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NEW YORK ATTORNEY GENERAL'S OFFICE 18-MONTH ROUND-UP

To Our Clients and Friends:

The New York Attorney General (“AG” or the “Office”) has a broad range of powers to launch investigations and bring actions on behalf of the State or its consumers in a wide variety of areas. The AG’s prerogatives can have a profound impact on corporations, nonprofits, individuals, and investors. This 18-month round-up is a summary of major cases and initiatives that have occurred under the leadership of New York State’s 67th Attorney General, Letitia James.

In January 2019, AG James was sworn into office. She promised a rigorous defense of New Yorkers’ interests, particularly in the face of a federal administration that, in her view, may not share New York’s regulatory and enforcement priorities. True to her word, and foreshadowed by her [inaugural speech](#), in 2019 AG James and her team challenged the federal government in numerous sectors, and launched or joined matters in the consumer, investor, environmental protection, and immigration areas, among others. AG James has kept her teams of over 600 lawyers busy, and they have worked on a number of ambitious and challenging cases, including, for example, the *T-Mobile/Sprint* antitrust case and the *Exxon/Mobile* securities fraud case. Both of these cases proceeded to trial. And in both, the Office did not prevail. That said, the Office continues to bring complex and high-profile cases. Most recently on August 6, 2020, AG James filed a lawsuit seeking to dissolve the National Rifle Association (“NRA”) based on the organization’s alleged diversion of millions of dollars away from the charitable mission of the organization for the personal benefit of its top executives^[1]—a similar theory to the Office’s lawsuit against the Trump Foundation that resulted in the dissolution of the organization and an award of damages.^[2] The lawsuit against the NRA is expected to be extensively litigated, as the NRA quickly filed its own countersuit claiming that the AG’s lawsuit is a “political vendetta.”^[3] Nevertheless, AG James has promised that the “lawsuit will continue undeterred.”^[4] As AG James continues to resolve the majority of cases through settlement agreements, she is also willing to use the bully pulpit to bring about results more favorable to her office.

In this round-up, we provide insight into some of AG James’s key cases and initiatives in her first 18 months in office. First, we provide background on AG James and her team. Second, we describe the Office’s aggressive approach vis-à-vis the federal government. Third, we discuss some of the Office’s key antitrust and competition cases, including the *T-Mobile/Sprint* trial loss. Fourth, we describe the Office’s activity in the data privacy and cybersecurity space. Fifth, we describe the Office’s efforts to protect investors. Sixth, we discuss significant cases the Office has brought in the health care area. Seventh, we review the Office’s actions in the environmental protection area, including the Office’s *ExxonMobil* trial loss. Eighth, we look at some of the actions the Office is taking in the employment space. Finally, we provide some thoughts regarding the Office’s approach going forward.

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I. AG James and Her Team

A. About AG James

AG James is the first woman of color to hold statewide office in New York, and the first woman ever elected as the State’s AG. AG James’s background consists of public service, including serving as head of the Brooklyn Regional Office of the New York AG’s Office in 1999. In 2003, AG James was elected to New York City Council, representing the 35th Council District in Brooklyn for a decade. In 2013, she became the first woman of color to hold citywide office as Public Advocate of New York City. Some of her prominent initiatives in these past roles have included assisting in the investigation of the New York Police Department’s stop-and-frisk policy, passing legislation requiring landlords to improve tenant living conditions, and expanding public access to recycling.

B. AG James’s Team

The Office is divided into five major divisions: Economic Justice, State Counsel, Social Justice, Criminal Justice, and Appeals and Opinions. Soon after her election as Attorney General, AG James quickly assembled a diverse team:

- **Jennifer Levy, First Deputy Attorney General:** Prior to joining the Office, Levy was the Supervising Attorney for the Civil Law Reform Unit at the Legal Aid Society, which oversees class action and affirmative litigation in matters of housing, government benefits, immigration, and homeless rights. Before that, she served as the General Counsel in Charge of Litigation for the Public Advocate for New York City, also alongside James.
- **Ibrahim Kahn, Chief of Staff:** Khan previously served as First Deputy Public Advocate of New York, working alongside AG James. Before his service in the Public Advocate’s office, Khan was a top advisor on AG James’s Public Advocate campaign.
- **Christopher D’Angelo, Chief Deputy Attorney General for Economic Justice:** D’Angelo is a former Associate Director of the U.S. Consumer Financial Protection Bureau’s Supervision, Enforcement and Fair Lending division. In his current position in the Office, he oversees New York’s antitrust, investor protection, and taxpayer protection bureaus, among others.
- **Meghan Faux, Chief Deputy Attorney General for Social Justice:** Faux was previously the Managing Director of Brooklyn Legal Services, an organization which represents Brooklyn residents, who otherwise could not afford legal services, on a broad range of issues including accessing affordable housing and essential public benefits. In her current position at the Office, she oversees a range of the Office’s bureaus—namely, the charities, civil rights, environmental protection, health care, labor, and real estate finance bureaus.
- **José Maldonado, Chief Deputy Attorney General for Criminal Justice:** Maldonado previously served as a Special Advisor to the New York City Civil Service Commission, providing legal advice on personnel decisions made by city agency commissioners. He also served as Counsel and Senior Policy Advisor to the New York City Fire Department

Commissioner, and as that Department’s first compliance officer, leading efforts to revamp its hiring and recruitment practices. Maldonado further served as Chief Assistant District Attorney in the Office of the Special Narcotics Prosecutor for the City of New York. In his current position in the Office, he oversees the Criminal Enforcement and Financial Crimes Bureau, the Conviction Review Bureau, and the Public Integrity Bureau, among others.

- **Orelia Merchant, Chief Deputy Attorney General, State Counsel:** From 2002 to 2019, Merchant served in the U.S. Attorney’s Office for the Eastern District of New York, most recently as an Executive Assistant U.S. Attorney directly overseeing the Office’s Civil and Administrative decisions. Merchant leads the Division of State Counsel, which manages litigation involving the State, including its agencies and officials.
- **Barbara Underwood, Solicitor General:** Underwood previously served as the Solicitor General of New York beginning in 2007 through early 2018, when the New York State Legislature selected Underwood to complete the remainder of former Attorney General Eric T. Schneiderman’s term. Before joining the Office, Underwood served in the U.S. Attorney’s Office for the Eastern District of New York. As Solicitor General, Underwood directs the Division of Appeals and Opinions, which is responsible for handling civil and criminal appeals in both state and federal courts.

II. Taking on the Feds

AG James’s first 18 months have been, in many ways, defined by the Office’s positioning vis-à-vis the federal government as an enforcer. Where she has viewed the federal government as stepping back—relaxing regulations or pulling away from enforcement or even acting unlawfully—AG James has aimed to fill the void. She has made clear that when she views newly enacted federal policy as harmful to her constituents (“discriminatory, regressive, and dangerous,” in her words), she will take action.^[5] She has vowed to “work in a legal system where even the most powerful federal official in the country cannot use a loophole to evade justice” and to protect “anyone targeted by the wrath of bigotry.”^[6] Since taking office, AG James has filed over 30 lawsuits and numerous amicus briefs against the Trump Administration over such policies, including those related to immigration controls,^[7] restricted access to health care,^[8] and a rollback of environmental regulations.^[9] She prevailed in the U.S. Supreme Court in a lawsuit to block the Trump Administration from adding a citizenship question to the 2020 census^[10]; she fought the implementation of a federal agency rule that would expand the ability of employers to refuse health care coverage to employees based on “religious beliefs or moral convictions”^[11]; and she filed a lawsuit to halt the enforcement of a federal agency rule that would jeopardize the ability of immigrants to obtain legal permanent resident status and citizenship if they use certain publicly funded health benefits -- a Motion to Stay Injunction Pending Appeal is currently pending.^[12] AG James has also created a Federal Initiatives Unit within her office “to ensure that the rights of all New Yorkers are not compromised by the federal government.”^[13]

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Immigration has been at the forefront of the broad set of federal issues that AG James has addressed in her first year. For example, she supported the challenge to the federal government’s “fundamentally flawed” logic in eliminating Deferred Action for Childhood Arrivals (“DACA”),^[14] standing alongside Gibson Dunn and others in support of multiple plaintiffs (including Gibson Dunn’s six Dreamer clients) who challenged the decision to end DACA as arbitrary and capricious under the Administrative Procedure Act and on other grounds. Gibson Dunn partner Ted Olson argued on behalf of Dreamers in the Supreme Court in November 2019.^[15] On June 18, 2020, in a 5-4 ruling, the U.S. Supreme Court struck down the Trump Administration’s plan to end DACA, finding that it did not comply with the procedural requirement that it provide a reasoned explanation for its action.^[16]

AG James has also launched recent challenges to the Trump Administration’s handling of the COVID-19 pandemic. In May 2020, AG James filed a legal challenge against an Environmental Protection Agency (“EPA”) non-enforcement policy that has effectively waived industry compliance with pollution monitoring and reporting—a non-enforcement policy the Trump Administration claimed was justified by the pandemic that AG James has described as “literally a matter of life and death.”^[17] AG James’s motion for a preliminary injunction and the EPA’s motion to dismiss are still being briefed. AG James has also challenged U.S. Department of Labor regulations that restrict workers’ rights to paid sick leave and emergency family leave during the pandemic; a move AG James argues contravenes the Families First Coronavirus Response Act.^[18] AG James’s motion for summary judgment was granted in part on August 3, 2020. AG James also led a coalition of 26 attorneys general in calling for the U.S. Department of Housing and Urban Development to ensure that senior citizens with reverse mortgages do not lose their homes because of the pandemic.^[19]

Across a broad spectrum, AG James has repeatedly challenged the Trump Administration’s policies, regulations, and actions.^[20]

III. Antitrust/Competition

A. T-Mobile & Sprint

On June 11, 2019, AG James and nine other attorneys general filed a lawsuit in the Southern District of New York to block T-Mobile’s proposed acquisition of Sprint under the Clayton Antitrust Act of 1914. The lawsuit claimed that the merger would harm competition in the mobile wireless telecommunications market by reducing the number of major mobile network operators to three, thereby

“Attorney General Letitia James is focused on enforcing the rule of law. In any case we pursue, we will follow the facts wherever they may lead. We wish the President would share our respect for the law.”

– New York Attorney General’s Office, April 29, 2019

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raising prices for consumers. The AGs also expressed concern that the merger would result in the loss of retail jobs and harm mobile wireless independent dealers.

Following the filing, on July 26, 2019, the Federal Trade Commission and U.S. Department of Justice joined the Federal Communications Commission in approving the deal, on the condition that T-Mobile sell its prepaid business and certain wireless spectrum to DISH Network to help enable the creation of a fourth wireless operator.^[21] Eight additional AGs later joined the AG James's lawsuit, although four ultimately withdrew.^[22] The trial commenced in December 2019 with 14 state AG plaintiffs and concluded in January 2020.^[23] On February 11, 2020, Judge Victor Marrero denied the AGs' request to enjoin the merger.^[24] The court found that the States failed to show that T-Mobile would pursue anticompetitive behavior following the merger, and rejected the argument that DISH would be unable to enter the wireless services market as a viable competitor.^[25] On February 16, 2020, AG James announced that she would not pursue an appeal.^[26] This high-profile loss demonstrates that even though the Office may be more aggressively pursuing interests traditionally handled by the federal government, like antitrust enforcement, such cases do not easily result in success for the AGs.

B. Google

On September 9, 2019, AG James made an announcement confirming the Office's ongoing investigation into Google for antitrust issues, alleging that the company's stature as a telecommunications and search engine giant was potentially harmful to consumers and the economy.^[27] In announcing the investigation, which currently involves 50 attorneys general, the AGs pointed to alleged "evidence" that "we have seen" that Google may have reduced consumer choice, slowed innovation, and violated consumer privacy.^[28]

Like the federal administration and many regulators around the country, AG James is looking for ways to address the perceived dominance of "big tech" in an era of ever-growing concern about how consumer data is used, and will likely test the applicability of century-old antitrust laws to the tech industry, which, unlike other industries, often offers consumers its products free of charge.^[29]

IV. Data Privacy, Cybersecurity, and Data Breaches

A. Equifax & Capital One

On July 22, 2019, AG James announced that she and 49 other attorneys general reached a \$600 million settlement with Equifax following their investigation into a 2017 data breach of the company.^[30] Equifax, one of the three large consumer reporting agencies, had announced on September 7, 2017, a data breach that affected more than 147 million consumers, 8 million of which were purportedly New York residents.^[31] According to press reports, the breach allegedly implicated personal information including social security numbers, names, dates of birth, addresses, credit card numbers and driver's license numbers.^[32]

The settlement comprised a \$425 million Consumer Restitution Fund and \$175 million payment in fines to the states, approximately \$9 million of which would be allocated to New York. In addition to the monetary payment, Equifax agreed to provide free credit monitoring for up to 10 years to consumers

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affected by the data breach; assist consumers with identity theft issues, such as by helping to dispute inaccurate information in credit reports; and strengthen the company’s security.[33] On December 19, 2019, Judge Thomas W. Thrash Jr. of the Northern District of Georgia granted final approval of the settlement.[34]

On July 30, 2019, AG James announced an investigation into Capital One, which experienced a data breach in which an outside individual gained unauthorized access and obtained certain types of personal information about Capital One credit card customers.[35] While the outcome of that probe is yet to be determined, the investigation demonstrates the Office’s ongoing commitment to aggressively investigating potential breaches of consumer data.

B. Zoom

On March 20, 2020—in the midst of the COVID-19 pandemic and associated increase in work-from-home and academic videoconferencing—AG James sent Zoom a public letter asking the company to address reports of various privacy and security issues with the videoconferencing application.

On May 7, 2020, in lieu of pursuing litigation, AG James announced an agreement with Zoom whereby the company agreed to take various additional security and privacy measures.[36] AG James opted for this route “[i]n recognition of the fact that Zoom has acted [] quickly to address the issues identified above, has worked cooperatively with the AG’s investigation, and has provided valuable services to schools, local governments and health care institutions to help address the unique circumstances” posed by the COVID-19 pandemic.[37] Under the agreement, Zoom will maintain a comprehensive data security program that will involve regular security risk assessments, report those assessments to the Office, and enhance encryption protocols. Zoom also agreed to stop sharing user data with social media companies, and give hosts more control over outside access to video conferences.[38]

V. Investor Protection

Since her inauguration, AG James has consistently reiterated a commitment to protecting investors, enhancing corporate accountability, and maintaining integrity in New York’s financial markets; she views her work in this area as part of her obligation to all New Yorkers (as she often has said, “[W]hat happens on Wall Street impacts families on Main Street”).[39]

On October 2, 2019, AG James announced a new whistleblower submission system that facilitates secure and anonymous contact with the Office.[40] The system, which utilizes a web portal allowing users to submit their complaint and relevant documentation, is intended to permit witnesses of unlawful or otherwise improper workplace conduct to express their concerns without revealing their identities.[41] While the Office encourages users to disclose their identities,[42] it recognizes that “many people have legitimate concerns about their anonymity” and hopes that the new system will “attract, engage, and protect whistleblowers,” especially at a time when those attempting to call out corruption are facing intimidation.[43]

The new whistleblower portal represents just one of the latest efforts undertaken by AG James in 2019 with the goal of enhancing corporate accountability. Just weeks earlier, on August 26, 2019, AG James

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announced the signing of a bill that restores the six-year statute of limitations for claims under the Martin Act,[44] reversing a 2018 ruling by the New York Court of Appeals[45] that confined the limitations period to three years.[46] The Martin Act, considered one of the nation’s most powerful “blue sky” laws, grants the AG broad powers to investigate financial fraud and to bring both civil and criminal claims against any publicly traded company suspected of wrongdoing.[47] By extending the statute of limitations period, the new law thereby enhances “one of the state’s most powerful tools to prosecute financial fraud,” which AG James cites as particularly important during a period in which she believes that the federal government has worked to roll back consumer financial protections.[48] Critics of the Martin Act, however, have always maintained the law is too expansive, both because it permits the AG to investigate, issue subpoenas, and demand production of corporate documents without probable cause or a grand jury ruling, and because a civil fraud violation under the Martin Act does not require the AG to demonstrate scienter.[49]

Last year, the Office investigated several institutions suspected of violating the Martin Act.[50] For example, in October, AG James announced the resolution of a three-year investigation into two related New York-based brokerage firms—BGC Financial LP (“BGC”) and GFI Securities LLC (“GFI”)—accused of using fraudulent practices to solicit trades of foreign exchange currency options.[51] AG James’s investigation allegedly uncovered that, over a two-year period, BGC and GFI posted false bids and trades in an effort to encourage others to buy and sell options at the level at which the brokers had reported the false trade.[52] As part of the settlement, the two entities admitted wrongdoing—specifically, posting fake bids to create a false appearance of greater liquidity in the market, and fraudulently announcing fake trades to deceptively entice traders to buy and sell options. They agreed to pay fines totaling \$12.5 million to the Office, among other penalties.[53] The U.S. Commodity Futures Trading Commission (“CFTC”) also imposed a \$25 million dollar civil penalty against BGC and GFI for the same conduct, but did not require the brokerage firms to admit wrongdoing.[54] Both the Office and the CFTC required the appointment of independent monitors, who will work in parallel for at least 12 months.

AG James has also sought to hold individuals in the C-suite responsible for Martin Act violations. For example, in December 2019, the Office filed a civil action against a private equity fund manager for violations of the Martin Act, alleging that this individual and the companies he controlled defrauded investors and misappropriated more than \$13 million dollars in funds.[55] In February 2020, a New York judge granted a preliminary injunction enjoining this individual from accessing funds associated with the alleged fraud, pending the upcoming trial.[56] Reiterating her commitment to protect investors, AG James declared that “[t]here is no safe haven for white collar fraudsters in New York....”[57] And in June 2020, the Office obtained a judgment against the founder and CEO of a wind turbine company who marketed unregistered securities and diverted investor funds to pay personal expenses in violation of the Martin Act.[58]

Not all Martin Act lawsuits pursued by AG James have been successful. As further discussed below, following a three-week trial in November 2019, the New York Supreme Court found that the Office failed to establish that ExxonMobil violated the Martin Act, holding that the Office did not prove that a “reasonable investor” would have been misled by ExxonMobil’s representations concerning climate change risks.[59]

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In September 2019, AG James led a coalition of eight attorneys general from around the country in filing a federal lawsuit challenging “Regulation Best Interest,” a June 2019 U.S. Securities and Exchange Commission (“SEC”) regulation that, according to the lawsuit, fails to comply with the requirements articulated in the Dodd-Frank Act.^[60] The regulation, known as “Reg BI,” outlines the obligations of broker-dealers who provide advice to investors, requiring covered broker-dealers to act in the best interests of their clients—but does not impose a fiduciary duty on them.^[61] According to the lawsuit,^[62] the SEC’s adoption of Reg BI was contrary to Congress’s delegation of authority as outlined in the Dodd-Frank Act. At the end of September 2019, the Southern District of New York dismissed the action for lack of subject-matter jurisdiction, finding that the law governing review of the SEC’s decisions mandated that the U.S. Court of Appeals for the Second Circuit was the proper forum for the litigation, rather than the district court.^[63] The Office continued to pursue this action in the Second Circuit. On June 26, 2020, just four days before Reg BI was set to take effect, the Second Circuit upheld Reg BI, finding that “the SEC lawfully promulgated Regulation Best Interest pursuant to Congress’s permissive grant of rulemaking authority” under the Dodd-Frank Act and that Reg BI was not arbitrary, capricious, or an abuse of the SEC’s discretion.^[64] As another setback to AG James and potential challenges to federal regulations in the future, the court also found that the states did not have standing to challenge this federal regulation because the states did not demonstrate that the regulation caused a “direct injury” to state revenues, as required for states that challenge federal regulations.^[65]

VI. Health Care

AG James’s actions in the health care space—from partnering with other states to preserve the Affordable Care Act, to lawsuits against the pharmaceutical industry—represented a clear prioritization of those areas in 2019. The Office made headlines for bringing large-scale suits in areas that dominated the news in 2019, including e-cigarette use among youth, the opioid crisis, and access to health care. AG James frequently characterized these actions as protecting not only New Yorkers but the American people,^[66] and her office did not hesitate to directly oppose the Trump Administration where she deemed appropriate.

A. Federal Actions – ACA

2019 was a year of significant pushback from AG James and other states’ attorneys general against the Trump Administration’s efforts to limit protections of the Affordable Care Act (“ACA”). In early January 2019, AG James set the tone for the Office’s actions for the rest of the year when she joined with 16 other attorneys general to appeal a Texas district court decision holding the ACA unconstitutional.^[67] In announcing that suit, AG James said that New York would “continue . . . to safeguard access to healthcare for all Americans.” The U.S. Supreme Court granted certiorari in March 2020.

AG James made good on that statement a few months later when, in May, she led a group of states and cities in filing a suit opposing the Trump Administration’s “refusal-of-care” rule,^[68] which was intended to give health-care providers, insurers, and employers greater leeway to refuse to provide medical care and services on the basis of their own religious or moral beliefs. The rule—also called the

“conscience rule” by its supporters—had been enacted by the U.S. Department of Health and Human Services (“HHS”) over opposition from the same group and others.

In November 2019, Judge Paul Engelmayer of the Southern District of New York found in favor of the states and struck down the rule. In a lengthy decision noting that the refusal-of-care rule was “shot through with legal defects,” Judge Engelmayer agreed with the Office that the rule as adopted was unconstitutional because its central justification—that there was a “significant increase” in conscience-related violations—was “flatly untrue,” rendering the HHS “decision to promulgate the rule arbitrary and capricious,” in violation of the Administrative Procedure Act (“APA”).^[69] On January 3, 2020, HHS appealed the decision to the Second Circuit.^[70]

The refusal-of-care case was just one of several actions in which AG James joined other state AGs to oppose ACA-related rulemakings by the Trump Administration. In July 2019, AG James led a twelve-state coalition in filing the appellees’ brief in the Court of Appeals for the D.C. Circuit, defending a district court decision that struck down the Association Health Plan (“AHP”) rule promulgated by the U.S. Department of Labor which, according to the lawsuit, violated both the ACA and Employee Retirement Income Security Act (“ERISA”) through an unlawful reversal of key ERISA terms for the purpose of undermining the ACA, without adequate justification. The rule attempted to undo federal consumer protections relating to fraud and consumer harm, and expand the use of AHPs, which offer health insurance to groups of small businesses with a common interest.^[71] The U.S. Department of Labor had appealed the decision, which found that the rule, which President Trump stated was aimed at dismantling Obamacare, was enacted in violation of the APA and was “clearly an end-run around the ACA.”^[72] The appeal remains pending following oral argument in November. And in August 2019, AG James again joined with 21 state AGs to oppose another new HHS rule aimed at undermining anti-discrimination provisions in the ACA.^[73]

B. Consumer Health – Drug Pricing

AG James has frequently participated in multi-state lawsuits challenging allegedly anticompetitive drug pricing.

In May 2019, 44 states including New York sued Teva Pharmaceuticals and 19 generic drug manufacturers for allegedly working together to artificially manipulate prices and restrain trade on more than 100 drugs, purportedly leading to inflated prices for consumers.^[74] According to the Office, the lawsuit represented the culmination of a five-year investigation by the states into efforts by the companies and individual executives to coordinate and elevate pricing.^[75] The suit is still at the pleadings stage.

In January 2020, AG James announced a lawsuit against Vyera Pharmaceuticals and two of its former CEOs, including the previously convicted Martin Shkreli, for anticompetitive behavior, including for an alleged 4,000% increase in the price of Daraprim—the only FDA-approved drug for the treatment of toxoplasmosis—in August 2015.^[76] Six other states have since joined the suit, which is in the discovery phase.^[77]

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In June 2020, AG James joined a coalition of 51 attorneys general nationwide in filing a related antitrust complaint against 26 generic drug manufacturers and 10 executives of these companies, alleging “broad, coordinated, and systematic antitrust violations, price-fixing, market allocating, and the rigging of bids for more than 80 different topical, generic drugs.”^[78] The suit is still in the pleadings phase.

Drug pricing was a focus of AG James’s work closer to home, too: in June 2019, the Office concluded an investigation of New York State pharmacies for failing to adhere to a law requiring them to post drug costs for consumers.^[79] The investigation led to cease-and-desist letters to 44 pharmacies that were found to be in violation of the rule, which mandates that pharmacies maintain and notify customers of a list of prices for the 150 most commonly prescribed drugs.

C. Consumer Health – E-Cigarettes, Opioids

AG James’s actions over the last year have mirrored the nationwide concern over opioid and e-cigarette use. Like many other states, in 2018 New York launched an investigation into JUUL Labs, Inc., the largest e-cigarette company in the United States; on November 19, 2019, more than a year later, the Office filed a lawsuit. The suit, filed only a few days after New York changed the law to make it illegal to sell e-cigarette products to those under 21, alleges that the company engaged in deceptive marketing of its e-cigarettes and contributed to the “ongoing youth vaping epidemic.”^[80] The case is currently in the discovery stage. It is part of a concerted push by the Office to spur further regulation of e-cigarette companies, as evidenced by her leading a coalition of seven attorneys general in filing comments with the Food and Drug Administration that urged enforcement actions related to flavored e-cigarettes and online sales.^[81]

AG James has also sued pharmaceutical companies in connection with the opioid crisis. In March 2019, she filed a lawsuit against six opioid manufacturers, four distributors, and the Sackler family (who owned Purdue Pharma), alleging that they ignored their duties to prevent unlawful diversion of opioids and thus contributed to the opioid epidemic.^[82] Trial for all defendants except for Purdue Pharma and the Sackler family (whose case is moving separately through the U.S. Bankruptcy Court) was set to begin in March 2020, but has been delayed due to the COVID-19 pandemic.

AG James also pursued physicians for alleged over-prescribing and attendant Medicaid fraud, and joined a bipartisan multistate coalition of 38 states in an effort to push Congress to remove federal barriers to opioid addiction treatment,^[83] calling it an effort to take “action from every angle” against the opioid crisis, and once again highlighting her willingness to get involved at the federal level.^[84]

D. Consumer Health – COVID-19

AG James focused on protecting the public health, particularly during the COVID-19 pandemic. She has acted to “ensure the health of New Yorkers [is] not further at risk during these trying times.”^[85] For example, in April 2020, citing the importance of protecting reproductive health and limiting trips to pharmacies, AG James demanded that several health insurance companies comply with the Comprehensive Contraception Coverage Act, requiring health insurers to provide a 12-month supply of contraception at one time.^[86] The Office has also launched repeated efforts to protect New Yorkers from Coronavirus health scams, including issuing guidance to New Yorkers^[87] and scrubbing websites

of scams that are “stoking fear in the hearts and minds of Americans,”^[88] and pursuing price gouging.^[89]

VII. Environmental Protection

AG James proclaimed in her 2019 Year in Review that she is committed to “fight[ing] policies that hurt New Yorkers, our natural resources, and our planet.” AG James is stepping in to fill what she views as a gap in environmental protection enforcement by the Trump Administration. Many state AGs, including AG James, have taken over 300 actions on climate change, air, water, and toxic chemicals during Donald Trump’s Presidency.^[90] A report by the State Energy and Environmental Impact Center at the NYU School of Law found that, as of the beginning of 2020, the Office has brought more environmental actions against the Trump Administration than any other state,^[91] bringing 129 of those actions in 2019.^[92]

AG James’s environmental activism takes aim at both the federal government’s policies and large corporations when she states that she believes that the federal government has not done enough to hold them accountable. The Office’s activism—frequently coordinated with AGs across the country—could have significant impacts on companies.

A. Taking on the Trump Administration’s Environmental Stance

AG James has challenged several of the Trump Administration’s new environmental rules, including the following:

(1) **EPA’s COVID-19 Policy.** On March 26, 2020, the EPA issued a temporary policy regarding EPA enforcement of environmental legal obligations in response to the novel coronavirus outbreak.^[93] The policy applies retroactively to March 13 and has no end date. The policy allows the EPA not to take enforcement action against companies that violate existing requirements if they draw a nexus between COVID-19 and their noncompliance.^[94] On April 15, 2020, AG James and 13 other states submitted a letter requesting that the EPA rescind the policy, contending that the “policy turns a blind eye to the impacts on our communities of more pollution and lesser accountability.”^[95] There has been no response to the letter to date. AG James and attorneys general from several other states filed a complaint against the EPA on May 13, 2020 to challenge this policy, alleging that the EPA had not responded to the letter “or taken any of the actions requested by the Attorney[] General.”^[96] This litigation remains pending in the Southern District of New York.^[97]

“While Washington is asleep at the wheel, New York continues to lead the way in protecting our planet. . . . I am proud to work with NYS Attorney General Letitia James to defend our precious environment from actions taken by this administration.”

—New York Senator Todd Kaminsky (D)

(2) The Cross-State Air Pollution “Close-Out” Rule. This 2018 Trump administration rule loosens requirements that upwind states reduce their contribution of ozone precursors to downwind states, impacting the downwind states’ ability to attain ozone pollution standards by certain statutory deadlines. AG James has challenged the Trump Administration’s EPA rulemaking surrounding the Close-Out Rule multiple times.

On October 1, 2019, the U.S. Court of Appeals for the D.C. Circuit sustained New York’s challenge and vacated the Close-Out Rule. The court explained that the Close-Out Rule’s failure to require upwind states to reduce their emissions would “contribute significantly to downwind nonattainment in 2021.”^[98] On October 29, 2019, AG James brought another lawsuit against the EPA for failure to “abide by its legal responsibility under the Clean Air Act [(“CAA”)] to ensure upwind sources of pollution do not continue to create unhealthy ground-level ozone pollution [] in New York.”^[99] The lawsuit followed the EPA’s denial of a March 2018 petition filed by New York. The petition requested the EPA to make a finding that nine upwind states were guilty of emissions violations and that the EPA ensure that the states reduced their emissions.^[100] On July 14, 2020 the court vacated the EPA’s denial of New York’s petition and remanded the case for further proceedings. On February 19, 2020, AG James joined a federal lawsuit against the EPA for its failure to control air pollution from upwind states, thus preventing New York from achieving compliance with the CAA.^[101] On July 28, 2020, the court ruled in favor of the coalition of state attorneys general, granting their motion for summary judgment, finding that the EPA had not performed its obligations under the law and granting injunctive relief.

(3) Energy Standards. In August 2019, AG James led a coalition of 22 states and seven localities in filing a lawsuit challenging the EPA’s Affordable Clean Energy (“ACE”) rule, a regulation that purported to replace the Clean Power Plan (“CPP”), which had placed strict limits on fossil-fuel power plant emissions.^[102] The lawsuit alleged that the EPA had no legal standing to weaken the CPP, that the replacement ignored an EPA mandate to set limits on greenhouse gases, and that the new rule would reverse progress made in addressing climate change and prolong the U.S.’s dependence on fossil fuels. EPA officials have argued that, unlike the CPP, the ACE rule adheres to the CAA and is just as effective.^[103] Oral argument in the case has been scheduled for October 8, 2020.^[104] In April 2020, AG James, together with 14 other states and New York City, filed a lawsuit in the Ninth Circuit challenging the U.S. Department of Energy’s (“DOE”) revisions to its Process Rule.^[105] The Process Rule describes the procedures, interpretations, and policies that guide DOE in establishing new or revised energy-efficiency standards for consumer products.^[106] The Office argued that the revisions impose an “unreasonably high threshold for energy efficiency savings” that “threaten” the economic and environmental progress made by DOE’s long-standing energy efficiency program.^[107] The case is pending in the Ninth Circuit.

“The Trump Administration’s attempt to weaken the Clean Air Act will cause lasting damage to the economy, environment, and health of the American people.”

– AG James, September 2019

(4) Changes to Vehicle and Greenhouse Gas Emissions Standards. In July 2019, the U.S. Department of Transportation's National Highway Traffic Safety Administration ("NHTSA") repealed an Obama-era rule and announced a new rule that limited the civil penalty rate for automobile manufacturers that fail to meet certain emissions standards. AG James led a coalition of 13 state attorneys general in challenging the agency decision in the U.S. Court of Appeals for the Second Circuit, alleging that the new rule was "unlawful and rewards automakers that fail to manufacture fuel-efficient vehicles" and that it "violated federal law, which mandates that public agencies update their civil penalties to account for inflation using a clear timetable and formula for adjustment."^[108] The case was heard on June 1, 2020.^[109] On March 31, 2020, the Trump Administration announced its final rule rolling back the Clean Car Standards.^[110] On May 27, 2020, AG James joined a multistate lawsuit against the EPA, U.S. Department of Transportation, and the NHTSA.^[111] The pending lawsuit, joined by 23 other attorneys general and several other local governments, argues that the rollback will halt the progress made "in saving consumers at the pump and reducing harmful greenhouse gas emissions, hurting the economy and public health at a time when the country can least afford it."^[112]

(5) Changes to Methane Emissions Standards. In November 2019, AG James joined a coalition of 21 state and local governments in filing comments opposing a proposed EPA rule that would rescind emissions standards for methane.^[113] The coalition argued that the proposal was unlawful because the EPA had failed to justify its decision to abandon methane regulation, disregarded its own previous conclusions about the "substantial adverse impacts of methane emissions from the oil and gas industry," and "arbitrarily eliminate[d] pollution controls from the transmission and storage segment of the oil and natural gas sector."^[114]

(6) Approval of Seismic Air Gun Survey Testing. In March 2019, AG James and eight other AGs joined a group of non-governmental organizations' motion to preliminarily enjoin the Trump Administration's authorization of seismic air gun survey testing in the Atlantic Ocean. Seismic testing is considered to a precursor to offshore drilling because it involves the use of high-powered air guns to release loud pressurized blasts through the Atlantic Ocean to the seafloor to map offshore oil and gas reserves. The AGs argued that the authorizations violated the Marine Mammal Protection Act, Endangered Species Act, National Environmental Policy Act, and the APA.^[115] The case is currently pending in the U.S. District Court for the District of South Carolina (Charleston).^[116]

B. Actions against Corporations

When it comes to the environment, AG James has also participated in actions against fossil fuel and automobile companies.

Fossil Fuel Companies. Former AG Eric T. Schneiderman initiated an investigation against ExxonMobil in November 2015 to determine whether the company had fraudulently misled investors and the public about the risks of climate change and how such risks might hurt the oil business.^[117] In 2018, following the nearly three-year investigation, then-AG Barbara Underwood brought a securities fraud case under the Martin Act against ExxonMobil based on an alleged accounting discrepancy, alleging that the oil company caused investors to lose up to \$1.6 billion by falsely telling them it had properly evaluated the impact of future climate regulations on its business.^[118] In late November 2019,

the case went to trial. In December, after three weeks of trial, New York State Supreme Court Justice Barry Ostrager dismissed the case with prejudice, finding that “[t]he office of the Attorney General failed to prove, by a preponderance of evidence, that ExxonMobil made any material misstatements or omissions about its practices and procedures that misled any reasonable investor.”^[119] The court further noted, “ExxonMobil does not dispute either that its operations produce greenhouse gases or that greenhouse gases contribute to climate change. But ExxonMobil is in the business of producing energy, and this is a securities fraud case, not a climate change case.”^[120]

Following the defeat, the Office has continued to insert itself in climate change litigation brought against oil companies around the country, notably in Baltimore and the Bay Area, joining multistate coalitions in filing amici briefs in pending environmental litigation.^[121] Supporting local government plaintiffs in these cases, the state AGs have argued that fossil fuel companies should be held accountable under state law, including state tort law, for actions purportedly contributing to climate change and resulting harms.^[122] The oil companies have argued that the issues are fundamentally about emissions, which are regulated at the federal level. Many of the cases have been dismissed, although some remain pending.

Automobile Industry. In January 2019, AG James, a coalition of state and federal agencies, as well as private class action plaintiffs reached a \$171 million settlement with Fiat Chrysler Automobiles (“Fiat”) and others. The deal—which did not involve any admission of guilt, and included civil penalties and compensation for eligible customers—settled purported claims that Fiat had allegedly falsely advertised that its “EcoDiesel” vehicles were environmentally friendly (in violation of state environmental and consumer protection laws and the federal Clean Air Act), among other allegations. Following the deal, Fiat announced “rigorous new validation procedures and updated . . . training programs.”^[123]

VIII. Employee Rights

AG James has also been active in areas relating to labor and employment, especially post COVID-19. Since January 2019, she has actively opposed multiple rule change proposals related to federal labor laws, like the Fair Labor Standards Act (“FLSA”), from the Trump Administration, leading coalitions of state attorneys general, because she believes the proposals weaken vital protections for workers and make it harder for states to enforce workplace laws. AG James’s many comment letters in opposition to the Trump Administration’s proposals suggest that AG James and other attorneys general have already teed up future litigation on numerous issues.^[124] We can expect her to file suit on many of these issues.

A. Challenging Federal Policy Changes

For example, in May 2019, AG James led a coalition of states in opposing a then-proposed, now-final, rule regarding the “white collar” exemption to the overtime pay requirements under the FLSA.^[125] The exemption generally applies to salaried employees with executive, administrative or professional duties that earn above a threshold amount. The AG coalition favored a higher, more “meaningful” salary threshold in part because they argued it would have, in practice, created a “bright-line” rule that clearly delineated exempt from non-exempt workers in more cases, particularly where states have a higher-than-national minimum wage. However, the salary threshold that the U.S. Department of Labor (“DOL”)

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ultimately adopted was far below that advocated for by AG James (and the other state attorneys general), and roughly tracks to wages that are or soon will be the minimum wage in states like New York.^[126] According to the AGs' comment letter, this lower salary requirement will likely lead to a higher incidence of worker misclassification, as more classification decisions turn on a "multifactorial duties test" that assesses the extent to which an employee's duties are administrative, executive, or professional. Despite AG James's efforts, the overtime rule went into effect on January 1, 2020.^[127]

AG James, along with Attorney General Josh Shapiro of Pennsylvania, also led an opposition to the Trump Administration's efforts to revise the definition of "joint employer" as it is used to determine liability in both the FLSA and the National Labor Relations Act. AG James and AG Shapiro, joined by other states and the District of Columbia, have filed suit to challenge the DOL's Final Rule^[128] under the APA.^[129] Cross motions for summary judgment are pending.

With the onset of COVID-19, AG James has redoubled her opposition to certain federal wage and hour policies—new and old—particularly where she believes wage workers will be disproportionately impacted. For example, AGs James and Shapiro again led a coalition of states in urging the Trump Administration to cease implementing the joint employer rule on the basis that the changes "put[] those most at risk of suffering financially as a result of the COVID-19 pandemic in even greater economic jeopardy."^[130] According to the coalition, the new rule limits employees' ability to collect back wages from bankrupt employers.^[131]

Similarly, AG James filed suit in federal court to block implementation of a rule issued by the DOL under the Families First Coronavirus Response Act, claiming that the portions of the rule violate the APA because they are not in accordance with law and exceed the DOL's statutory authority.^[132] AG James seeks to sever and vacate portions of the rule^[133] that "make[] it harder for New Yorkers and Americans throughout the country to claim [paid sick leave and emergency family leave] benefits, which unnecessarily puts more workers at risk of exposure to COVID-19."^[134] On August 3, 2020, the court agreed with AG James, invalidating parts of the DOL rule that AG James argued unfairly restricted access to the program.^[135]

AG James has also gone beyond wage and hour issues.^[136] In a comment letter to the Federal Trade Commission, she joined other state AGs in advocating for increased scrutiny of anticompetitive policies in the labor market, singling out non-compete and no-poach agreements as examples.^[137] Joining with other state attorneys general, she filed an amicus brief before the U.S. Supreme Court, joining in support of preservation of anti-discrimination protections, and highlighting the state's "critical role in enforcing anti-discrimination [laws]."^[138] She also co-led the filing of an amicus brief before the U.S. Supreme Court arguing that Title VII prohibits employment discrimination based on an individual's sexual orientation and stereotyping of that individual's gender identity.^[139] This brief argued that discrimination against LGBT workers undermines the states' ability to create inclusive communities, and that a contrary interpretation of Title VII would limit the extent to which states can rely on and utilize federal law to combat that discrimination. The U.S. Supreme Court ruled adversely to her position in the first case,^[140] but, in the second, issued a landmark ruling protecting the rights of LGBT workers—finding that "[a]n employer who fires an individual for being homosexual or transgender fires that person

for traits or actions it would not have questioned in members of a different sex” is in violation of Title VII.[141]

B. Employee Protection Efforts and Enforcement in New York

AG James has been active in prosecuting employers and publicly supporting the passage of various laws and initiatives to protect the rights of workers, including that:

- AG James lauded state-wide passage of the Salary History Bill, finding that the practice of inquiring into past salaries during the hiring process “unfairly perpetuates discrimination towards women and women of color, and … deprives them of the equal pay and recognition that they rightfully deserve.”[142]
- AG James applauded an amendment to the Equal Pay Act, which bans employers from paying different wages based on gender, remarking that she is “proud to see NY lead the way on ensuring equity in the workplace” by requiring that employees be paid equally for “substantially similar work.”[143] She also joined a letter by a coalition of state attorneys general supporting a lawsuit seeking to compel “complete and final adoption” of the Equal Rights Amendment, after Virginia became the 38th state to ratify the Amendment, and urged Congress to remove any deadline for ratification.[144]
- AG James also successfully pushed for passage of a state law that penalizes discrimination and retaliation against immigrant employees, stating that “it is incumbent on us to help vulnerable workers be able to stand up for their rights without fear of punishment.”[145] This law went into effect in October 2019.[146] While the law essentially codifies federal case law interpreting anti-retaliation provisions, AG James advocated for the law to combat the “culture of fear” that has resulted from “increasingly heated rhetoric” regarding immigration nationwide.[147]
- AG James also heralded a decision by the New York State Court of Appeals reinstating a determination by the state’s Unemployment Insurance Appeal Board that a delivery driver was entitled to unemployment benefits.[148] AG James heralded the decision that “delivery drivers are employees [and not independent contractors] and are entitled to the same unemployment benefits other employees can obtain” particularly “[a]s the nation battles the spread of the coronavirus and more and more employees are laid off.”[149]

AG James has signaled she will consider “all legal options” to protect employees in the wake of COVID-19.[150] For instance, she has demanded that fast food restaurants provide employees with personal protective equipment,[151] and at least twice called on employees to report perceived violations of both preexisting labor laws and the recently issued executive orders.[152] We expect she will continue to advance the rights of and protections for workers in the turbulence of the COVID-19 pandemic.

AG James also secured several settlements on behalf of employees:

- AG James reached a \$450,000 settlement with a home health care company following the passage of the new law barring discrimination against immigrant employees based on allegations that

more than 100 home health aides were not paid their earned wages, and were instead allegedly threatened with deportation if they reported or complained of the wage theft.[153]

- In a settlement regarding the company’s prior sick leave policies and practices, a coffeehouse chain recently agreed to pay \$150,000 to a restitution fund, reform its sick leave policy, educate its workers on the new sick leave policy, and submit a compliance report detailing its progress within six months.[154]
- AG James has secured a \$530,000 settlement for 150 car wash workers for wage theft.[155]
- With the New York City Comptroller’s Office, AG James required a developer to pay over \$400,000 in restitution and interest to workers, as well as \$2.5 million to New York City and the State, to settle its inquiry into whether the developers willfully violated wage requirements under Section 421-a of the New York Real Property Tax Law, which provides tax breaks on certain multifamily buildings.[156]
- AG James reached a settlement awarding \$240,000 and a 10-year profit sharing arrangement for 11 former employees of a New York City restaurant and requiring implementation of new policies after an investigation found that the restaurant failed to systematically address or take adequate action to address the sexual harassment of the female staff.[157]

IX. The Future

While we expect the next 18 months to look directionally like the last 18 months, the upcoming Presidential election will have important implications for AG James’s priorities. Civil rights including voter protection, the impact of the ongoing pandemic on consumers, borrowers, and workers will undoubtedly continue to draw her focus. The Office’s aggressive enforcement positions require that companies pay careful attention to AG James’s actions and next steps. AG James will continue to look for and seize upon opportunities in a broad range of areas building on her successes to date.

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[14] Press Release, N.Y.S. Attorney General, Attorney General James Remarks on DACA Following Supreme Court Argument (Nov. 12, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-remarks-daca-following-supreme-court-argument>.

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