

Public Interest and Politics: How *FTC v. Kroger* Illustrates the Modern Role of the State Attorney General

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“One of the most important developments in American politics and governance is that the attorneys general of the 50 states have become major players in national policy.”¹

I. INTRODUCTION

In December 2024, a federal court in Oregon and a state court in Washington blocked what would have been the largest grocery store merger in United States

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¹ Paul Nolette, *Commandeering Federalism: The Rise of the Activist State Attorneys General*, Law & Liberty (Sept. 5, 2016), <https://perma.cc/3CK5-KWZE>.

history.² Over two years before the rulings, Kroger agreed to purchase Albertsons for nearly \$25 billion, which would have merged approximately 5,000 stores and over 700,000 employees.³ In February 2024, the Federal Trade Commission challenged the merger in federal court, arguing that the merger would “eliminate competition and raise grocery prices for millions of Americans, while harming tens of thousands of workers.”⁴ Later, the FTC would call its success a “major victory for the American people.”⁵

While much has been written on the case’s core legal issues—market definition, monopsony power, and divestiture effectiveness—the state attorneys’ general roles deserve investigation. Over a dozen State AGs were involved, either litigating as co-plaintiffs, serving as *amici* or, in Washington, prosecuting their own state-level enforcement action. The State AGs were sharply divided, taking opposite positions on the merger’s legality and the effect it would have on their constituents. Eight states and Washington, D.C. were co-plaintiffs with the FTC.⁶ The States of Washington and Colorado both filed state court actions to block the merger.⁷ At the same time, an *amicus* brief filed on behalf of AGs from four other states argued that the FTC and its State AG co-plaintiffs were “oblivious [as] to the plain-as-day economic reality” of its anti-merger position.⁸

This disparity in position deserves further inquiry given that State AGs have approximately the same job: their state’s chief law enforcement officer. This article first traces the development of the modern State AG and how the emergence of multistate litigation creates incentives for partisanship and political ambition. Second,

² Alina Selyukh, *Kroger and Albertsons Grocery Megamerger Halted by Two Courts*, NPR (Dec. 10, 2024), <https://perma.cc/9XEG-3FM5>.

³ Alexander Coolidge, *Kroger Wants to Merge with Rival Albertsons: What We Know About the Proposed \$25B Takeover*, USA Today (Jan. 21, 2024), <https://perma.cc/VH4E-EQXI>.

⁴ *FTC Challenges Kroger’s Acquisition of Albertsons*, Federal Trade Commission (Feb. 26, 2024), <https://perma.cc/JDL5-GFLC>.

⁵ Press Release, Fed. Trade Comm’n, *Statement on FTC Victory Securing Halt to Kroger, Albertsons Grocery Merger* (Dec. 10, 2024), <https://perma.cc/PGE5-9P2Y>.

⁶ The FTC was joined by Arizona, California, Illinois, Maryland, Nevada, New Mexico, Oregon, and Wyoming.

⁷ See *AG Ferguson Files Lawsuit to Block Kroger-Albertsons Merger*, Washington State Office of the Attorney General (January 15, 2024) <https://coag.gov/grocerymerger/>; see also *Colorado Attorney General Phil Weiser Files Lawsuit to Block Proposed Kroger/Albertsons Merger*, Colorado Office of the Attorney General (February 14, 2024), <https://perma.cc/QK4X-C45Q>.

⁸ Brief for the State of Ohio as Amicus Curiae Supporting Defendant, p. 12, Federal Trade Commission v. Kroger, No. 3:2024cv00347 (D.Or. 2024), retrieved at <https://storage.courtlistener.com/recap/gov.uscourts.ord.178374/gov.uscourts.ord.178374.264.02.pdf>; in support of the merger, Ohio was joined by Alabama, Georgia, and Iowa.

this article explores how State AGs were involved in *FTC v. Kroger* to demonstrate the incentives and political opportunities at work.

II. ANALYSIS

A. The Evolution of the State AG.

“The powers and duties of state attorneys general are defined in state constitutions, statutes, and common law.”⁹ While an attorney general’s precise responsibilities vary among the states, territories, and the District of Columbia,¹⁰ a State AG is the state’s chief legal officer.¹¹ AGs advocate for their citizens’ public interest in federal and state court systems, issue opinions to agencies, propose legislation, and initiate civil suits on the state’s behalf.¹² Their discretion is also significant. In a leading case, *Florida ex rel. Shevin v. Exxon Corp.*,¹³ the Fifth Circuit held that a State AG permissibly sued oil companies under antitrust law on behalf of state agencies even without state agency consent. The attorney general “may exercise all such authority as the public interest requires.”¹⁴

Three key developments can help explain the State AG’s role in modern cases like the Kroger-Albertsons merger. First, State AGs have an outsized ability to shape public policy via the litigation process. Second, congressionally expanded State AG resources have empowered officials to tackle national issues through coalitions with politically like-minded AGs from other offices. Third, all but seven State AGs are elected. In addition to their mandate to represent public interest, State AGs have incentives to litigate hotly politicized issues at the forefront of the American consciousness.

B. State AGs Have Become Policymakers Through an Expanded Role in Litigation.

State AGs have increasingly taken on responsibilities previously assumed by interest group litigators and private class action attorneys. The historical arc of the State AG in American policy and politics draws its impetus from a “distinctive

⁹ See Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 4 (1993).

¹⁰ This article will refer to all non-federal attorneys general as “state AGs” for simplicity.

¹¹ *What Attorneys General Do*, National Association of Attorneys General, <https://perma.cc/9RG6-RAWD>.

¹² *Id.*

¹³ 526 F.2d 266, 268 (5th Cir. 1976).

¹⁴ *Id.*

American reliance on lawsuits in [shaping] public policy.”¹⁵ Concerns of a private litigation explosion in the last century were fueled by broadened tort causes of actions, new consumer laws, and massive class actions.¹⁶ Congress responded by making private litigation more difficult while simultaneously strengthening State AG enforcement power.¹⁷ By the 1980s, state legislators had largely expanded State AGs’ responsibilities such that they included a “public advocacy” role, maintaining uniformity in their states’ legal and policy positions.¹⁸ Federal legislation, such as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, bolstered State AG power by allowing AGs to pursue antitrust enforcement in federal court.¹⁹ Through the Dodd Frank Act in 2010, Congress empowered State AGs to handle widescale complex litigation and made it substantially easier for State AGs to enforce federal consumer protection and financial laws.²⁰ Further, federal court rules have also reduced the barriers for State AGs to express their opinions in Court: Supreme Court Rule 37(4) clarified that State AGs need not obtain leave from the Court to file an amicus brief on their state’s behalf.²¹

C. Multistate Litigation Extends a State AG’s Reach Beyond State Boundaries.

The most significant feature of modern State AG practice—causing it to implicate both policy and politics—is the rise of nationwide, multistate enforcement actions. State AGs accomplish this by establishing coalitions with other State AGs, often invoking federal law. Modern society’s collective action problems explain the rise of State AGs at the national level: many regulatory challenges, such as environmental concerns, are ineffective if dealt with only at the state level.²² Another example, tobacco litigation in the 1990s, solidified the role of State AGs in politics and

¹⁵ Paul Nolette, *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America*, at 7. (2015).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Matheson, *supra* note 9, at 3.

¹⁹ 15 U.S.C. 15(a)(1)-(2).

²⁰ See 12 U.S.C. § 5552(a)(1)); see also Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd–Frank*, 99 Iowa L. Rev. 115 (2013) (“Prior to passage of the Dodd–Frank Act, state attorneys general played a peripheral, ad hoc role in the enforcement of federal consumer financial protection law. Now, with the Act, they have the potential to be lead actors, including the power to enforce federal law even when the CFPB lacks authority.”)

²¹ Sup. Ct. R. 37(4).

²² Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 Tex. L. Rev. 43, 49 (2018).

policymaking.²³ When Congress failed to sufficiently address the health risks posed by tobacco, a coalition of State AGs accepted a mission to hold manufacturers accountable. The 1998 settlement exceeded \$200 billion, and tobacco manufacturers agreed to change their marketing strategies.²⁴

To appreciate how relatively new this phenomenon is, consider that in the 1980s, only a handful of cases were brought by more than one State AG, and those usually involved less than five.²⁵ Now, over 40 percent of all multistate cases involve at least half of the country's 56 AGs.²⁶ Paul Nolette, a leading scholar on State AGs, has catalogued 686 multistate cases between 1980 and 2013, finding that the cases virtually all touch either antitrust, health care, consumer protection, or environmental policy.²⁷ By securing settlements or judgments in nationwide cases, State AGs impose a “de facto national regulatory solution on a particular industry.”²⁸ Sometimes this requires an appeal to federal power, and sometimes this requires denouncing it.²⁹

D. National Cases Incentivize Partisan Priorities and Present Public Opportunities.

When it comes to litigation strategies, enforcement priorities and policy positions taken in the legislative process, State AGs differ considerably. Perhaps unsurprisingly, these differences are often among party lines. Republican AGs fought ObamaCare; Democratic AGs challenged President Trump's travel bans. These differences are magnified in the myriad of amicus curiae filings and the ideological stances taken by State AGs on various sides of multistate coalitions.³⁰ Paul Nolette and Colin Provost have observed that multistate litigation “followed a trend of rapidly increasing partisan conflict between states and the federal government” and that State AG amicus briefs have “become significantly more polarized over time.”³¹ During the

²³ See *id.* at 65.

²⁴ *Id.* at 69.

²⁵ Nolette, *supra* note 16, at 21.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Lemos & Young, *supra* note 22, at 49.

²⁹ See *id.*

³⁰ *Id.* at 72–73 (“The most comprehensive study of state litigation in the Supreme Court reports that since 1989 states have ‘become exceptionally active *amicus curiae* participants. They account for 20% of all *certiorari* petitions accompanied by an *amicus* brief and 18% of the *amicus* briefs on the merits.’ Today, states’ participation in the Supreme Court—both as direct parties and as amici—is second only to that of the federal government.”).

³¹ Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 PUBLIUS: J. FEDERALISM 469, 474 (2018).

Obama Administration, then-Texas AG Greg Abbott repeatedly summarized his job as essentially counteracting the Democratic regime: “I go into the office, I sue the federal government and I go home.”³² Because multistate litigation requires coalition building, the most likely team member is one on the same political “team.” Both parties have attorneys general associations that facilitate this kind of cooperation.³³

Multistate litigation also breeds opportunities at the national level. There is a strong link between political ambition and multistate AG litigation.³⁴ In the first systematic study of State AGs and political ambition, Provost found that elected State AGs active in multistate litigation are much more likely to later run for governor or senate.³⁵ The State AGs who are appointed—and lack the same electoral incentives—are unlikely to pursue higher office. This possibly supports the claim (or critique) that State AGs participate in multistate litigation to have a shot at the national spotlight. This could also explain why multistate litigation has become a “knee-jerk” reaction to essentially any significant federal policy change.³⁶ The thesis is that the nationalization of State AG focus, made possible by nationwide coalitions, has contributed to, if not caused, a rapid politicization of the office. Given the national attention possible from multistate litigation, especially in the media, it is likely that State AGs are incentivized to pursue multistate litigation in hopes of positioning themselves among the country’s most notable policymakers.

Against this backdrop, many State AGs are both empowered and incentivized to involve themselves in antitrust matters of national importance. As a policy matter, State AGs are more likely to be concerned—and familiar with—the voting public’s concerns at the state and local level than a federal agency. For example, if a proposed merger might increase or reduce jobs or prices in one state or region in particular, an AG’s strategy may differ from a federal agency. Similarly, a local company contemplating a merger, or one of its competitors, may influence enforcement priorities at the state level in ways that may go unnoticed by the FTC.

³² Geoff Mulvihill and Kathleen Foody, *State Attorney General Races Gain Attention in Trump Era*, ASSOCIATED PRESS (June 2, 2018, 5:05 PM CST), <https://perma.cc/Y2EC-DXSR>.

³³ See, e.g., *About DAGA*, Democratic Attorneys General Association, <https://perma.cc/NZ44-FD9P> (“The Democratic Attorneys General Association (DAGA) is the only committee solely dedicated to electing and supporting Democratic state Attorneys General.”).

³⁴ See 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, 603 (2010). (“In the context of political ambition, the use of multistate lawsuits as a policy tool has the potential to tell us a great deal about who runs for higher office and who does not.”).

³⁵ *Id.*

³⁶ See Marissa A. Smith, *Politicization of State Attorneys General: How Partisanship Is Changing the Role for the Worse*, 108 CORNELL L. REV. 517, 533 (2023). (“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.”).

The Clayton Act and the Hart-Scott-Rodino Act established the legal grounding and federal support upon which State AGs may bring merger enforcement actions.³⁷ By the 1970s, the National Association of Attorneys General (“NAAG”), became the formal venue for the centralization of State AG enforcement priorities, including antitrust.³⁸ In 1983, NAAG created a task force for uniformity in merger enforcement, the Multistate Antitrust Task Force.³⁹ The NAAG Task Force remains very active today, with comprehensive guidelines for both horizontal and vertical merger investigations. It also establishes suggested protocol for cooperative investigations with the FTC and the Department of Justice’s Antitrust Division.⁴⁰

III. STATE AGS AND THEIR ROLES IN THE *FTC V. KROGER*

A. The FTC and State AGs jointly sued Kroger and Albertsons.

The FTC announced on February 26, 2024, that it had filed a lawsuit in the District of Oregon challenging Kroger’s acquisition of Albertsons, a deal that had been years in the making.⁴¹ The FTC was joined by “Arizona, California, the District of Columbia, Illinois, Maryland, Nevada, New Mexico, Oregon, and Wyoming.”⁴² Eight of those AGs are Democrats.⁴³ The Republican outlier at the time of the suit was now-Wyoming Supreme Court Justice Bridget Hill.⁴⁴ Wyoming attorneys general are appointed rather than elected.⁴⁵

The State of Washington’s AG, Bob Ferguson, had filed a lawsuit in Washington state court one month prior.⁴⁶ Colorado AG Phil Weiser also filed a state court lawsuit. Their complaints alleged that the merger would harm millions of

³⁷ David A. Zimmerman, *Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers*, 48 EMORY L. J. 337, 342 (1999).

³⁸ *Id.* at 344.

³⁹ *Id.*

⁴⁰ See Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, National Association of Attorneys General, <https://perma.cc/5GEK-V5GA>.

⁴¹ *FTC Challenges Kroger’s Acquisition of Albertsons*, Federal Trade Commission (Feb. 26, 2024), <https://perma.cc/JDL5-GFLC>.

⁴² *Id.*

⁴³ See *Meet the Attorneys General*, Democratic Attorneys General Association, <https://perma.cc/E88X-DWVU>.

⁴⁴ See *Bridget Hill*, Ballotpedia, https://ballotpedia.org/Bridget_Hill.

⁴⁵ Wyo. Stat. Ann. § 9-1-601.

⁴⁶ AG Ferguson files lawsuit to block Kroger-Albertsons merger, Washington State Office of the Attorney General (Jan. 15, 2024), <https://perma.cc/ZZZ2-PAJB>.

consumers, namely because in many communities, Kroger or Albertson-owned stores are either the two largest supermarkets or the only supermarket.⁴⁷ Just before filing the complaint, AG Ferguson announced a bill that would increase state antitrust penalties to catch up with other states, such as California.⁴⁸ AG Ferguson was elected Governor of Washington later that year.⁴⁹ In January 2025, Colorado AG announced he is running for governor.⁵⁰

B. The Plaintiffs Alleged That a Merger Between the Two Largest Grocery Store Chains Would Hurt Consumers and Workers.

Echoing individual statements by those AGs published on their respective websites, the complaint alleged that the \$24.6 billion merger would violate the Clayton Act by eliminating competition for both consumers and laborers.⁵¹ The FTC and State AGs argued that a joining of forces between two of the largest supermarkets would eliminate incentives to outcompete one another on price and quality, harming consumers.⁵² Without Albertsons as a competitor, customers would have paid more for potentially worse products under the merger.⁵³

A key issue in the government complaint, and later in the opinion, was how to define the companies' "market."⁵⁴ The government argued that the relevant market was the "supermarket"—a "one-stop shop" where customers can purchase all their grocery needs in one trip.⁵⁵ In this market, competitors recognize one another, and they price check each other to remain competitive on price and service.⁵⁶ That market is distinct from other grocery retailers, such as club stores, limited assortment stores, premium natural organic stores, dollar stores, and E-commerce retailers. Anticipating an objection that modern shoppers buy groceries from outside of the traditional

⁴⁷ *Id.*

⁴⁸ See *AG Ferguson calls for increase in Washington's penalty for price-fixing*, Washington State Office of the Attorney General (Jan. 4, 2024), <https://perma.cc/3372-VXVK>.

⁴⁹ See *About Governor Ferguson*, Governor Bob Ferguson, <https://perma.cc/G5JD-RTQG>.

⁵⁰ See Chase Woodruff, *Attorney General Phil Weiser Announces Run for Colorado Governor*, Colorado Newsline (January 2, 2025), <https://coloradonewsline.com/briefs/attorney-general-phil-weiser-announces-run-for-colorado-governor/>.

⁵¹ See *FTC Challenges Kroger's Acquisition of Albertsons*, Federal Trade Commission (Feb. 26, 2024), <https://perma.cc/JDL5-GFLC>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Complaint at 7, *Federal Trade Commission v. Kroger Company*, 2024 WL 4164811 (D. Or.).

⁵⁵ *Id.*

⁵⁶ *Id.* at 8.

supermarket setting, the government alleged that a hypothetical monopolist from the “supermarket” market would still benefit from increased prices, at the consumer’s expense, because the goods and services from the other food sellers are too differentiated for enough consumers to make a wholesale shift to alternative grocery options.⁵⁷ In other words, the average Kroger consumer would be unlikely to look for better options at Whole Foods or the Dollar Store. Relying on analysis from the Herfindahl-Hirshman Index, the government also asserted that the merger is presumptively unlawful because of how the effect it would have on market concentration in several geographic areas.⁵⁸

The government also argued that the merger would substantially lessen labor competition.⁵⁹ Like the way the stores react to their competitors’ pricing, stores monitor their competitors’ wages and benefits at the local level.⁶⁰ According to the government, Kroger and Albertsons and their subsidiaries compete aggressively to hire and retain employees, with over 700,000 among the two parent companies.

According to the government, labor unions find their strength in pitting employers against one another in the fight for workers. Kroger and Albertsons are the two largest employers of union grocery labor in the country. In the states joined as co-plaintiffs and many others, Kroger and Albertsons negotiate with the same unions. In many communities, Kroger and Albertsons are among just a few (or the only two). By eliminating the competition, unions would lose their leverage to negotiate for wages, benefits, advancement opportunities, and improved workplace conditions.

Finally, the government argued that countervailing factors on decreased competition, such as the defendant’s proposed divestiture, were insufficient. Recognizing antitrust challenges, Kroger and Albertsons announced in September 2023 that they would sell 413 stores and other assets to C&S Wholesalers. The government alleged that the divestiture wouldn’t dilute the anti-competitive effect on the market for several reasons. First, in many local markets across the country in which Kroger and Albertsons both have stores, the divested assets would not be present. Second, the proposed divestiture allegedly would not have cast off sufficient assets for C&S (or any acquirers) to “replicate the competitive intensity” that currently exists in the market for prices or labor.

C. Several AGs Expressed Support for the Merger.

Given the complaint’s frequent references to “local” markets, it is not surprising that State AGs were involved. What is notable is the number of State AGs

⁵⁷ *Id.*

⁵⁸ *Id.* at 9–12.

⁵⁹ *Id.* at 15–19.

⁶⁰ *Id.* at 15.

who took seemingly opposite stances on the issues. The two pro-merger amicus briefs are worth considering. The first responded to the complaint's allegations. The second supported Kroger's challenge that the FTC's administrative tribunal is unconstitutional. Both pro-merger briefs were filed by Dave Yost's office, the Attorney General of Ohio. In the first, Ohio was joined by Alabama, Georgia, and Iowa. On the second, in addition to those three, Ohio was joined by Louisiana, Montana, Nebraska, Oklahoma, and West Virginia. All State AGs involved are Republicans.⁶¹

D. Republican AGs Took Opposite Positions on the Merger's Effect on Competition and Challenged the Constitutionality of the FTC's Internal Judges.

The first pro-merger amicus pulled no punches, arguing that the FTC is “exploiting the antitrust laws in pursuit of a policy goal – prohibition of all mergers of large grocery store chains – devoid of economic justification[.]”⁶² First, citing case law, the brief challenged the complaint's arguments about the relevant market. Responding to the FTC's allegation that shoppers would not shift outside of the supermarket market in a post-merger world, the AGs called this allegation “pure invention.”⁶³ The AGs argued that customers have already shifted away from the traditional supermarket because the ease of access they provide.⁶⁴ According to those AGs, under the FTC's view, a supermarket merging with grocery behemoths like Walmart or Costco would survive antitrust scrutiny because they are supposedly in different markets. Nonetheless, that kind of merger would also increase market concentration — something the FTC feared.

The AGs also argued not only that the merger would weaken competition, but they also maintained that it would have been “procompetitive.” The merger would have enabled Kroger to “compete more aggressively on price, deliver improved services, and respond better to consumer needs.”⁶⁵ If the FTC is correct that the merger would cause Kroger to raise prices and decrease quality, Kroger's market share “would actually weaken” because those events would “drive consumers into the waiting arms of its many competitors.”⁶⁶ In the eyes of these AGs, the FTC is

⁶¹ See *Meet the AGs*, Republican Attorneys General Association, <https://perma.cc/RRE2-G8LK>.

⁶² See Brief for the States of Ohio et. al. as Amicus Curiae, p. 2, *Federal Trade Commission v. Kroger Company*, 2024 WL 4164811 (D. Or.).

⁶³ *Id.* at 5.

⁶⁴ *Id.*

⁶⁵ *Id.* at 12.

⁶⁶ *Id.*

“oblivious.”⁶⁷ Finally, citing relevant statistics, the AGs asserted that the divestiture would have solved any Clayton issues.⁶⁸

The second pro-merger amicus, filed a month after the first and joined by more State AGs, argued that the current administrative scheme, in which businesses appear before an FTC Administrative Law Judge in addition to a proceeding in federal court, violates Article II of the Constitution.⁶⁹ In August 2024, Kroger sued the FTC on the same line of reasoning.⁷⁰ According to Ohio AG Dave Yost, FTC judges, who adjudicate FTC complaints in-house, are members of the executive branch whom the President should constitutionally be permitted to remove.⁷¹ In the complaint, the AGs argue that FTC judges are “triply” protected from presidential removal, meaning that their office in its current form is unconstitutional.⁷² In other words, it’s difficult for the President to fire FTC judges. If the courts accept this reasoning, the FTC would be substantially weakened in its merger enforcement efforts.⁷³

IV. CONCLUSION: APPLYING STATE AG SCHOLARSHIP TO *FTC V. KROGER*

FTC v. Kroger illustrates the principles discussed in this article’s first section. Empowered by federal law, several State AGs joined a federal agency to block a merger that they believed would have negatively impacted their states and local communities. Similarly, the AGs supporting the merger advocated for their own constituents’ local interests. By challenging the constitutionality of the FTC’s Administrative Law Judges, those AGs expressed the traditional federalist sentiment that the federal government has become too powerful.

The multistate, bipartisan nature of modern State AG practice was also on full display. It was not a coincidence that those in favor of the merger were Republicans and all but one AG against were Democrats. In addition to illustrating the highly partisan environment, these partisan coalitions also accentuate the reality that there is strength in numbers. If teammates are needed to accomplish policy goals that require

⁶⁷ *Id.*

⁶⁸ *Id.* at 15.

⁶⁹ See generally Motion by the States of Ohio et. al. For Leave to File Amicus Brief, *The Kroger Co. v. The Federal Trade Commission*, Case No. 1:24-cv-00438-DRC.

⁷⁰ See *Kroger Files Motion to Enjoin the FTC’s Administrative Merger Challenge*, Kroger (Aug. 19, 2024), <https://perma.cc/872S-X36Y> (“The company argues that by proceeding in its administrative tribunal, in addition to the separate action in federal court, the FTC is violating Constitutional protections.”).

⁷¹ Motion by the States of Ohio, *supra* note 69 at 2.

⁷² *Id.*

⁷³ See Marty Schladen, Ohio Attorney General Dave Yost leads brief that would sap federal antitrust enforcement, *Ohio Capital Journal* (Sept. 26, 2024), <https://perma.cc/4FJP-I.83A>.

other States' cooperation to be effective, then the best candidates are those who share those views. Those AGs likely ran campaigns on the same issues, and democratic accountability will ensure action is taken.

Finally, political dynamics were at play. Washington AG, Ferguson, now governor, filed an action in state court by himself. In some sense, when multistate coalitions with the backing of the federal government have become the norm, filing an action on one's own will draw even more attention. It is likely that the action in State court benefited AG Ferguson later that year on election day when he was up for governor. Colorado's AG, Phil Weiser, is currently running for governor. With the November 2025 election looming, AG Weiser has remained active in multistate litigation against the Trump Administration.⁷⁴

Second, Attorney General Bridget Hill of Wyoming was the lone Republican to join the FTC in suing Kroger. As discussed in the first section, electoral incentives likely play some role in an AG's involvement in multistate litigation, especially along partisan lines. While AG Hill sought to block the Kroger merger, she also joined AG Yost's amicus supporting President Trump's presidential immunity case.⁷⁵ While the Wyoming Governor would later appoint now-Justice Hill to the Wyoming Supreme Court, this variation in the political process raises the question of whether appointed AGs have different incentives than popularly elected AGs. This idea and its normative value should be investigated further.

Third, it remains to be seen whether any of the AGs involved will run for higher office—a move correlated with involvement in multistate litigation.⁷⁶ A survey of the AGs in this litigation reveals that several had held at least one other elected office. This is understandable given that even running for AG requires some degree of clout. But *FTC v. Kroger* was a widely followed case. By publicly taking positions on both sides of a national issue, these state AGs are willing to take big steps to protect their citizens' interests, even if it requires a nationwide campaign.

⁷⁴ *Colorado joins lawsuit to stop Trump administration's illegal tariffs that are raising prices and creating economic chaos*, Colorado Attorney General (April 23, 2025), <https://coag.gov/press-releases/phil-weiser-jared-polis-colorado-lawsuit-trump-illegal-tariffs-4-23-25/>.

⁷⁵ *See Jake Gendron, Attorney General Bridget Hill backs amicus brief supporting Trump's Supreme Court presidential immunity case*, Cap City News (March 27, 2024), <https://perma.cc/W9HX-RTAB>.

⁷⁶ *See When is AG Short for Aspiring Governor*, *supra* note 34.