

The Use and Misuse of Consumer Protection Enforcement Authority by State Attorneys General

GRACE HORTON*

TABLE OF CONTENTS

I.	INTRODUCTION	706
II.	STATE ATTORNEYS GENERAL: AN OVERVIEW.	707
	A. THE OFFICE OF THE STATE ATTORNEY GENERAL	708
	B. THE ROLE OF THE STATE ATTORNEY GENERAL AS CHIEF LEGAL OFFICER AND REPRESENTATIVE OF THE PUBLIC INTEREST	710
	C. THE DISCRETIONARY AUTHORITY OF THE STATE ATTORNEY GENERAL WHEN LITIGATING ON BEHALF OF THE PUBLIC INTEREST	711
III.	STATE ATTORNEYS GENERAL AND CONSUMER PROTECTION.	712
	A. STATUTORY AUTHORITY FOR STATE ATTORNEY GENERAL CONSUMER PROTECTION ENFORCEMENT	712
	B. CIVIL INVESTIGATIVE DEMANDS (CIDS) IN STATE ATTORNEY GENERAL CONSUMER PROTECTION ENFORCEMENT	714
	C. IMPACTS OF STATE ATTORNEY GENERAL CONSUMER PROTECTION ENFORCEMENT.	715
IV.	A NEW ERA: STATE ATTORNEY GENERAL USE OF CONSUMER PROTECTION LITIGATION FOR PERSONAL AND PARTISAN POLITICAL GAIN.	718
	A. MODERN STATE ATTORNEYS GENERAL ADOPTION OF A CULTURE OF ADVERSARIAL LEGALISM.	718
	B. MODERN STATE ATTORNEYS GENERAL INCREASE IN PARTISANSHIP AND POLITICAL ASPIRATIONS	718

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C. MODERN STATE ATTORNEYS GENERAL & AGGRESSIVE USE OF CONSUMER PROTECTION AUTHORITY: CASE STUDIES	720
1. CASE STUDY 1: TEXAS ATTORNEY GENERAL KEN PAXTON & ANNUNCIATION HOUSE	721
2. CASE STUDY 2: CALIFORNIA ATTORNEY GENERAL ROB BONTA & EXXON MOBIL	723
Case Studies Reflection: Normative Assessment	725
V. PROPOSAL FOR CURBING MISUSE AND ABUSE OF CONSUMER PROTECTION AUTHORITY: LEGAL ETHICS, BAR ASSOCIATIONS, AND THE MODEL RULES OF PROFESSIONAL CONDUCT	726
APPENDIX A	729
THE TEXAS CONSTITUTION	729
ARTICLE IV. EXECUTIVE DEPARTMENT	729
APPENDIX B	730

I. INTRODUCTION

For the last four decades, state attorneys general (hereinafter state AGs) have utilized innovative approaches to consumer protection litigation to expand the power and political reach of their office. In the 1990s, once little-known state AGs rose to prominence in national politics after engaging in the first round of nationwide multistate consumer protection litigation against the tobacco industry.¹ In the 2000s, another large multistate consumer protection lawsuit was settled against pharmaceutical industry giant Purdue Pharma in response to the opioid epidemic.² By the 2010s, state AGs were fully recognized as powerful, integral actors in consumer protection on the national stage and began to collaborate with the federal government to earn larger settlements and broader consumer relief than ever before.³

1. See Paul Nolette, *Commandeering Federalism: The Rise of the Activist State Attorneys General*, L. & LIBERTY (Sept. 5, 2016) [hereinafter *Commandeering Federalism*], <https://lawliberty.org/forum/commandeering-federalism-the-rise-of-the-activist-state-attorneys-general/> [<https://perma.cc/LQY9-GLGF>]; Mark C. Miller, *State Attorneys General, Political Lawsuits, And Their Collective Voice in the Inter-Institutional Constitutional Dialogue*, 48 NOTRE DAME J. LEGIS. 1, 5-8 (2021).

2. See Ashley L. Taylor et al., *State Attorneys General: The Robust Use of Previously Ignored State Powers*, 40 URB. LAW 507, 513-14 (2008).

3. See Dee Pridgen & Jolina C. Cuaresma, CONSUMER PROTECTION AND THE LAW § 7:1 (2024).

Through the late 2010s and early 2020s there has been a marked increase in the amount of political and policy activism emerging from the offices of state AGs.⁴ State AGs over the past two decades have more willingly, more frequently, and more boldly harnessed the power of their popular mandate as elected officials to engage in adversative litigation on value-centric issues which further their own political interests.⁵ This increased political activism has arisen in lockstep with increased portrayal of the attorney general office as a political stepping-stone to higher public office, like governorships or seats in the state or federal legislature. Some of today's most activist attorneys general, like Ken Paxton of Texas and Rob Bonta of California, have adopted innovative consumer protection enforcement tactics in recent high-profile litigation.⁶ These strategies are poised to shape national policy and further elevate their own political influence.

This apparent new phase of innovation in consumer protection litigation by activist state AGs prompts new questions about the proper role of state AGs in shaping national politics and the appropriate scope of their power. Should state AGs be allowed to use the powerful tools afforded by their office for the pursuit of consumer protection to target their political opponents and further their own personal and professional goals? If not, how can overreach and misuse of the tools of their office be constrained?

In Section II, this Note will provide an overview of the office of the state AG. In Section III, this Note will expand on the powers afforded state AGs in the realm of consumer protection. In Section IV, this Note will articulate the characteristics of the new era of politically-motivated state AG consumer protection litigation emerging today. It will examine whether today's state AGs are misusing the powers afforded their office in pursuing consumer protection litigation not for the benefit of the public interest but rather for personal or partisan political gain. Finally, in Section V, this Note will conclude with a proposal for one solution to rein in overreaching state AGs despite the significant deference granted them in the area of consumer protection: bar association enforcement of codified rules of professional conduct.

II. STATE ATTORNEYS GENERAL: AN OVERVIEW

To fully appreciate the impact of state AG consumer protection litigation, it is important to establish who state AGs are and what role they play in the state government.

4. See Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 J. FEDERALISM 469, 469-471 (2018); Miller, *supra* note 1, at 14-18.

5. See Nolette & Provost, *supra* note 4, at 469-471.

6. See, e.g., Petition and Counterclaim in the Nature of Quo Warranto of Defendant, ¶ 12-19, Annunciation House, Inc. v. Paxton, No. 2024DCV0616 (Tex. Dist. July 02, 2024); People ex rel Bonta v. Exxon Mobil Corp., No. CGC-24-618323. (Cal. Super. 2024). See also *infra* section IV.C: Modern State Attorneys General & Aggressive Use of Consumer Protection Authority: Case Studies.

A. THE OFFICE OF THE STATE ATTORNEY GENERAL

State AGs are officers of the state executive branch who serve as the chief legal officer of their state. Aside from the governorship, the office is “arguably the most prominent statewide office one can hold.”⁷ Each state constitution formally establishes the state AG position within the state executive branch.⁸ However, state constitutional descriptions of the state AG position are generally brief and fail to articulate the finer details of the position.⁹ Finer details about the office of state AG are outlined in state codes of statutes, which can vary significantly between states.¹⁰ The broadest source of state AG authority arises out of the common law.¹¹

Beyond the black letter law of state AG authority, state AGs owe the prominence of their office to two deliberate institutional design choices: popular election of state AGs and their independence from oversight by other government officeholders.

Attorneys general in forty-three states and the District of Columbia are elected by popular vote, and all but two attorneys general nationwide serve the public entirely independent from gubernatorial oversight and control.¹² The popular election of state AGs was a deliberate institutional design choice made by most states to further two key goals: enhancing the responsiveness of the executive branch and weakening the power of the chief executive.¹³

7. Nick Robinson, *The Decline of the Lawyer-Politician*, 65 BUFF. L. REV. 657, 691 (2017).

8. For an example of a state constitutional provision describing the attorney general position, see *infra* Appendix A.

9. See Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 268 (5th Cir. 1976) (“[The] duties and powers [of attorneys general] are not exhaustively defined by either constitution or statute but include all those exercised at common law . . . [Accordingly, the attorney general] typically may exercise all such authority as the public interest requires.”). See also State v. Lead Indus., Ass’n, Inc., 951 A.2d 428, 471 (R.I. 2008) (“Indeed, the Rhode Island constitution recognizes the Office of the Attorney General and provides for its continued existence with all the powers inherent at common law; it also provides that the General Assembly may imbue the Attorney General with powers in addition to those common law powers.”).

10. In the Texas Government Code, for example, there are nearly 2000 references to the state attorney general position. See *Duties & Responsibilities of the Office of the Attorney General*, TEX. OFFICE OF THE ATTORNEY GENERAL, <https://www.texasattorneygeneral.gov/about-office/duties-responsibilities-office-attorney-general> [<https://perma.cc/75FJ-YP7C>] (last visited Dec. 13, 2024).

11. See, e.g., in re Cardizem CD Antitrust Litigation, 218 F.R.D. 508, 521-522 (E.D. Mich. 2003). State AG powers under state law and the common law will be discussed in greater detail in sections II.B, II.C, and III.A.

12. The Council of State Governments, *Table 4.19: The Attorneys General, 2023*, THE BOOK OF THE STATES, <https://bookofthestates.org/tables/2023-4-19/> [<https://perma.cc/56HY-CAVJ>] (July 2023) [hereinafter Book of the States Table 4.19]; D.C. CODE § 1–204.35. In Maine and Tennessee, the state attorney general is appointed by the state legislature and the state supreme court, respectively. See Book of the States Table 4.19, *supra*. In three states, New Jersey, New Hampshire, and Hawaii, the state attorney general is appointed by the governor but cannot be removed at will. See Haw. Const. art V, § 6; N.H. Const. pt. 2, arts. 46, 47, 73; N.J. Const. art. V, § IV, paras. 3, 5. Only two states, Alaska and Wyoming, have a state attorney general that is both appointed by the governor and removable at the governor’s will. See Alaska Const. art. III, § 25; Wyo. Stat. Ann. §§ 9-1-601, 9-1-202 (2005).

13. See Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 753 (2016).

First, the popular election of state AGs “enhance[s] governmental responsiveness to local priorities.”¹⁴ State AGs who are popularly elected have significant incentive to engage with the public. They must ensure voters are satisfied with the administration of their office to win reelection at the end of their term. In fact, the nature of the state AG office often facilitates frequent public engagement. According to the National Association of Attorneys General (NAAG), certain responsibilities of the state AG office, like consumer protection, are uniquely “people law” and can often provide the closest contact a constituent has with any state governmental entity.¹⁵ By attaining office through popular election and regularly engaging with the public in their provision of legal service to the state, the majority of state AGs have a strong popular mandate they can wield to justify their actions taken as chief legal officer of the state to represent the legal interests of the public they serve.

Second, the popular election of state AGs serves to “weaken the power of a central chief executive [by] further[ing] an intrabranch system of checks and balances.”¹⁶ The forty-eight state AGs who are popularly elected, or otherwise do not serve at the will of the governor, enjoy near-complete independence from other officers of the executive branch in carrying out the responsibilities of their office. There is considerable academic debate over the proper identity of the “client” of the state AG as chief legal officer of the state.¹⁷ While the answer to this question remains unclear, courts have held that, tracing all the way back to the colonial era under English rule,¹⁸ “[i]n case of a conflict of duties the Attorney General’s primary obligation is to the Commonwealth, the body politic, rather than to its officers, departments, commissions, or agencies.”¹⁹ As a result, state AGs are not bound to follow the policy prescriptions of the governor. In fact, by utilizing their independence and the judicial system, state AGs can bring lawsuits to challenge gubernatorial actions in court as violations of state or federal statutes or constitutional provisions, essentially granting state AGs a veto-like power over gubernatorial actions.²⁰ This power not only allows the state AG to provide an

14. *Id.*

15. *Consumer Protection 101*, NAT’L ASS’N OF ATT’YS GEN. [hereinafter *Consumer Protection 101*], <https://www.naag.org/issues/consumer-protection/consumer-protection-101/> [<https://perma.cc/369X-MWN8>] (last visited Dec. 13, 2024).

16. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2451 (2006); see also *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986).

17. See, e.g., William R. Dailey, CSC, *Who is the Attorney General’s Client?*, 87 NOTRE DAME L. REV. 1113 (2012).

18. See *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974) (“[A]t common law the duty of the Attorney General was to represent the king, he being the embodiment of the state. But under the democratic form of government now prevailing the people are the king”) (citation omitted).

19. *Id.* at 868.

20. See *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 358-359 (Ky. 2016).

intra-branch check curtailing gubernatorial wrongdoing, but also allows the state AG to exercise significant interpretive power over state legislation.

State AGs also provide an interbranch check on legislative authority and enjoy near-complete independence from the legislature. Most state constitutions include a formal separation of powers clause.²¹ Several courts have also held that state AGs have the power to act independently in determining when to litigate, and that these decisions must be rooted entirely in the AG's own discretion.²² Accordingly, the legislature is limited in its authority to exert oversight over the state AG. While a state legislature may have the authority to deprive the state AG of certain powers through the passage of legislation or constitutional amendments, in the absence of any affirmative exercise of legislative authority to constrain the power of the state AG—which in several circumstances would require a constitutional amendment—the state AG “may exercise all such authority as the public interest requires.”²³

As a result of their popular mandate to act as legal representatives of the state, formal independence from other executive branch officers, and limited oversight by other branches of state government, state AGs can independently and unilaterally affect the lived realities of residents within their state and beyond through their role as chief legal officer of the state and representative of the public interest.

B. THE ROLE OF THE STATE ATTORNEY GENERAL AS CHIEF LEGAL OFFICER AND REPRESENTATIVE OF THE PUBLIC INTEREST

According to NAAG, “as chief legal officer of the states. . . , the role of an attorney general” is twofold: state AGs “serve [both] as counselor to state government agencies and legislatures, and as a representative of the public interest.”²⁴ This paper will focus exclusively on the role of state AGs as representatives of the public interest, as it is within this role that state AGs pursue consumer protection litigation.

As legal representatives of the public interest, state AGs have the authority to engage in litigation upholding the rule of law and furthering the public interest by “protecting the rights, health, and safety of their states’ residents.”²⁵ For nearly half a century, the Supreme Court has upheld state AGs’ broad authority to bring

21. See, e.g., MASS. CONST. pt. I, art. XXX (separation of legislative, executive and judicial departments); N.H. CONST. pt. I, art. XXXVII.

22. See *Feeney v. Commonwealth*, 373 Mass. 359, 365 (1977); see also *State v. Lead Indus., Ass’n, Inc.*, 951 A.2d 428, 473 (R.I. 2008); Peter Brann & James Tierney, *The Role of the State Attorney General*, HARV. L. SCH. § 1.5 (2024) <https://opencasebook.org/casebooks/29-the-role-of-the-state-attorney-general/> [<https://perma.cc/8JGV-6S6V>] (Memorandum of Former Members of the Office of the Attorney General of New Hampshire).

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

24. *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/4VBS-HDJZ>] (last visited Dec. 13, 2024).

25. *About the State AG Project*, AMERICAN CONSTITUTION SOCIETY, <https://www.aeslaw.org/projects/state-attorneys-general-project/about/> [<https://perma.cc/YR97-LXW5>] (last visited Dec. 13, 2024); see also *Lead*, 951 A.2d at 471.

suits on behalf of “the health and well-being—both physical and economic—of [the state’s] residents in general.”²⁶ State AGs have expansive power under the common law not only to bring suits on behalf of the public interest but also to define the public interest in the first place.²⁷ This power arises out of the popular election of state AGs. In *Florida ex rel. Shevin v. Exxon Corp*, the Fifth Circuit stated, “[T]he Attorney General is elected by the people; he is entrusted by them with the common law power to legally represent them or some of them in matters deemed by him to affect the public interest.”²⁸ State AGs’ responsibility for enforcing consumer protection law arose out of this expansive authority and has since been cemented in state statutes and the common law.²⁹

C. THE DISCRETIONARY AUTHORITY OF THE STATE ATTORNEY GENERAL WHEN LITIGATING ON BEHALF OF THE PUBLIC INTEREST

In addition to the authority to determine what the public interest is, state AGs are afforded a vast degree of discretion over when, how, and why they litigate. As the state’s chief legal officer, state AGs are afforded broad discretion to “make any disposition of the state’s litigation” they believe is in the state’s best interest.³⁰ They may pursue any policy goal through litigation without obtaining gubernatorial or legislative approval.³¹ In *State v. Lead Industries Association*, the Supreme Court of Rhode Island ruled that the state AG is entitled to act with autonomy in litigation because the state AG is a “constitutional officer” and “an independent official elected by the people of Rhode Island.”³² As discussed above, state AGs serve independently from gubernatorial oversight and cannot be forced into or prohibited from litigation by the legislature. It is also unclear whether voters understand the power of this position enough to sufficiently check state AG use of discretion at the ballot box.³³ Because of the significant degree of

26. Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 607 (1982).

27. See Miller, *supra* note 1, at 4.

28. *Shevin*, 526 F.2d at n.6. Though this case was brought in the Fifth Circuit and is describing the role and powers afforded to the Florida state attorney general, state courts frequently read and rely on opinions about other state AGs to articulate their own holdings. Though each state’s powers are different, these holdings are cross-referenced. See *Lead*, 951 A.2d at n.47.

29. See Citron, *supra* note 13, at 753.

30. See Miller, *supra* note 1, at 12-13 (quoting Marshall, *supra* note 16, at 2456-57).

31. See Miller, *supra* note 1, at 4.

32. See *Lead*, 951 A.2d at 474.

33. In all ten states that held a popular State Attorney General election in 2024, fewer voters cast a vote for a candidate running for State Attorney General than for a candidate running for President. See *2024 Attorney General Results*, NBC NEWS, <https://www.nbcnews.com/politics/2024-elections/attorney-general-results> [<https://perma.cc/VYG4-7YRV>] (last updated 11:25AM ET Dec. 2, 2024). This result is unsurprising, considering on average only half of the eligible electorate casts a ballot in the average presidential election year, and only two-thirds of those participating voters fill out their entire ballot. See *It’s Not Just About the White House: Down-ballot Voting is Important Too*, U.S. VOTE FOUNDATION, <https://www.usvotefoundation.org/downballot> [<https://perma.cc/32L5-CPRD>] (last visited Dec. 13, 2024). However, it seems to suggest non-participating voters see the state attorney general position as relatively unimportant. Political and legal advocacy organizations like the American Constitution Society tried to preempt this outcome, issuing pleas to

state AG discretion and the limited checks on their authority, it is important that state AGs carry out the duties of their office with candor, restraint, and a strong sense of legal ethics. This is especially true in the realm of consumer protection, where state AG discretion may be at its highest.

III. STATE ATTORNEYS GENERAL AND CONSUMER PROTECTION

A. STATUTORY AUTHORITY FOR STATE ATTORNEY GENERAL CONSUMER PROTECTION ENFORCEMENT

State AGs derive their expansive power as the chief legal officer of their state and their authority to litigate on behalf of the public interest from state constitutions, statutes, and the common law.³⁴ While state AGs are technically bound by both state and federal legal regimes, the authority and obligations of state AGs arise primarily out of state law, with federal law playing a more limited, preemptive role.³⁵ Accordingly, this Note will confine itself to a consideration of state AG powers under state law.

State AGs find their authority to engage in consumer protection litigation on behalf of the public in both state statutes and the common law. In 1914, Congress passed the Federal Trade Commission Act, which banned “unfair methods of competition” and “unfair or deceptive practices” at the federal level and created the FTC, a consumer protection enforcement agency, to enforce the Act.³⁶ By the 1960s, the FTC realized its consumer protection goals could not be accomplished without parallel enforcement efforts by state government leaders and began to

voters prior to Election Day 2024, urging them to make their voices heard in this down-ballot race. *See* Valerie M. Mannery, *State Attorneys General Matter. Cast Your Vote This Election*, AMERICAN CONSTITUTION SOCIETY (Oct. 9, 2024), <https://www.acslaw.org/inbrief/state-attorneys-general-matter-cast-your-vote-this-election/> [<https://perma.cc/Y3TF-QYF4>]. By state, the differences in voter turnout for the 2024 State AG race compared to the Presidential race were as follows: IN: -96,755 voters (-3.3%), MO: -91,053 voters (-3.1%), MT: -14,438 voters (-2.4%), NC: -108,117 voters (-2.1%), OR: -126,056 voters (-5.6%), PA: -152,517 voters (-2.2%), UT: -38,999 voters (-2.6%), VT: -22,754 voters (-6.2%), WA: -135,538 voters (-3.5%), WV: -46,654 voters (-6.1%). *See 2024 Attorney General Results, supra*.

34. Some states, like Connecticut, restrict the AG’s common law powers to specific areas, like charitable trusts and gifts. *See* *Blumenthal v. Barnes*, 261 Conn. 434, 447 (2002). In other states, they are expansive. *See* *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 521-522 (E.D. Mich. 2003).

35. *See* Devins & Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty To Defend*, 124 YALE L.J. 1836, 2107 (2015). In several circumstances, the federal Constitution grants a power or imposes a duty on the states which the states may then delegate to the state attorney general. *See id.* at n. 25. In these circumstances, the Constitution does come to bear on said delegated power. *Id.* Additionally, several federal statutes exist which formally grant power or authority to state attorneys general, including 49 U.S.C. § 14711(a) (2012) (authorizing state attorneys general to enforce the consumer protection provisions of the interstate transportation code). *See* Devins & Prakash, *supra*, at 2109. However, even though state attorneys general join several federal employees or appointees in taking the supportive oath when they enter office, “the supportive oath never requires [state] attorneys [general] to shed their ordinary role of advancing the interests of their states” in favor of independently acting on federal law as the “‘best’ reading of the law” should circumstances of conflict arise. *Id.* at 2110.

36. 15 U.S.C. § 45(a)(1).

collaborate with state AGs.³⁷ In 1967, this collaboration produced a pivotal piece of model legislation: the Unfair Trade Practices and Consumer Protection Act.³⁸ At the urging of the FTC,³⁹ state AGs nationwide, equipped with this collaboratively-drafted model legislation, took up the mantle of consumer protection enforcement themselves, matching the FTC's actions at the state level.⁴⁰ Each attorney general in all fifty states and the District of Columbia created a consumer protection division to spearhead consumer protection litigation⁴¹ as their states adopted statutes based on the 1967 model legislation.⁴² These state "Unfair Deceptive Acts and Practices" statutes, commonly referred to as UDAP statutes or Little FTC statutes,⁴³ mirror the FTCA by prohibiting "unfair and deceptive acts or practices in or affecting commerce"⁴⁴ in the state, and by granting the state AG or the consumer protection division the authority to enforce state consumer protection laws.⁴⁵

As is the case with most statutes governing state AG duties and powers, UDAP statutes have varying scopes of coverage and available remedies from state to state.⁴⁶ For instance, all fifty states allow the attorney general to commence civil proceedings against suspected violators of consumer protection laws, while only a subset of states allow the attorney general to commence criminal proceedings under consumer protection laws.⁴⁷ Despite these variations, all fifty state AGs wield power under the banner of consumer protection.⁴⁸ State AGs utilize their consumer protection powers to significantly impact the lives of residents and consumers inside—and often outside—their state.⁴⁹

37. John F. Graybeal, *Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina*, 80 N.C. L. REV. 1927, 1933 n.19 (2002).

38. *See id.*; Matthew W. Sawchak & Kip D. Nelson, *Defining Unfairness in "Unfair Trade Practices"*, 90 N.C. L. REV. 2033, 2037 (2012).

39. *See* Henry N. Butler, *Are State Consumer Protection Acts Really Little FTC Acts?*, 63 FLA. L. REV. 163, 164-65 (2011).

40. *See* Graybeal, *supra* note 37, at n.19.

41. *See* Citron, *supra* note 13, at 753.

42. *See* Graybeal, *supra* note 37, at 1934.

43. *See* Craig Carpenter, Nicole Hobeiche & Sophilia Wu, State Bar of Texas, TXCLE ADVANCED INTELLECTUAL PROPERTY LAW, 7-VI (2023).

44. *See id.*

45. *See Consumer Protection 101*, *supra* note 15. For example, Texas's UDAP statute, the Deceptive Trade Practices-Consumer Protection Act, reads, "False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division [of the state AG's office]." TEX. BUS. & COM. CODE § 17.41.

46. *See* Appendix A. For an in-depth comparison of all UDAP statutes by state and territory, see The Book of the States Table 4.22. The Council of State Governments, *Table 4.22: Attorneys General: Consumer Protection Activities, Subpoena Powers and Antitrust Duties*, THE BOOK OF THE STATES (July 2023) [hereinafter Book of the States Table 4.22], <https://bookofthestates.org/tables/2023-4-22/> [<https://perma.cc/2K3T-WRR6>].

47. *See* Book of the States Table 4.22, *supra* note 46.

48. According to former Maine Attorney General James Tierney, "it is a core duty of every attorney general to be involved in consumer protection." Brann & Tierney, *supra* note 22, at § 6.1.

49. *See id.*

B. CIVIL INVESTIGATIVE DEMANDS (CIDS) IN STATE ATTORNEY GENERAL CONSUMER PROTECTION ENFORCEMENT

Perhaps the most powerful tool in the state AG's arsenal in consumer protection litigation is the civil investigative demand (CID).⁵⁰ CIDs, also referred to as 'administrative subpoenas,' are pre-complaint tools of discovery issued by all fifty state AGs to collect evidence before initiating a consumer protection lawsuit.⁵¹

CIDs are crucial to state AG consumer protection investigations. They are a powerful tool state AGs use to gather the information necessary to litigate against an offending business, corporation, or service provider.⁵² State AG reliance on CIDs in consumer protection litigation is due, in part, to the relatively few constraints placed on attorney generals' use of the pre-litigation discovery device.⁵³

The CID provides state AGs a "breadth of pre-suit investigatory authority . . . not available to most litigants."⁵⁴ Unlike a traditional search warrant or subpoena, the standards required of state AGs when issuing CIDs are remarkably lax. The attorney general need only have a reasonable suspicion that a consumer protection law has been or is being violated or "reasonably believe[] it to be in the public interest to conduct an investigation."⁵⁵ A CID can generally be filed against any party engaged in business activity within the state based on an assumption that the party has therefore consented to the state's laws.⁵⁶ Furthermore, an AG may issue CIDs to individuals or entities other than the primary party being investigated if there is a reasonable basis to believe a non-violator has information relevant to a pending investigation.⁵⁷

CID requests are permissible so long as the information requested is "reasonably relevant" to the investigation, the documents demanded are "not too indefinite," and their scope is appropriately limited by the authority of the attorney general.⁵⁸ However, even these requirements place minor limitations on state AG authority to issue CIDs. Courts tend to construe 'relevance' broadly in relation to CID requests.⁵⁹ Though a CID "must state specifically which documents or other

50. See Pridgen & Cuaresma, *supra* note 3, at § 7:2.

51. See *id.*

52. See 7A C.J.S. Attorney General § 41 (2024).

53. See Pridgen & Cuaresma, *supra* note 3, at § 7:2.

54. See Brann & Tierney, *supra* note 22, at § 6.1.

55. TEX. BUS. & COM. CODE § 17.60; see also Citron, *supra* note 13, at 761.

56. See 7A C.J.S. Attorney General § 41 (2024).

57. 7A C.J.S. Attorney General § 41 (2024).

58. United States v. Morton Salt 338 U.S. 632, 652 (1950); see also Okla. Press Publ'n Co. v. Walling, 327 U.S. 186, 208 (1946); Madison Equities, Inc. v. Office of Attorney General, 967 N.W.2d 667, 673 (2021)

59. See Pridgen & Cuaresma, *supra* note 3, at § 7:2; see, e.g., Matter of Attorney General's Investigative Demand to Michael Malemed, 493 A.2d 972, 977 (Del. Super. Ct. 1985) (holding that an expansive request for "all . . . documents used in connection with the sale or advertisement for sale of products in Delaware" was sufficiently relevant to investigation).

types of evidence are requested,⁶⁰ even technically indefinite or overbroad requests for information are often permitted on the grounds that it is the purpose of the CID to obtain all necessary pre-suit information.⁶¹ Furthermore, it can be difficult to determine whether a given request falls within the legal authority of the state AG until the end of an investigation, when there is sufficient information to determine whether a violation of consumer protection law has occurred.⁶² As a result, “most courts will take the attorney general at his or her word that the practice under investigation is within the parameters of the relevant statute. . . .”⁶³

In sum, the autonomy with which state AGs can issue CIDs, the vast population of intrastate and interstate actors subject to CID authority, and the significant degree of deference afforded state AG determinations of permissible CID scope, reasonableness, definiteness, and specificity all contribute to the CID’s status as the most powerful tool in the state AG’s consumer protection arsenal.

C. IMPACTS OF STATE ATTORNEY GENERAL CONSUMER PROTECTION ENFORCEMENT

State AGs pursue consumer protection litigation against businesses, corporations, and service providers who are allegedly jeopardizing the health, safety, and overall well-being of the state’s residents or otherwise acting contrary to the public interest. State AG efforts in pursuit of this goal often cause significant impacts that ripple across industries and the country. Accordingly, it is important that the consumer protection enforcement power of state AGs be used responsibly and appropriately.

The impact of state AG consumer protection litigation can extend far beyond the boundaries of any one case or courtroom. By bringing strategic consumer

60. Pridgen & Cuaresma, *supra* note 3, at § 7:4; *see, e.g.*, *In re Mem’l Hermann Healthcare Sys.*, 274 S.W.3d 195 (Tex. App.—Houston [14th Dist.] 2008); *Humphreys v. State ex rel. Guste*, 369 So. 2d 250, 253 (La. App. 4th Cir. 1979).

61. *See* Pridgen & Cuaresma, *supra* note 3, at § 7:2; *see, e.g.*, *Scott v. Ass’n for Childbirth at Home, Intern.*, 88 Ill. 2d 279, 58 Ill. Dec. 761, 430 N.E.2d 1012 (1981) (holding that attorney general cannot always be required to give exact names and dates of documents requested in CID and need only give “reasonably informative description” of documents or information requested to fulfill definiteness requirement); *In re Attorney General’s Investigative Demand to Michael Maleded*, 493 A.2d 972, 977 (Del. Super. Ct. 1985); *Dolomite Energy, LLC v. Commonwealth of Ky. Off. of Fin. Insts.*, 269 S.W.3d 883 (Ky. App. 2008); *Atlanta Auto Auction v. Ryles*, 148 Ga. App. 20, 251 S.E.2d 28, 30 (1978); *cf. Myerson v. Lentini Bros. Moving & Storage Co., Inc.*, 33 N.Y.2d 250, 351 N.Y.S.2d 687, 696, 306 N.E.2d 804 (1973).

62. *See* Pridgen & Cuaresma, *supra* note 3, at § 7:6; *see, e.g.*, *Steele v. State ex rel. Gorton*, 85 Wash. 2d 585 (1975) (AG need only allege possible deceptive practices, no requirement to cite authority under which investigation is brought).

63. *See* Pridgen & Cuaresma, *supra* note 3, at § 7:2. In *Steele v. State ex rel. Gorton*, for example, the Supreme Court of Washington held that the state AG did not need to have “absolute assurances that violations of the Consumer Protection Act have occurred” before “embarking upon investigations,” but could issue a valid CID based on the “adequately specified” basis for investigation: “possible deceptive and unfair practices in the operation of an employment agency.” *Steele*, 85 Wash. 2d 585 (emphasis added); *cf. State ex rel. Shriver v. Leech*, 612 S.W.2d 454, 456 (Tenn. 1981) (Example of CID being denied because attorney general failed to state in CID “the ‘case’ that is pending or the ‘matter’ under investigation. . . .”).

protection cases, individual state AGs have the capacity to change business practices on an industry-wide scale and fill gaps in state or federal regulatory schemes. Prominent industries “have significantly changed their practices after being in the crosshairs of AG investigations.”⁶⁴ For example, in 2012, forty-nine state AGs and the federal government launched multistate consumer protection litigation against the five largest mortgage servicers in the nation “to address mortgage loan servicing and foreclosure abuses.”⁶⁵ The resulting twenty-five billion dollar settlement agreement required servicers nationwide to alter aspects of their businesses to protect homeowners against foreclosure moving forward.⁶⁶ In 1998, the historic Master Settlement Agreement ended four years of multistate consumer protection litigation against “Big Tobacco” and drastically limited the advertising and marketing of tobacco products, forcing all tobacco companies to change their marketing practices if they wanted to survive under the new conditions.⁶⁷ Even consumer protection actions brought by an individual state AG can force the adoption of new nationwide norms of conduct in a given industry. In 2014, then-California Attorney General Kamala Harris issued formal guidance for companies seeking to comply with the California Online Privacy Protection Act (CPPA)⁶⁸—“which was the first law in the nation to require operators of commercial websites, including mobile apps, to conspicuously post a privacy policy if they collect personally identifiable information from Californians.”⁶⁹ The act applied any time the end user of an application resided in California. Given the size of California’s population, no app developer could opt-out of the Act’s privacy requirements without forfeiting access to ten percent of the U.S. market.⁷⁰ Accordingly, Attorney General Harris’s enforcement of CPPA’s protections had a sweeping impact beyond California’s borders.⁷¹ Today, virtually all app developers have adopted a data privacy policy compliant with CPPA, regardless of where the company is located.⁷²

64. Christopher Allen et al., *State Attorney Activism and Enforcement Trends*, BLOOMBERG LAW (Feb. 2020), <https://www.bloomberglaw.com/external/document/XE6O0BNG000000/corporate-compliance-professional-perspective-state-attorney-act> [https://perma.cc/S8YU-367E].

65. Press Release, U.S. Dep’t. of Just. Off. of Pub. Aff., Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest> [https://perma.cc/4R6J-ED9V].

66. Michelle M. Mello et al., *The Role of State Attorneys General in Improving Prescription Drug Affordability*, 95 SO. CAL. L. REV. 595, 607-09 (2022).

67. See Miller, *supra* note 1, at 5.

68. CAL. BUS. & PROF. CODE § 22575-79 (codification of CPPA).

69. Press Release, Office of the California Attorney General, Attorney General Kamala D. Harris Issues Guide on Privacy Policies and Do Not Track Disclosures (May 21, 2014) <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-issues-guide-privacy-policies-and-do-not-track> [https://perma.cc/JX2K-BK56].

70. See *The Mobile App Developer’s Guide to CCPA Compliance*, FLURRY, <https://www.flurry.com/ccpa-compliance-guide/> [https://perma.cc/NW5Q-Q2YZ] (last visited Dec. 13, 2024).

71. See *id.*

72. See *id.*

State AGs also rarely need to litigate consumer protection cases to a final verdict to affect their desired policy changes. Often a state AG need only announce a major investigation into consumer protection issues to “elevate the national salience” of the relevant policy issue and “suggest[] a culprit [is blameworthy] well before any legal issues are resolved in court.”⁷³ For example, in October 2017, New Jersey Attorney General Christopher Porrino announced, after initiating a consumer protection lawsuit against Purdue Pharma, “when we point the finger of blame . . . Purdue is in the bullseye of the target. Today, [we] took the first step toward holding them legally and financially responsible for their deception.”⁷⁴

In some instances, state AGs utilize mere threats of litigation to induce defendants to negotiate. These instances of “policy-creating litigation” use “threats of lawsuits founded on novel and untested legal theories” in order to get defendants to adopt new business practices in exchange for the threatened lawsuit not to be brought.⁷⁵ These options to affect policy change without litigating a case to a final verdict provide state AGs with extrajudicial means by which to affect policy within and without their state in whichever way they define to be in the public interest.

State AGs can also use the early stages of consumer protection litigation to pressure defendants into paying large sums of settlement money in lieu of litigating a case to its final verdict.⁷⁶ When faced with state AG action, defendant businesses often fear that litigating a case to trial would leave their business financially and reputationally worse off overall.⁷⁷ Such fear is inspired in consumer protection defendants because of the risk that the results of a CID may be made public before the litigation itself is resolved.⁷⁸ Legal industry commentators have likened the threat of pre-trial publication of state AG investigation results to “the sword of Damocles, hanging by a thread and casting a shadow over [a] company’s business prospects, recruiting efforts, overall reputation, and if publicly held, its stock price.”⁷⁹

Through the strategic application of all the tools at their disposal in pursuing consumer protection litigation, including CIDs, state AGs have a powerful, autonomous capacity to affect actors engaged in commerce and engender sweeping change both inside and outside their state.

73. Nolette & Provost, *supra* note 4, at 488.

74. *Id.*

75. See *Commandeering Federalism*, *supra* note 1.

76. See *id.*

77. Ashley Taylor, Stephen Piegras & Ryan Strasser, *Developing a strategy for settling multistate AG investigations*, THOMSON REUTERS (Nov. 10, 2022), <https://www.reuters.com/legal/legalindustry/developing-strategy-settling-multistate-ag-investigations-2022-11-10/> [<https://perma.cc/X8VE-E95A>].

78. See *id.*

79. *Id.*

IV. A NEW ERA: STATE ATTORNEY GENERAL USE OF CONSUMER PROTECTION LITIGATION FOR PERSONAL AND PARTISAN POLITICAL GAIN

State AGs have historically utilized innovative approaches to consumer protection litigation to expand the power and political reach of their office. These innovations in consumer protection litigation have tracked or influenced changes in both the reality and public perception of the state AG position.

Today, state AGs are following in the footsteps of their predecessors and entering another new era of expanding their power, whether for good or for ill, by utilizing innovative consumer protection enforcement tactics to increase their presence in the national political arena. Influenced by the adoption of a culture of adversarial legalism and the increasing partisanship and political aspirations of current and aspiring state AG officeholders, it appears today's state AGs may be utilizing their consumer protection enforcement authority, particularly the power to issue CIDs, to make a name for themselves on the national political stage.

A. MODERN STATE ATTORNEYS GENERAL ADOPTION OF A CULTURE OF ADVERSARIAL LEGALISM

The newest evolution of the historic trend of state AGs innovating in consumer protection litigation to advance the reach of their office into national politics reflects the modern adoption of a culture of adversarial legalism by particularly activist state AGs.⁸⁰ Adversarial legalism, as coined by historian Robert Kagan, is a uniquely American legal tradition of “policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation” “characterized by frequent resort to highly adversarial legal contestation.”⁸¹ Today's state AGs are practicing what appears to be adversarial legalism—frequently launching strategic, aggressive investigations and lawsuits in the sphere of consumer protection enforcement to achieve individual goals.

B. MODERN STATE ATTORNEYS GENERAL INCREASE IN PARTISANSHIP AND POLITICAL ASPIRATIONS

The adoption of a culture of adversarial legalism is inextricably linked to two factors of state AG-ship that have grown increasingly salient over time: partisanship and political aspiration. In contrast to previous eras, in which state AGs were “relatively obscure stepping-stone positions focused mainly on small-bore issues,”⁸² today, state AGs are powerful actors in American politics who “make their presence known . . . in area after area, be it health care, environmental

80. Historian Robert Kagan coined the term “adversarial legalism,” defining it as a uniquely American legal tradition of “policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation” “characterized by frequent resort to highly adversarial legal contestation.” See Miller, *supra* note 1, at 6-7 (citing Robert Kagan).

81. *Id.*

82. *Commandeering Federalism, supra* note 1.

regulation, guns, immigration, or cultural issues.⁸³ Partisan players are taking notice of this increased presence.

From 2008 to 2022, in the 48 states where state AGs are popularly elected, the cost of state AG races increased twelve times over, from \$17 million to \$222 million.⁸⁴ In contrast, the cost of gubernatorial campaigns increased only eightfold.⁸⁵ This increase in campaign fundraising suggests party players acknowledge modern state AGs to be powerful partisan actors⁸⁶ who have the capacity to “judicialize” American politics⁸⁷—“shape[ing] nationwide politics and policy by pushing strategic lawsuits through their [favorite] courts.”⁸⁸

Spurred by this outgrowth of external attention, many state AGs today seem to be setting loftier goals for themselves as career politicians. A common joke among state AGs and those who study them is that “AG” really stands for “aspiring governor.”⁸⁹ At the start of 2021, for example, seven former state AGs occupied governors’ mansions across the country.⁹⁰ Five state AGs have risen to the vice presidency, including former Vice President Kamala Harris.⁹¹ One state AG has occupied the oval office: President, and former Arkansas State Attorney General, Bill Clinton.⁹² Still more former state AGs have found themselves in other higher offices once their tenure as state AG has concluded.⁹³

83. *Id.*

84. *See State Attorneys-General are Shaping National Policy*, THE ECONOMIST (Feb. 8, 2024) [hereinafter ECONOMIST], <https://www.economist.com/united-states/2024/02/08/state-attorneys-general-are-shaping-national-policy> [https://perma.cc/4QZQ-PSM4].

85. *See id.*

86. Companies wary of facing potential consumer products litigation by state AGs and their legal representatives have been utilizing campaign contributions as strategic investments for avoiding future litigation. *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/5DW6-GH7W]. In 2014, when over 30 state attorneys general were investigating 5-Hour Energy for alleged deceptive advertising practices, a lawyer for the company attended a fundraiser hosted by the Democratic Attorneys General Association (DAGA) specifically to speak to then-Missouri Attorney General Chris Koster, whose office had joined the investigation. *Id.* Emphasizing the fact that her firm had contributed thousands of dollars to Koster’s campaign, the attorney was able to convince the Attorney General to pull out of the investigation. *See id.*

87. *See* Miller, *supra* note 1, at 7.

88. *See* ECONOMIST, *supra* note 84.

89. *See* Miller, *supra* note 1, at 14. Marshall, *supra* note 16, at 2453 (“[T]he political reality that the Office of the Attorney General has long been seen by many of its occupants as a stepping stone to the Governor’s office”). Recent examples of AG-turned-governor include Kentucky Governor, Andy Beshear, Massachusetts Governor, Maura Healy, Texas Governor, Greg Abbott, and North Carolina Governor-elect, Josh Stein. *See America’s Governors*, NATIONAL GOVERNORS ASSOCIATION, <https://www.nga.org/governors/> [https://perma.cc/NJ5R-Z7MB] (last visited Dec. 13, 2024).

90. *See* National Association of Attorneys General, *From Burr to Harris: AG to VP*, NAAG (Jan. 19, 2021), <https://www.naag.org/attorney-general-journal/from-burr-to-harris-ag-to-vp/> [https://perma.cc/9YQ7-6TNW].

91. *See id.*

92. *See* White House Historical Association, *William J. Clinton*, THE WHITE HOUSE <https://www.whitehouse.gov/about-the-white-house/presidents/william-j-clinton/> [https://perma.cc/BAV7-22MN] (last visited Dec. 13, 2024).

93. *See* National Association of Attorneys General, *Former Attorneys General Who Have Held Higher*

As recognition of their potential to obtain higher political office and impact national politics continues to grow, state AGs once again appear to be harnessing their consumer protection authority to stand out in partisan spheres. Today, individual AGs are more frequently foregoing opportunities to join multistate consumer protection litigation in favor of launching their own consumer protection cases.⁹⁴ While this trend may be influenced to a degree by AG's increasing ability to "reshap[e] entire industries through their consumer protection. . . investigations and settlements,"⁹⁵ rising political ambitions have also played a role. "Increasing savvy in public relations and on social media" has allowed state AGs to produce "more effective publicity regarding their accomplishments."⁹⁶ "In short, AGs have become much better at telling their constituents what they are doing."⁹⁷

A cycle of sorts seems to be playing out: First, a state AG launches a bold consumer protection lawsuit seeking to reshape entire industries, achieve policy goals, and rise in prominence in national politics. Next, the federal government, private sector, party leaders, and public take notice of this action. Supporters then praise the state AG for their ostensible achievements and, in turn, the state AG is further emboldened to launch even more attention-grabbing lawsuits. Recent actions taken by particularly activist state AGs like Texas Attorney General Ken Paxton and California Attorney General Rob Bonta illustrate this cycle in action and beg the question: are consumer protection lawsuits today being launched by state AGs on behalf of the public interest, or is there another more personal motivation at play?

C. MODERN STATE ATTORNEYS GENERAL & AGGRESSIVE USE OF CONSUMER PROTECTION AUTHORITY: CASE STUDIES

In the context of the current moment—the increasing judicialization of American politics and increasing partisanship and political aspiration of state AGs—it is unsurprising that activist state AGs seem to be seeking creative ways to use their office to influence national policy and make a name for themselves utilizing the relatively unchecked power afforded the office in the realm of consumer protection enforcement.

Alarming, today's activist state AGs appear to be using their broad, unchecked authority in the realm of consumer protection enforcement for personal political gain by launching consumer protection investigations against perceived political opponents. As previously articulated, state AGs have broad authority, particularly in the realm of consumer protection, to use the powerful tools of their office, including

Office, NAAG, <https://www.naag.org/former-attorneys-general-who-have-held-higher-office/> [https://perma.cc/A92Y-Q2B5] (last visited Dec. 13, 2024).

94. See Allen et al., *supra* note 64.

95. See *id.*

96. See *id.*

97. See *id.*

CIDs, as they see fit in furthering the legal interests of their state. State AGs also have the authority to define those legal interests in the first place.

Particularly aspirational state AGs today appear to be launching consumer protection investigations against entities and organizations disfavored by their respective party or supporters based on unorthodox claims of state consumer protection law violations.⁹⁸ Given the limited evidence of wrongdoing and unique legal theories underpinning these investigations, the impetus for launching these lawsuits might be, in part, a desire to further the state AG's partisan goals and political future.⁹⁹

The following case studies describe recent consumer protection investigations launched by Texas Attorney General Ken Paxton and California Attorney General Rob Bonta and illustrate the potential harm that could arise should the broad investigatory powers of the state AG office under its consumer protection authority be coopted for personal partisan or political gain.

1. CASE STUDY 1: TEXAS ATTORNEY GENERAL KEN PAXTON & ANNUNCIATION HOUSE¹⁰⁰

On February 7, 2024, Texas Attorney General Ken Paxton and his Consumer Protection Division launched an investigation into the El Paso-based nongovernmental organization Annunciation House, which provides services to immigrants and refugees who have turned themselves in to U.S. immigration officials and await court hearings.¹⁰¹ Paxton alleged the organization had been (1) aiding and abetting undocumented immigration, (2) encouraging or inducing undocumented immigration and sheltering or concealing undocumented immigrants, (3) engaging in human smuggling, (4) operating an illegal stash house, and (5) counseling illegal immigrants to commit fraud through asylum application workshops.¹⁰² To

98. See *infra* sections IV.C.i-ii.

99. See generally Devins & Prakash, *supra* note 35, at 2104 (articulating that, because state AGs are “elected politicians, and many seek higher office,” a desire to appeal to partisan supporters and endear themselves to an electoral block are “considerations that weigh on attorneys general and that shape their decisions” about litigation).

100. In this Note, Texas Attorney General Ken Paxton's ongoing lawsuit against Annunciation House will be treated as if it were a consumer protection case. The case has evolved over time and the gravamen of the claim is ultimately that Annunciation House is engaged in human trafficking. However, the case continues to be overseen by the Consumer Protection Division and the initial civil investigative demand that prompted the controversy was issued under a theory of consumer protection. Because Attorney General Paxton and his Consumer Protection Division continue to treat this case as within the realm of the AG's consumer protection authority, this Note will do the same. See Petition and Counterclaim in the Nature of Quo Warranto of Defendant, ¶ 12-19, *Annunciation House, Inc. v. Paxton*, No. 2024DCV0616 (Tex. Dist. July 02, 2024) [hereinafter Paxton Counterclaim], <https://www.texasattorneygeneral.gov/sites/default/files/images/press/Annunciation%20House%20Answer%20and%20Counterclaim%20Filed.pdf> [<https://perma.cc/T5B9-2NRR>].

101. See William Melhado, *Ken Paxton Sues to Revoke an El Paso Nonprofit's State Registration After it Didn't Immediately Hand over Client Records*, TEX. TRIBUNE (Feb. 20, 2024), <https://www.texastribune.org/2024/02/20/ken-paxton-el-paso-annunciation-house/> [<https://perma.cc/B327-RUGG>]; Uriel J. García, *El Paso Judge Blocks Ken Paxton's Efforts to Subpoena Annunciation House*, TEX. TRIBUNE (Mar. 11, 2024), <https://www.texastribune.org/2024/03/11/texas-migrant-shelter-investigation/> [<https://perma.cc/NC3X-B8CK>].

102. See Paxton Counterclaim, *supra* note 100, Exhibit A at 5–7.

investigate these accusations, Paxton issued a CID to Annunciation House, ordering them to produce, within twenty-four hours, a broad array of documents related to their operations, facilities, applications for funding, and identifying information about the individuals the NGO serves.¹⁰³ Annunciation House refused to comply with the administrative subpoena, alleging the attorney general was harassing them out of disagreement with the organization and its mission. Annunciation House believed Paxton was using the investigation as a tool to terminate their operations in Texas.¹⁰⁴ The attorney general's own website suggests these accusations have teeth: On February 20, 2024, Paxton posted a Press Release titled "Attorney General Ken Paxton Sues to End NGO's Operations In Texas After Discovering Potential Efforts to Facilitate Illegal Immigration."¹⁰⁵ Ultimately Annunciation House sued the state, requesting a restraining order against Paxton and a court ruling as to what information Paxton could legally compel them to produce.¹⁰⁶

Paxton countersued. On July 2, 2024, an El Paso district court granted Annunciation House an injunction halting Paxton's request for information. In making his decision, Judge Francisco Dominguez stated, "The record before this Court makes clear the Texas Attorney General's use of the request to examine documents from Annunciation House was a pretext to justify its harassment of Annunciation House employees and the persons seeking refuge."¹⁰⁷ Today, the saga continues. The Supreme Court of Texas accepted Paxton's direct appeal and heard oral arguments on January 13, 2025. A decision has yet to be rendered as of writing.¹⁰⁸

The allegations made by Annunciation House and Judge Francisco Dominguez against Paxton are troubling and paint a dismal picture of state AG litigation in the present moment. It suggests the judicialization of politics and rising political aspirations of State AGs are leading AGs to coopt their duty to represent the public interest to further their own partisan interests and curry favor with their band of supporters. Paxton is "one of the few state attorneys general with national name recognition" and has earned such notoriety thanks to his reputation for engaging in spotlight-capturing "right-wing legal activism."¹⁰⁹ Experts and

103. See Paxton Counterclaim, *supra* note 100, Exhibit A.

104. See Vianna Davila, *Here Are the Organizations that Ken Paxton Targeted Using Consumer Protection Laws*, TEX. TRIBUNE (May 30, 2024), <https://www.texastribune.org/2024/05/30/texas-ken-paxton-consumer-protection-law-investigations/> [https://perma.cc/5SFN-RY8H]; Press Release, Office of Texas State Attorney General, Attorney General Ken Paxton Sues to End NGO's Operations In Texas After Discovering Potential Efforts to Facilitate Illegal Immigration (Feb. 20, 2024) [hereinafter Feb. 20 Press Release], <https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-sues-end-ngos-operations-texas-after-discovering-potential-efforts> [https://perma.cc/3XRP-DXTN].

105. Feb 20. Press Release, *supra* note 104.

106. See Melhado, *supra* note 101.

107. Robert Moore & Cindy Ramirez, *El Paso Judge Rejects Ken Paxton's 'Outrageous and Intolerable' Efforts to Shut Down Annunciation House Shelters*, EL PASO MATTERS (Jul. 2, 2024), <https://elpasomatters.org/2024/07/02/el-paso-annunciation-house-texas-ag-ken-paxton-ruling/> [https://perma.cc/G2N6-2TMN].

108. Paxton v. Annunciation House, Inc., No. 24-0573 (Tex. July 16, 2024).

109. Molly Hennessy-Fiske, *Texas AG Ken Paxton is seeking payback — and maybe higher office*, WASH. POST (Dec. 15, 2023), <https://www.washingtonpost.com/nation/2023/12/15/ken-paxton-texas-republican->

strategists in the political arena have identified that Paxton deliberately engages in “aggressive suits, threats and investigations” to appeal to his strongly conservative electoral base as he seeks higher office.¹¹⁰ When his current four-year term comes to an end in 2026, it has been speculated that Paxton may run for governor, lieutenant governor, or be tapped by the Trump administration for a position in Washington.¹¹¹ Paxton’s strategy in pursuing aggressive, attention-grabbing lawsuits encapsulates the present moment in state AG practice: domination of the field by a judicialization of national politics and engagement in lawsuits based on political and partisan aspirations. As Mark Jones, a political science professor at Rice University, has remarked, “The [Republican electoral] base loves [Paxton’s aggressive lawsuits]. . . He’s using these cases to remind them why he’s their guy.”¹¹²

2. CASE STUDY 2: CALIFORNIA ATTORNEY GENERAL ROB BONTA & EXXON MOBIL

It is not just Republican state AGs like Paxton who appear to be utilizing broad consumer protection authority to further their own partisan and political goals. Another example can be found across the political aisle in California Attorney General Rob Bonta’s 2024 investigation into ExxonMobil.

On September 23, 2024, California Attorney General Rob Bonta filed a complaint¹¹³ against ExxonMobil for an alleged decades-long campaign of public deception the oil and gas giant ran about plastic recycling, using “slick marketing and misleading public statements” to provide the public with false confidence in the effectiveness of recycling methods that cause irreparable harm to California’s environment.¹¹⁴ The suit arose following two years of intense investigation by the California Department of Justice into “the role of fossil fuel and petrochemical companies in the global plastics waste crisis” which uncovered “never-before-seen documents” from ExxonMobil, the world’s largest producer of polymers.¹¹⁵ Though lawsuits against oil and gas companies over their impact on climate change have become commonplace, Bonta’s suit against ExxonMobil is the first

party/ [https://perma.cc/G39E-5WTU].

110. *See id.*; *see also About the Attorney General*, Office of the Texas Attorney General, <https://www.texasattorneygeneral.gov/about-office> [https://perma.cc/24R5-HW8Y] (last visited Dec. 13, 2024) (“Paxton has also been aggressive in his approach to protecting the health and safety of Texans . . .”).

111. *See* Hennessy-Fiske, *supra* note 109.

112. *See id.*

113. Complaint for Plaintiff, *People ex rel Bonta v. Exxon Mobil Corp.*, No. CGC-24-618323. (Cal. Super. 2024) [hereinafter *Bonta Complaint*] (Trial Pleading).

114. *See* Angela Dewan, *California Sues ExxonMobil for Alleged Decades of Deception Around Plastic Recycling*, in *First-of-Its-Kind Lawsuit*, CNN (Sep. 23, 2024), <https://www.cnn.com/2024/09/23/climate/california-sues-exxonmobil-plastic-recycling/index.html> [https://perma.cc/VAD9-BHJ7]; Tareen Kazi & Paulina Weiner, *California Lawsuit Against ExxonMobil Raises Concerns in Recycled Plastics Market*, S&P GLOBAL (Sep. 27, 2024), <https://www.spglobal.com/commodity-insights/en/news-research/latest-news/chemicals/092724-california-lawsuit-against-exxonmobil-raises-concerns-in-recycled-plastics-market> [https://perma.cc/XKZ8-2U9F].

115. *See* Dewan, *supra* note 114.

of its kind as it “take[s] on a fossil fuel company [specifically] for its messaging around plastic recycling”—yet another innovation by a state AG in the consumer protection arena. A former EPA official referred to the investigation as “the single most consequential lawsuit filed against the plastics industry.”¹¹⁶ In sum, through this lawsuit, Bonta is suing one of the largest fish in the pollution-producing sea armed with the findings of two years of investigation to support an innovative argument in consumer protection litigation, and environmentalists have taken notice.

ExxonMobil paints a very different picture of this litigation. Responding to Bonta’s allegations, the company claims the recycling problem Bonta identified is truly the fault of the state which, ExxonMobil argues, has “an ineffective recycling system that officials have known about for decades.”¹¹⁷ ExxonMobil argued that California could have worked with the company to try to develop a collaborative solution to the plastics problem, but instead “[California] failed to act, and now they seek to blame others,” setting their sights on the oil and gas giant.¹¹⁸

ExxonMobil’s allegations are not unreasonable. After filing his complaint, Attorney General Bonta took to his official Instagram account to announce the action’s commencement.¹¹⁹ Bonta’s announcement reflects a common strategy employed by state AGs whereby they use direct communication with voters to influence public perception on key issues they are pursuing and “suggest[] a culprit [is blameworthy] well before any legal issues are resolved in court.”¹²⁰ In his announcement on Instagram, Bonta stated,

Two and a half years ago I launched an investigation into ExxonMobil for *their* role in the plastic pollution crisis. And the results were damning. For decades, ExxonMobil had engaged in a campaign of deception that led to and worsened the plastic waste and pollution crisis. So, we’re suing. We will hold ExxonMobil accountable and ensure that *they* pay to clean up the mess *they* made. And ensure that we have beautiful waterways just like this for Californians to enjoy for generations to come.¹²¹

Attorney General Bonta’s video communicated to the California public that a definitive determination of wrongdoing had been made, even though any judicial deliberation of the merits has yet to occur. Not only does this bold assertion circumvent the judicial system’s determination of fault, but it also portrays Bonta in a protector-like role for California’s environment. Environmental issues are salient among the California electorate. In 2024, nearly sixty percent of California

116. *See id.*

117. *See id.*

118. *See id.*

119. *See* Attorney General Rob Bonta (@agrobbona), INSTAGRAM (Sep. 24, 2024) [hereinafter Bonta Instagram Post], https://www.instagram.com/agrobbona/reel/DAUIkgztmh_/ [<https://perma.cc/QP7Z-TSB8>].

120. Nolette & Provost, *supra* note 4, at 487.

121. Bonta Instagram Post, *supra* note 119 (emphasis added to reflect words stressed in original video).

voters approved Proposition 4, an environmental protection ballot initiative that would issue bonds to address water, wildfire, and climate issues statewide.¹²² Though Bonta has kept any future political aspirations closer to the chest than other AGs like Paxton, newspapers across the state have speculated, based on confidential sources, that the Attorney General may be considering running for Governor in 2026.¹²³ Regardless of where Bonta's career leads him in the future, he has already made history by pursuing this innovative environmental consumer protection action against ExxonMobil. If he is successful, AGs in other states with a history of environmental protection activism may choose to follow in his footsteps.

Case Studies Reflection: Normative Assessment

The consumer protection lawsuits brought by Attorneys General Paxton and Bonta this year prompt some questions of concern. Does this use of consumer protection litigation against political opponents exceed the scope of authority of the state AG? If not, does it otherwise present the potential for significant harm if allowed to continue?

While these cases appear, perhaps unfortunately, legally sound and squarely within the scope of authority of the state AG, they nevertheless should not be condoned.¹²⁴ Politically-motivated and adversative consumer protection litigation poses a danger to defendants, to the public, to democracy, and to the attorney general position itself.

For defendant organizations who find themselves politically at odds with their state AG, this style of litigation poses a significant threat that the organization could someday be forced to endure harassment by a public official, invasive investigations, and lengthy legal proceedings purely because the state AG disagrees with them on political grounds. Particularly wealthy defendants, like ExxonMobil, may face an increased risk of politically-motivated state AG lawsuits—the potential for a lawsuit or pre-suit settlement to generate an outsized payment for the state may compound upon the existing allure of triumphing over a political opponent.¹²⁵

122. See *California General Election State Ballot Measures – Statewide Results*, CALIFORNIA SECRETARY OF STATE <https://electionresults.sos.ca.gov/returns/ballot-measures> [<https://perma.cc/QKG6-9M8T>] (last updated Dec. 5, 2024).

123. See Ashley Zavala, *California Attorney General Rob Bonta 'Seriously Considering' Running for Governor*, KCRA (May 22, 2023), <https://www.kcra.com/article/california-attorney-general-rob-bonta-seriously-considering-running-for-governor/43964311> [<https://perma.cc/V7FS-EGUT>].

124. See Paxton Counterclaim, *supra* note 99, at ¶ 9-11 (As illustrated by the opening section of Paxton's counterclaim against Annunciation House, even that case, though supposedly brought for political reasons, was rooted in the legal authority of the state attorney general to issue administrative subpoenas and engage in litigation against alleged violators of consumer protection law.).

125. For example, in August 2024, Massachusetts Attorney General Andrea Joy Campbell reached a \$600 million settlement with several major tobacco manufacturers over deceptive marketing practices. See Press Release, Office of the Massachusetts Attorney General, Attorney General Campbell Reaches Historic

For the public, this style of litigation undercuts democratic responsiveness by enabling the state AGs to impose their own interests as the “public interest,” largely eliminating the significance of the popular election of state AGs as a tool to increase officeholder accountability. Politically-motivated litigation further inhibits effective democratic responsiveness by enabling policy to be set in courts or through settlement negotiations—two venues “shielded from the normal democratic process.”¹²⁶

This style of litigation also poses a threat to the state AG office as an institution. When attorneys general act in ways that the public perceives to edge towards exceeding the scope of their authority, it can “harm the esteem in which the public holds the office” and cause the public to view the attorney general as “one more lawyer, one more politician on the make, [which] undercuts the credibility of the office itself.”¹²⁷ In *Shevin*, the court stated,

Regardless of the effectiveness of his efforts in particular public legal situations, at least the people have the continuing satisfaction of knowing that their elected Attorney General has the right to exercise his conscientious official discretion to enter into those legal matters deemed by him to involve the public interest.¹²⁸

Today, the public may lose even the confidence that their state AG will litigate on behalf of their interest rather than his or her own. To protect potential defendants from harassment, protect the public voice, protect democracy, and protect the integrity of the office, state AGs should be dissuaded from pursuing litigation for personal gain. One avenue through which this discouragement might be accomplished may be found in the realm of legal ethics.

V. PROPOSAL FOR CURBING MISUSE AND ABUSE OF CONSUMER PROTECTION AUTHORITY: LEGAL ETHICS, BAR ASSOCIATIONS, AND THE MODEL RULES OF PROFESSIONAL CONDUCT

Given the vast discretion state AGs are afforded in their pursuit of consumer protection enforcement, there are few formal limitations to impose on their

\$600M Settlement With Major Tobacco Manufacturers (Aug. 8, 2024), <https://www.mass.gov/news/attorney-general-campbell-reaches-historic-600m-settlement-with-major-tobacco-manufacturers> [https://perma.cc/JT6V-2HEY]. The value of this settlement will be paid into the state’s general fund, which means the financial benefits resulting from Attorney General Campbell’s consumer protection victory has the potential to fund a variety of government programs benefitting countless state residents. *See id.* Like consumer protection investigations, the settlements reached in state attorneys general litigation can have powerful impacts on the lived experiences of state residents. *See id.* These impacts can even transcend state borders and pose further complication when state priorities conflict. State attorney general strategies about settlements—particularly regarding the size and scope of settlements and their potential to shape industries as a whole—presents a fruitful area for further research about possible abuses of the state attorney general power.

126. *See Miller, supra* note 1, at 7.

127. *See Miller, supra* note 1, at 28.

128. *State v. Lead Indus., Ass’n, Inc.*, 951 A.2d 428, 474 (R.I. 2008) (quoting *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 266 (5th Cir. 1976)).

exercise of power. Formally, the enforcement options available are: 1) elections, 2) impeachment, and 3) the passage of a constitutional amendment or legislation to revise their authority. Elections are supposed to serve as a check on popularly elected state AGs—the public can vote out misbehaving officeholders—but in today’s political reality that is difficult in politically hegemonic states.¹²⁹ The prevalence of political hegemony in state governments also suggests it would be difficult to pass a constitutional amendment to reduce the state AG’s authority in these states.

Given that the guardrails on state AG conduct are so weak in comparison to the exceptional deference and discretion afforded officeholders, the legal field should step in and impose guardrails of its own through rules of professional ethical conduct. In *Hearing the States*, Anthony Johnstone writes that “unlike other elected officials, attorneys general represent the states as lawyers, not just as politicians.”¹³⁰ Furthermore, he articulates that “the extension of national political polarization into state attorney general offices raises serious potential conflicts of interest” between state AG duties as a lawyer and their desire for political success.¹³¹ Bar associations and state legal disciplinary agencies, armed with codified rules based on the *Model Rules of Professional Conduct*, are well-equipped to provide a check on misbehaving state AGs—who are, first and foremost, attorneys—when these conflicts of interests arise.

Paxton’s suit against Annunciation House provides a fitting example of how bar association enforcement of state AG misconduct might play out. As previously mentioned, Annunciation House felt “harassed” by Paxton and believed he was launching his investigation into the organization for illegitimate reasons.¹³² The Preamble of the *Model Rules of Professional Conduct* states, “[A] lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.”¹³³ Rule 8.4(c) states “it is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”¹³⁴ Finally, Rule 8.4(g) states “it is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment.”¹³⁵ Judge Dominguez’s ruling in favor of Annunciation House suggests Paxton has violated these professional conduct requirements. As such, he could be subject to the disciplinary authority of the Texas State Bar Association.¹³⁶

129. For example, Texas Attorney General Ken Paxton was impeached but there were insufficient votes to remove him from office. See Carla Astudillo, *Ken Paxton Was Acquitted. See How each Senator Voted*, TEX. TRIBUNE (Sep. 16, 2023), <https://www.texastribune.org/2023/09/16/ken-paxton-impeachment-vote/> [https://perma.cc/P9QM-UMHB].

130. Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. 575, 622 (2018) (footnote omitted).

131. *Id.* at 615.

132. See Davila, *supra* note 104.

133. MODEL RULES OF PROF’L CONDUCT pmb1. (2021) [hereinafter MODEL RULES].

134. MODEL RULES R. 8.4(c).

135. MODEL RULES R. 8.4(g).

136. See MODEL RULES R. 8.5.

In fact, Paxton has already been sued by the enforcement arm of the Texas State Bar Association, the Texas Commission for Lawyer Discipline, in his individual capacity as an attorney for knowingly making false statements about the 2020 election in the case *Texas v. Pennsylvania*.¹³⁷ In *Paxton v. Commission for Lawyer Discipline*, the Court of Appeals for the Fifth District of Texas at Dallas affirmed that the Commission could validly bring disciplinary action against Paxton for his professional misconduct as an individual attorney without implicating his role as state AG, the separation-of-powers doctrine, nor sovereign immunity.¹³⁸

A consolidated case against Paxton and an Assistant Attorney General, titled *Webster v. Commission for Lawyer Discipline*, is currently making its way through the Texas state court system. It remains to be seen whether the Commission's actions will have any impact on Paxton's conduct moving forward, however, it seems to be a promising approach to curtailing abuses of state AG authority. If successful, this approach could be employed to address other abuses of state AG power that are similarly difficult to curtail through formal checks and balances or the democratic process, but nonetheless violate ethical principles of the legal profession.¹³⁹

Whether or not the Commission is successful, bar associations across the country should pay closer attention to the state AG within their jurisdiction. At the end of the day, a state AG is, first and foremost, an attorney who is subject to the same ethical obligations as any other attorney barred in their jurisdiction. To protect the legitimacy of the position, the ethics of legal practice, and the interests of the public, bar associations may provide the check on state AG authority the country has been missing.

137. See *Paxton v. Commission for Lawyer Discipline*, No. 05-23-00128-CV (Tex. App. 2024) (Commission arguing Paxton violated rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct). See generally *Tex. Disc. Rules of Pro. Conduct r.8.04(a)(3)* (Tex. Bar Ass'n.).

138. See Memorandum Opinion, *Paxton v. Commission for Lawyer Discipline*, No. 05-23-00128-CV (Tex. App.—Dallas 2024).

139. One such AG practice area that may present another opportunity to employ this type of enforcement strategy is state AG use and allocation of settlement funds. Attorneys have an ethical obligation to responsibly steward client funds. See MODEL RULES R. 1.15. Historically, a set amount of settlement funds won by state attorneys general has been contributed into NAAG's "litigation support fund" which the organization uses to help fund further state AG litigation. Following in the footsteps of the Commission for Lawyer Discipline, critics who allege this is an improper use of state settlement earnings could creatively try seeking enforcement under a novel theory implicating Rule 1.15. See *Litigation Settlements Should Go to States and Consumers, Not Slush Funds*, INST. FOR LEGAL REFORM (Aug. 23, 2022), <https://instituteforlegalreform.com/blog/litigation-settlements-should-go-to-states-and-consumers-not-slush-funds/> [<https://perma.cc/BC7W-ZTUR>].

APPENDIX A

THE TEXAS CONSTITUTION

ARTICLE IV. EXECUTIVE DEPARTMENT

Sec. 1. OFFICERS CONSTITUTING EXECUTIVE DEPARTMENT. The Executive Department of the State shall consist of a Governor, who shall be the Chief Executive Officer of the State, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Commissioner of the General Land Office, and Attorney General.

* * *

Sec. 22. ATTORNEY GENERAL. The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law.

APPENDIX B

Select State Unfair and Deceptive Acts and Practices Statutes

- CALIFORNIA: CAL. BUS. & PROF. CODE § 17000-17100
- Connecticut: CONN. GEN. STAT. § 42-110a to § 42-110q
- Massachusetts: MASS. GEN. LAWS 93A § 1-11
- Michigan: MICH. COMP. LAWS § 445.90-445.922
- Minnesota: MINN. STAT. § 325D.43-325D.48
- Texas: TEXAS BUS. & COM. CODE § 17.41-17.63