("At least 156 multistate lawsuits were filed against the federal government during President Donald Trump's term in office from January 2017 to January 2021.").

¹⁰⁷ See *Multistate Litigation Database*, *supra* note 88.

¹⁰⁸ *Id.*

¹⁰⁹ See Neuhauser, *supra* note 102.

SAGs shows the partisan nature of multistate litigation. Republicans were trigger-happy when it came to multistate litigation under Obama, but that urge to fight the federal government evaporated the moment a Republican became president. The same can be said for Democratic SAGs once a Democrat president assumed office. In the first year of Trump's presidency, Democratic SAGs filed thirty-five lawsuits against the federal government.¹¹⁰ Now that Biden has taken office, Democratic AGs have only filed five lawsuits against the federal government and *all* five challenged Trump-era regulations.¹¹¹ Meanwhile, Republicans have jumped back on the multistate litigation bandwagon after their four-year hiatus and have led twenty-seven suits against the Biden Administration.¹¹² Republican SAGs are less than ten lawsuits shy of equaling the number of Democratic SAG-led lawsuits filed in the first year of Trump's presidency. With a month left in the year and SAG seats up for grabs in the 2022 election cycle, we will see how many more suits, if any, are filed. It would be unsurprising to see more cases filed, particularly considering multiple Republican SAG candidates have stated that they are making opposition to Biden the focus of their 2022 campaigns."¹¹³ For any incumbent SAGs, this will likely mean more suits filed against the Biden Administration akin to Greg Abbott during the Obama Administration.

The current partisan approach to multistate litigation detracts from the SAG role. Filing multistate lawsuits (or failing to do so) for solely political reasons takes SAG discretion too far. In such circumstances SAGs are no longer representing the interests of their states and constituents. They are representing personal and party interests—even at the expense of those who they have a duty to represent.¹¹⁴ What began as a powerful tool to check the federal government has turned into a means of grandstanding to show party loyalty. As such, SAGs are acting less like attorneys and more like politicians.

¹¹⁰ See *Multistate Lawsuits Against the Federal Government During the Trump Administration*, *supra* note 106.

¹¹¹ See *Multistate Litigation Database*, *supra* note 88.

¹¹² *Id.*

¹¹³ Bryan Lowry, *Races For State AG in 2022 Hold High Stakes for Biden as GOP Looks to Halt Agenda*, McCLATCHY, <https://www.mcclatchydc.com/news/politics-government/white-house/article255702981.html> [https://perma.cc/LR28-K5Y5] (last updated Nov. 11, 2021).

¹¹⁴ Texas Republican AGs Greg Abbott and Ken Paxton combined filed forty-eight lawsuits against the Obama Administration. See Satija, Carbonell, & McCrimmon, *supra* note 86. The estimated cost for thirty-nine of those lawsuits was \$5.9 million (as of mid-2016). *Id.*

2. *Amicus Curiae*

Until recently, SAGs filed amicus briefs before the Supreme Court¹¹⁵ in a bipartisan manner, and “[s]tates agreed far more often than they disagreed.”¹¹⁶ There are two different stages when SAGs can file amicus briefs, the cert stage and the merits stage.¹¹⁷ Cert briefs focus on influencing the Court’s docket whereas merits briefs argue for a desired outcome once the Court has already agreed to hear the case.¹¹⁸ Since the Clinton Administration, the average number of merits briefs filed has remained fairly constant, while the average number of cert briefs has nearly doubled.¹¹⁹ This shows an increasing desire to shape the Court’s docket, which could be tied to partisanship. In that same time frame, the partisanship of amicus briefs as a whole has increased significantly, with notable jumps under Obama and Trump.¹²⁰ Under Clinton and Bush, partisan briefs made up roughly nineteen percent and twenty-five percent of the briefs filed, respectively.¹²¹ Under Obama, that number jumped to about forty-four percent and, in the early stages of Trump’s presidency, it was roughly seventy-eight percent¹²²

These percentages indicate that SAGs are approaching amicus briefs in an increasingly partisan manner. Just as with multistate litigation, a function that began as a way for SAGs to work together has become a platform for partisan grandstanding. SAGs are using amicus briefs not only as tools to promote their own parties, but also as weapons against the opposing party. Under Clinton, in roughly six percent of cases where SAGs filed amicus briefs there was a competing coalition of SAGs on the opposite side of the case.¹²³ In 2017, that number rose to twenty percent.¹²⁴

¹¹⁵ Unless otherwise noted, the amicus briefs discussed in this section are those filed before the Supreme Court.

¹¹⁶ Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. Rev. 1229, 1234 (2015).

¹¹⁷ *Memorandum to Those Intending to File an Amicus Curiae Brief in the Supreme Court of the United States*, SUP. CT. U.S. OFF. CLERK (Oct. 2019), <https://www.supremecourt.gov/casehand/AmicusGuide2019.pdf> [<https://perma.cc/J3FN-WEQ9>].

¹¹⁸ See *Supreme Court Procedure*, SCOTUSBLOG, <https://www.scotusblog.com/supreme-court-procedure/> [<https://perma.cc/BM3Q-7BDU>] (last visited Jan. 13, 2023).

¹¹⁹ Nolette & Provost, *supra* note 84, at 474–76.

¹²⁰ See *id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

The rising partisanship of multistate litigation is likely contributing to the growing number of state opposition briefs. As I mentioned previously, when a Republican coalition of SAGs filed a lawsuit challenging the ACA, a coalition of Democrats filed an amicus brief in support of the ACA. Further in both *Windsor* and *Perry*, Republican and Democratic coalitions of SAGs filed amicus briefs on opposing sides.¹²⁵ The partisanship of these filings is evident in the self-conflicting views each coalition took in their briefs for *Windsor* and *Perry*. For example, in *Windsor*, the Democratic coalition argued that the federal DOMA was an intrusion into state's rights to control laws governing marriage.¹²⁶ Meanwhile in *Perry*, the Democratic coalition argued that the Supreme Court should intervene and strike down the state's law regarding marriage.¹²⁷ A Republican coalition in *Perry* argued that the Court striking down Prop. 8 would undermine states' abilities to regulate and define marriage.¹²⁸ But, many of those same Republicans contradicted themselves in *Windsor* when they defended federal regulation of marriage.¹²⁹ These examples indicate that what the coalitions were pushing for was an outcome that best suited their partisan ideologies. Thus, both coalitions were willing to make conflicting arguments as well as push principles inconsistent with their parties' platforms¹³⁰ (Democrats arguing for states' rights and Republicans arguing for federal control) to achieve a desired political result.

As these cases show, SAGs are willing to undermine their own credibility through inconsistent arguments in favor of supporting their parties' broader policy goals. Further, the more partisan SAGs become, the more amicus briefs and multistate litigation will become inextricably linked. As increasing numbers of partisan multistate lawsuits are filed, the number of SAG opposition briefs will likely rise accordingly. Thus, partisanship will spawn more partisanship, forcing SAGs on opposing sides further apart.

¹²⁵ See Nolette, *supra* note 79.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See *Republican Attorneys General Association*, BALLOTPEDIA, https://ballotpedia.org/Republican_Attorneys_General_Association [<https://perma.cc/LFT9-ASH7>] (last visited Jan. 13, 2023) ("Bolstering states' rights and reducing the power of the federal government is one of [the Republican Attorney Generals Association's] main principles.").

C. RAGA and DAGA

Although SAG campaigning and lobbying could be the topic of its own paper, I want to briefly mention these topics through the lenses of RAGA and DAGA simply to skim the surface of their impacts on the partisan divide among SAGs. In 1999, Republicans only held twelve of the fifty SAG positions.¹³¹ That year, the Republican Attorneys General Association (RAGA) was created.¹³² Three years later, the Democrats followed suit creating the Democratic Attorneys General Association (DAGA).¹³³ The creation of RAGA brought the SAG office “back into political play around the country,”¹³⁴ and now Republican SAGs outnumber Democratic SAGs twenty-seven to twenty-three respectively.¹³⁵ These organizations were born from the growing political divide in our country and both seem to perpetuate it to this day.

As aforementioned, for many years RAGA and DAGA and a “handshake agreement that they wouldn’t target seats held by incumbents from the other party.”¹³⁶ RAGA decided to end that agreement in 2018 and went on to spend \$50.9 million¹³⁷ that election cycle while DAGA spent \$20.5 million.¹³⁸ Despite the spending disparity, DAGA still came out on top with Democrats walking away with more seats than Republicans.¹³⁹ However, the significance of this lies in the spending. SAG seats are so desirable as a means of effecting change that both organizations were willing to spend over \$80 million collectively to try to gain seats for their parties.

DAGA and RAGA also play crucial roles in the lobbying efforts targeting SAGs. Both hold exclusive, luxury events for their member SAGs and lobbyists with high price tags and tight

¹³¹ Alan Greenblatt, *The Avengers General*, GOVERNING (May 1, 2003), https://www.heartland.org/_template-assets/documents/publications/12520.pdf [<https://perma.cc/4ERC-W2AQ>].

¹³² *Republican Attorneys General Association*, *supra* note 130.

¹³³ *Democratic Attorneys General Association*, BALLOTPEdia, https://ballotpedia.org/Democratic_Attorneys_General_Association [<https://perma.cc/VWY6-PBCX>] (last visited Jan. 5, 2023).

¹³⁴ Greenblatt, *supra* note 131.

¹³⁵ *Attorney General (State Executive Office)*, BALLOTPEdia, [https://ballotpedia.org/Attorney_General_\(state_executive_office\)](https://ballotpedia.org/Attorney_General_(state_executive_office)) [<https://perma.cc/PDM7-5HKY>] (last visited Jan. 13, 2023).

¹³⁶ See Greenblatt, *supra* note 29.

¹³⁷ See *Republican Attorneys General Association: Overview*, *supra* note 29.

¹³⁸ See *Democratic Attorneys General Association*, *supra* note 29.

¹³⁹ *Attorney General Elections, 2018*, BALLOTPEdia, https://ballotpedia.org/Attorney_General_elections,_2018 [<https://perma.cc/G9CU-ZZWW>] (last updated Nov. 9, 2018).

security to maintain privacy.¹⁴⁰ An investigation done by the New York Times uncovered just how intensive and problematic these lobbying efforts are.¹⁴¹ For example, the article highlights a backdoor deal made between lobbyists for 5-Hour Energy and SAGs to stop investigations into deceptive advertising by the company that were being carried out by more than thirty SAGs.¹⁴² Rather than attempting to fight the matter in court, should the SAGs' investigations have led them to file lawsuits, the executives for 5-Hour Energy nipped the issue in the bud by sending their lobbyists to an opulent DAGA event at the Loews Santa Monica Beach Hotel in California.¹⁴³ There the lobbyists were able to confer with SAGs and ensure the investigations would be put to rest.¹⁴⁴ Like DAGA, RAGA holds its own events at luxury hotels with lobbyists in attendance from a wide range of companies and industries including the American Coalition for Clean Coal Electricity, Citigroup, Facebook, Purdue Pharmaceuticals, and the National Rifle Association to name a few.¹⁴⁵

Such blatant lobbying is able to take place because there are few restrictions or disclosure requirements that govern SAGs.¹⁴⁶ Thus, organizations like RAGA and DAGA are able to lobby SAGs in ways that the Republican and Democratic Parties cannot influence other elected officials. Because SAGs have such wide discretion and few checks placed on them, public trust is particularly important. However, it seems that those same factors making trust important also make SAGs particularly susceptible to the effects of lobbying with little repercussions. Thus, if SAGs are not careful these practices "can corrode public trust" in them.¹⁴⁷ Not only are RAGA and DAGA jeopardizing public trust through lobbying, they also are contributing to the widening political divide in our country by

¹⁴⁰ See Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014), <https://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html> [<https://perma.cc/4AB2-XNRX>].

¹⁴¹ See *id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *RAGA as a Money Machine*, N.Y. TIMES (Oct. 28, 2014) <https://www.nytimes.com/interactive/2014/10/28/us/1-RAGA-as-a-Money-Machine.html> [<https://perma.cc/YB8G-6A7S>]. The PDF contains information from RAGA's 2014 summer retreat to Coronado, California, including a list of over 250 lobbyists attending and their respective companies.

¹⁴⁶ See Lipton, *supra* note 140.

¹⁴⁷ *Id.*

intensifying competition for SAG seats and turning elections into spending wars.

CONCLUSION

The significance of SAGs' partisan approaches discussed in Part III goes beyond the interests at stake in any given case. What stands out is the serious partisanship that has infiltrated the SAG position. SAGs are letting party identity shape their choices to defend state statues, engage in multistate litigation, and file amicus curiae briefs in the Supreme Court. The issue becomes the growing disparities between the two sides of the political aisle. As the parties move further apart, if SAGs continue to follow the same trajectory, they will increasingly alienate their constituents that fall outside of their voter block. And, as discussed in Part II, these alienated constituents, particularly those in stronghold states, will have little-to-no recourse against their SAGs. With partisan antipathy on the rise,¹⁴⁸ continued alienation of constituents through highly partisan decisions will only deepen the political divide in our country. SAGs are uniquely positioned to effect positive change through their wide-reaching powers and broad discretion; however, these same tools, when polluted with partisanship, can lead to unchecked decisions that do more harm than good.

¹⁴⁸ Steven Webster, *Angry Americans: How Political Rage Helps Campaigns But Hurts Democracy*, THE CONVERSATION (Sept. 10, 2020), <https://theconversation.com/angry-americans-how-political-rage-helps-campaigns-but-hurts-democracy-145819> [<https://perma.cc/5LKG-YYC8>].

