

AN EXAMINATION OF NEW YORK'S MARTIN ACT AS A TOOL TO COMBAT CLIMATE CHANGE

ASHLEY POON*

Abstract: Environmental statutes and regulations in the United States have largely failed to comprehensively control the human activities that cause climate change. This Note examines a novel approach to the matter in the form of an investigation led by New York Attorney General Eric Schneiderman to discover how ExxonMobil incorporates its climate change research into its corporate governance, accounting, and business planning. Schneiderman's investigation relies on the New York securities fraud statute, the Martin Act, to determine if the company has internally reached one conclusion about climate change in its research while promoting another to investors. ExxonMobil initially cooperated with the Attorney General's investigation, but the company has since struck back. The battle now involves two lawsuits, many cross-subpoenas, nearly half the country's Attorneys General, and at least one federal agency. This Note chronicles the history of the Martin Act, a parallel model of litigation in Attorneys' General attacks on Big Tobacco, and outlines the current status of Schneiderman's investigation and parallel litigation.

INTRODUCTION

On November 4, 2015, New York Attorney General Eric Schneiderman launched an investigation into ExxonMobil to determine if the oil and gas company committed fraud regarding climate change in its annual reports, public statements made by executives to the press, and newspaper advertisements.¹ A spokesman from Schneiderman's office said the investigations would determine if the company violated New York's securities, business, and consumer fraud laws by publicly mischaracterizing the certainty of climate change research and the effect of this research on the company's strategy.² In August 2016, Schneiderman revealed that the inquiry

* Executive Comment Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2016–2017.

¹ See Justin Gillis & Clifford Krauss, *ExxonMobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. TIMES (Nov. 5, 2015), <http://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html> [https://perma.cc/AXW4-6KRV].

² Matthew Daly, *House GOP Subpoenas NY, Mass. AGs on Climate Change Probe*, ASSOCIATED PRESS: THE BIG STORY (July 13, 2016, 8:14 PM), <http://bigstory.ap.org/article/0ee0825afde64a4f8fb4fa78f5d76e9b/house-gop-subpoenas-ny-mass-ags-climate-change-probe> [https://perma.cc/AXW4-6KRV].

focused on ExxonMobil's more recent statements—such as a 2014 report assessing global energy demand and supply, climate change policy, and carbon asset risk—regarding its climate change predictions and requisite impact on the company's strategy.³

The Martin Act (“the Act”) provides the New York Attorney General with a uniquely powerful tool in pursuing corporate fraud because of the Act's strong investigative power and its joint civil and criminal penalties.⁴ Through its investigation into ExxonMobil, Schneiderman's office will analyze whether the company's external statements conflict with its internal findings, thereby preventing investors from making informed investment decisions.⁵ The conflict, if any, would violate the Act, which prohibits all deception or fraud related to the sale of securities.⁶

The New York Attorney General's office began looking into ExxonMobil a year before the first subpoena was issued.⁷ The investigation likely hinges on the Martin Act, New York's securities fraud law.⁸ To demonstrate a violation of the Act, the Attorney General must show that the

cc/Z8TM-3JTG]; Sarah N. Lynch, *Exxon Taps High-profile Lawyer to Fight N.Y. Climate Change Probe*, REUTERS (Dec. 1, 2015, 5:28 PM), <http://www.reuters.com/article/us-exxon-probe-climate-change-idUSKBN0TK5RRR20151201> [https://perma.cc/7QWC-WV8H]. In early December 2015, ExxonMobil hired Paul Weiss' litigation co-chair Theodore V. Wells, Jr. in anticipation of the investigation. Lynch, *supra*. Wells is a high-profile litigator who worked on behalf of the National Football League during the New England Patriots' “deflategate” scandal. *Id.*

³ John Schwartz, *ExxonMobil Fraud Inquiry Said to Focus More on Future Than Past*, N.Y. TIMES (Aug. 19, 2016) <http://www.nytimes.com/2016/08/20/science/exxon-mobil-fraud-inquiry-said-to-focus-more-on-future-than-past.html> [https://perma.cc/9ZCA-LXVM]. Schneiderman said “it is a civil fraud case,” and noted that criminal charges could be filed if the investigation reveals evidence of criminal actions. *Id.*

⁴ See Aaron A. Tidman, *Securities Law Enforcement in the Twenty-First Century: Why States Are Better Equipped Than the Securities and Exchange Commission to Enforce Securities Law*, 57 SYRACUSE L. REV. 379, 391 (2007).

⁵ Gillis & Krauss, *supra* note 1.

⁶ N.Y. GEN. BUS. LAW § 352 (McKinney 2016); Lincoln Caplan, *Will the “Tobacco Strategy” Work Against Big Oil?*, NEW YORKER (Nov. 17, 2015), <http://www.newyorker.com/news/news-desk/will-the-tobacco-strategy-work-against-big-oil> [https://perma.cc/2YDR-L385]. In 2007, for the first time since the 1980s, ExxonMobil publicly admitted that climate change was occurring and was largely a result of burning fossil fuels. Katie Jennings, Dino Grandoni & Susanne Rust, *How Exxon Went from Leader to Skeptic on Climate Change*, L.A. TIMES (Oct. 23, 2015), <http://graphics.latimes.com/exxon-research/> [https://perma.cc/9CMF-ZSND]. New York courts have held that the applicable statute of limitations for the Martin Act is six years. *Loengard v. Santa Fe Indus., Inc.*, 514 N.E.2d 113, 115 (N.Y. 1987); *Podraza v. Carriero*, 630 N.Y.S.2d 163, 169 (App. Div. 1995); *State v. Bronxville Glen I Assocs.*, 581 N.Y.S.2d 189, 190 (App. Div. 1992). The Supreme Court of New York has held that a new cause of action accrues for each action that purportedly violated the Martin Act. *State v. 7040 Colonial Rd. Assocs. Co.*, 671 N.Y.S.2d 938, 944 (App. Div. 1998). Schneiderman will need to show that ExxonMobil's last violation of the Martin Act occurred within six years of the date he commences an action. See N.Y. GEN. BUS. LAW § 213 (McKinney 2016); *Podraza*, 360 N.Y.S.2d at 169.

⁷ Gillis & Krauss, *supra* note 1.

⁸ *Id.*

defendant committed fraud “in connection with the sale of securities and commodities,” and that fraud deceived or misled investors.⁹

Schneiderman’s investigation was prompted, in part, by investigative reporting from *InsideClimate News* and the *Los Angeles Times*.¹⁰ An eight-month investigation conducted by *InsideClimate News* tracked ExxonMobil’s early climate change research in the 1970s, and concluded that the company contradicted itself by later funding research denying climate change in order to promote its business.¹¹ The *Los Angeles Times* uncovered how ExxonMobil pioneered climate change research in the 1980s and closely studied how climate change impacts the company’s strategy—affirming the certainty of its existence—while simultaneously establishing a public policy that questioned this certainty because of the negative impact potential legislation and regulation would have on business.¹²

In September 2016, Schneiderman’s office expanded its investigation of the company to scrutinize its accounting practices, specifically examin-

⁹ *People v. Federated Radio Corp.*, 154 N.E. 655, 657 (N.Y. 1926).

¹⁰ Gillis & Krauss, *supra* note 1. The *InsideClimate News* and *Los Angeles Times* investigations focus on Exxon, which merged with Mobil Oil in 1999. See *Exxon: The Road Not Taken*, INSIDECLIMATE NEWS, <http://insideclimatenews.org/content/Exxon-The-Road-Not-Taken> [https://perma.cc/N693-BZAD] (providing an overview of the *InsideClimate News* series investigating Exxon); The Energy and Environment Reporting Fellowship, COLUM. JOURNALISM SCH., <http://www.journalism.columbia.edu/page/1184-the-energy-and-environment-reporting-fellowship/8> [http://perma.cc/9H6Q-GRUR] (detailing the collaboration between the *Los Angeles Times* and Columbia Journalism School’s Energy & Environment Fellowship Project to produce the investigative series); Our History, EXXONMOBIL, http://exxonmobil.com/Benelux-English/about_who_history.aspx [https://perma.cc/LD83-B3XJ]. In an August 2016 interview with *The New York Times*, Schneiderman said this research is not the focus of his investigation, but was “important to establish knowledge and the framework to look for inconsistencies.” Schwartz, *supra* note 3.

¹¹ See *Exxon: The Road Not Taken*, *supra* note 10.

¹² Jennings, Grandoni & Rust, *supra* note 6. ExxonMobil is the world’s largest publicly traded oil and gas company. *About Us*, EXXONMOBIL CORP., <http://corporate.exxonmobil.com/en/company/about-us> [https://perma.cc/BJW4-LZ6E]. Burning oil and gas to create energy creates carbon dioxide emissions, which contributes to climate change. *Overview of Greenhouse Gases*, ENVTL. PROT. AGENCY, <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> [https://perma.cc/QLH3-QZKB]. ExxonMobil expressed its public policy through newspaper advertising campaigns, public executive statements, and at the company’s shareholder meetings. See Sara Jerving et al., *What Exxon Knew About the Earth’s Melting Arctic*, L.A. TIMES (Oct. 9, 2015), <http://graphics.latimes.com/exxon-arctic/> [https://perma.cc/P9VH-ZF3M]. In 1989, Exxon’s manager of science and strategy development, Duane LeVine, told the board of directors that “scientists generally agreed gases released by burning fossil fuels could raise global temperatures significantly by the middle of the 21st century.” Jennings, Grandoni & Rust, *supra* note 6. In April 2016, the Center for International Environmental Law published an extensive report showing that the oil industry was aware of climate change risks as far back as the 1960s. *New Documents Reveal Oil Industry Knew of Climate Risks Decades Earlier Than Suspected; Suggest Coordinated Efforts to Foster Skepticism*, CTR. FOR INT’L ENVTL. L. (Apr. 13, 2016), <http://www.ciel.org/news/smoke-and-fumes/> [https://perma.cc/VZB3-6HQ5]. The report also uncovered a connection between the oil and tobacco industries, and showed that the two industries worked together to strategize approaches to policy. CTR. FOR INT’L ENVTL. L., *supra*.

ing why ExxonMobil did not write-down the value of its oil and gas reserves on the company's balance sheet when energy prices dropped.¹³ Though ExxonMobil had cooperated with Schneiderman's investigation for nearly a year, in October 2016 the company added Schneiderman to a lawsuit seeking to block the subpoena, claiming infringement of the company's free speech rights.¹⁴ Schneiderman has repeatedly quipped that "the First Amendment doesn't protect you for fraud."¹⁵ Days after Schneiderman announced the expansion of his investigation into ExxonMobil's accounting methods, the Securities and Exchange Commission ("SEC") opened its own investigation into how the company values its assets.¹⁶

At the end of January 2017, ExxonMobil wrote down the value of more than two billion dollars in assets.¹⁷ This was the first time the company booked such a decline since at least 1990.¹⁸ Less than a month later, in its annual 2016 report to the SEC, it "de-booked" a further 3.5 billion barrels of oil reserves in an oil sands project in Canada.¹⁹ The company did not mention the investigations as motivation for these actions.²⁰

¹³ Bradley Olson, *Exxon's Accounting Practices Are Investigated*, WALL ST. J. (Sept. 16, 2016, 5:53 AM), <http://www.wsj.com/articles/exxons-accounting-practices-are-investigated-1474018381> [<https://perma.cc/W9ZA-X924>]. A write-down is the readjustment of an asset's value given internal or external circumstances that warrant a new valuation. *Id.* Since 2014, ExxonMobil's rivals in the energy industry have collectively written down their oil and gas asset values by two hundred billion dollars in light of lower crude oil and natural gas prices. *Id.* Lower fuel prices make the cost of tapping into oil and gas reserves more expensive to the point of being cost prohibitive. *Id.*

¹⁴ ExxonMobil Corporation's Memorandum of Law in Support of Its Motion for Leave to File a First Amended Complaint at *7, *Exxon Mobil Corp. v. Healey*, No. 4:16-CV-469-K (N.D. Tex. 2016 Dec. 15, 2016), 2016 WL 6460416. ExxonMobil had produced more than 2.5 million pages of documents related to the investigation at the time of publication. Erin Ailworth, *Exxon Rejects New York's Accusations in Climate Case*, WALL ST. J. (Sept. 20, 2016, 7:55 PM), <https://www.wsj.com/articles/exxon-rejects-new-yorks-accusations-in-climate-case-1489717149> [<https://perma.cc/Z9ZX-P223>].

¹⁵ Schwartz, *supra* note 3. This line appears to have been inspired by a Supreme Court opinion by Justice Ruth Bader Ginsburg, which held that the First Amendment does not protect fraudulent statements or actions. *See* Letter from Richard A. Johnson, Chief Legal Counsel for Mass. Att'y Gen. Maura Healey, to Lamar Smith, Chairman, Comm. on Sci., Space, & Tech. (July 26, 2016), <http://www.mass.gov/ago/docs/energy-utilities/exxon/ltr-to-congressman-lamar-smith-7-26-16.pdf> [<https://perma.cc/5D6J-U82Q>].

¹⁶ Bradley Olson & Aruna Viswanatha, *SEC Probes Exxon Over Accounting for Climate Change*, WALL ST. J. (Jan. 31, 2017, 5:18 PM), <http://www.wsj.com/articles/sec-investigating-exxon-on-valuation-of-assets-accounting-practices-1474393593> [<http://perma.cc/4W7H-BV4J>].

¹⁷ Bradley Olson, *Exxon Profit Tumbles on Charge; Revenue Rises*, WALL ST. J., <https://www.wsj.com/articles/exxon-profit-tumbles-on-charge-revenue-rises-1485869562> [<https://perma.cc/H5S6-EQWM>].

¹⁸ *Id.*

¹⁹ Geoffrey Smith, *Exxon's Big Oil Sands Write-Off Could Help It Dodge SEC Troubles*, FORTUNE (Feb. 23, 2017), <http://fortune.com/2017/02/23/exxon-mobil-oil-sands-sec/> [<https://perma.cc/CM5P-HR86>]. Writing down reserves and de-booking reserves are related but separate actions. Olson, *supra* note 13. Assigning a book value to oil or gas reserves, known as booking

Part I of this Note discusses the extraordinary discovery power the Act grants New York's Attorney General, and demonstrates how the Act's strong criminal and civil penalties induce corporations to comply with investigations.²¹ Part I of this Note also details former Attorney General Eliot Spitzer's powerful reforms of the financial services industry which were enabled by the Act and which may serve as a blueprint for Schneiderman's attempted reform of climate change disclosures.²² Part II examines the earlier national cooperative effort by states' Attorneys General and Congress against Big Tobacco as a potential model for nationally comprehensive climate change litigation and legislation.²³ Part III outlines theories behind investigations from Schneiderman and the SEC.²⁴ Finally, Part IV traces the increasingly convoluted battle in the climate change debate.²⁵

I. THE MARTIN ACT: NEW YORK'S SECURITIES FRAUD STATUTE

A. Attorneys General as Power Politicians: How the Martin Act Gained Its Strength

The Martin Act ("the Act") is unique today among state and federal securities laws because of its investigatory strength, broad coverage, and the combined civil and criminal range of the authority it gives to the Attorney General.²⁶ The statute, enacted in 1921, is New York's blue sky law.²⁷ Blue sky laws received their name because they were enacted to hinder and prosecute fraud from securities sellers, who would defraud unknowing investors

reserves, involves expert opinions from engineers, geophysicists and geologists, who collectively decide if recent discoveries can be extracted in a cost-effective manner under current regulations. *Id.* De-booking refers to the formal recognition of the impact the falling value of a reserve will have on the company and is recorded as a charge to a company's income statement. *Id.* The Financial Accounting Standards Board, a non-governmental financial and reporting organization that sets standards for publicly traded American companies, governs the rules pertaining to this process, and has not announced an investigation of ExxonMobil to date. *Id.*

²⁰ Smith, *supra* note 19.

²¹ See *infra* notes 26–81 and accompanying text.

²² See *infra* notes 26–82 and accompanying text.

²³ See *infra* notes 82–113 and accompanying text. ExxonMobil has resisted this comparison, calling tobacco a harmful, addictive product used by a "portion of the public," whereas fossil fuels are a key part of the global economy. Amy Hardler et al., *Exxon Fires Back at Climate Change Probe*, WALL ST. J. (Apr. 14, 2016, 3:08 PM), <http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535> [https://perma.cc/5WAV-KCW5].

²⁴ See *infra* notes 114–160 and accompanying text.

²⁵ See *infra* notes 161–214 and accompanying text.

²⁶ Tidman, *supra* note 4, at 389; see N.Y. GEN. BUS. LAW §§ 352–359-H (McKinney 2016).

²⁷ Nicholas Thompson, *The Sword of Spitzer*, LEGAL AFF. MAY–JUN. 2004, at 51, https://www.legalaffairs.org/issues/May-June-2004/feature_thompson_mayjun04.msp [https://perma.cc/A67T-5892]; see N.Y. GEN. BUS. LAW §§ 352–359-H.

by peddling worthless pieces of paper that represented valueless or nonexistent corporations.²⁸

The New York Attorney General's Investor Protection Bureau enforces the Act.²⁹ The Act enables the Attorney General to investigate and bring enforcement action to stop securities fraud if the Attorney General believes that someone previously engaged in, is currently engaged in, or is about to engage in fraudulent practices.³⁰

The Martin Act uniquely enables the New York Attorney General to seek both civil and criminal penalties.³¹ When originally enacted, the statute only granted the Attorney General authority to seek civil penalties; the New

²⁸ Thompson, *supra* note 27. These peddlers were purportedly willing to “sell shares of the blue sky if they could.” *Id.* Unlike other states’ blue sky laws, the Martin Act focuses on enforcement against fraud, and does not regulate the registration of brokers and securities. *Id.*

²⁹ *Investor Protection Bureau*, N.Y. STATE OFFICE OF THE ATT’Y GEN., <http://www.ag.ny.gov/bureau/investor-protection-bureau> [<https://perma.cc/VY2T-PPDR>]; Jeff Izant, *Mens Rea and the Martin Act: A Weapon of Choice for Securities Fraud Prosecutions?*, 2012 COLUM. BUS. L. REV. 913, 939; see N.Y. GEN. BUS. LAW §§ 352–359-H. This authority is part of the Attorney General’s role as the “People’s Lawyer” and state’s chief legal officer. *Our Office*, N.Y. STATE OFFICE OF THE ATT’Y GEN., <https://ag.ny.gov/our-office> [<https://perma.cc/2WRV-2848>].

³⁰ N.Y. GEN. BUS. LAW § 353. The New York Attorney General pursues Martin Act investigations to protect consumers and investors. *Id.* Some ExxonMobil investors have taken matters into their own hands regarding the company’s actions related to climate change. See Terry Wade & Anna Driver, *Rockefeller Family Fund Hits Exxon, Divests from Fossil Fuels*, REUTERS (Mar. 24, 2016, 10:48 AM), <http://www.reuters.com/article/us-rockefeller-exxon-mobil-investments-idUSKCN0WP266> [<http://perma.cc/3KZC-9QUV>]. In March 2016, the Rockefeller Family Fund announced it was divesting from fossil fuels, including its ExxonMobil holdings. *Id.* While only a small portion of the Rockefeller Family Fund’s endowment is invested in fossil fuels, the move is significant because the Rockefeller family made its fortune from Standard Oil, a corporate predecessor to ExxonMobil. *Id.* A separate group of ExxonMobil investors have pushed the company to increase its transparency around climate change, leading to the appointment of climate scientist Susan Avery to the ExxonMobil board of directors. Ed Crooks, *ExxonMobil Appoints Climate Scientist to Board*, FINANCIAL TIMES (Jan. 26, 2017), <https://www.ft.com/content/d87ce444-e388-11e6-8405-9e5580d6e5fb> [<https://perma.cc/ZFM3-73ZY>]. Another group of shareholders filed a class action lawsuit against ExxonMobil for allegedly concealing knowledge about climate change related to the valuation of its hydrocarbon reserves. Complaint for Violation of the Federal Securities Law at *22–23, *Ramirez v. ExxonMobil Corp.*, No. 16-cv-03111 (N.D. Tex. Nov. 7, 2016), 2016 WL 6594861. The shareholders contend that ExxonMobil overstated its ability to extract the reserves despite its knowledge that carbon limits would prevent it from doing so. *Id.* at *1–2. The lawsuit claims that ExxonMobil did so in order to secure a twelve billion dollar debt offering in the spring of 2016. *Id.* at *2. Months later, the company’s share price fell when it became apparent that the Securities and Exchange Commission (“SEC”) and Schneiderman were investigating the company’s accounting methods. *Id.* at *3; see *supra* notes 13–16 and accompanying text. The shareholders seek compensatory damages for their losses caused by the thirteen percent drop in share price after the investigations were announced. Complaint for Violation of Federal Securities Law, *supra*, at *24. At the time of publication, this case was ongoing. *Id.*

³¹ Kulbir Walha & Edward E. Filusch, *Eliot Spitzer: A Crusader Against Corporate Malfeasance or a Politically Ambitious Spotlight Hound? A Case Study of Eliot Spitzer and Marsh & McLennan*, 18 GEO. J. LEGAL ETHICS 1111, 1116 (2005).

York legislature strengthened the statute in 1955 by amending it to include criminal penalties.³²

The Attorney General, pursuant to the Martin Act, has significant power to investigate suspected fraud related to the offer, sale, and purchase of securities.³³ The New York Court of Appeals defined fraud under the statute as any deceitful or dishonest practice.³⁴ The court reasoned that because the purpose of the Act is to prevent any fraud in the sale of securities, the Act governs any actions that tend to deceive or mislead investors, without regard to the actor's intent.³⁵

Under the Act, the Attorney General may sue to permanently enjoin fraudulent securities practices if he or she believes that any person or corporation is involved in fraudulent activities.³⁶ The Act is an especially potent tool in prosecuting fraud because the Attorney General does not need to show that the corporate defendant had any intent to deceive, manipulate, or defraud in order for the Attorney General to investigate, subpoena, or enjoin a party.³⁷ New York courts have upheld the statute's lack of intent.³⁸ For example, in *People v. Photocolor Corp.*, the court found that restricting the Attorney General's enforcement power to intentional acts of fraud would contradict the legislature's intent to grant the Attorney General the power to protect "against fraudulent practice in the advertisement and sale of securities."³⁹

The statute also does not require the Attorney General to show that third parties or the public relied on the defendant's fraudulent actions, nor is there a requirement of damages suffered.⁴⁰ Additionally, those called in for questioning as part of Martin Act investigations do not have a right to counsel, nor a right against self-incrimination.⁴¹

³² *Id.*

³³ *Investor Protection Bureau*, *supra* note 29; Thompson, *supra* note 27, at 50.

³⁴ *People v. Federated Radio Corp.*, 154 N.E. 655, 657 (N.Y. 1926).

³⁵ *Id.*

³⁶ N.Y. GEN. BUS. LAW § 352 (McKinney 2016).

³⁷ *People v. Barysh*, 408 N.Y.S.2d 190, 193 (Sup. Ct. 1978); Tidman, *supra* note 4, at 390.

³⁸ *Federated Radio Corp.*, 154 N.E. at 658 (establishing that the Martin Act's purpose is to prevent all kinds of fraud and the statute does not require the fraudulent act to have any evil design); *Barysh*, 408 N.Y.S.2d at 193 (stating plainly that the Martin Act does not require the common law element of *scienter*); *People v. Photocolor Corp.*, 281 N.Y.S. 130, 135, 137 (Sup. Ct. 1935) (citing *Federated Radio Corp.*, 154 N.E. at 657–58) (holding that the Martin Act reaches a variety of conduct and does not require malfeasance or even outright fraud).

³⁹ 281 N.Y.S. at 136–37.

⁴⁰ Robert G. Morvillo & Robert J. Anello, *Securities, Investigations and Prosecutions Under the Martin Act*, N.Y.L.J. (Mar. 31, 2003), <http://www.newyorklawjournal.com/id=900005383709/?sreturn=20160928114851> [<https://perma.cc/QG3E-AUVQ>].

⁴¹ Thompson, *supra* note 27, at 51.

B. A History of Enforcement from Ottinger to Schneiderman

The Act was not always as strong as it is today.⁴² Originally, the Act automatically granted immunity to anyone who testified in cooperation with an investigation, making it difficult to prosecute corporate actors the Attorney General believed were engaging in fraud.⁴³ After the removal of the Act's immunity clause in 1925, Attorney General Albert Ottinger became the first to aggressively use the Act.⁴⁴

Ottinger's actions survived a challenge that sought to limit the statute's subpoena power as unconstitutional.⁴⁵ In *Dunham v. Ottinger*, a stockbroker objected to an investigation by Ottinger on the grounds that the Act grants the Attorney General judicial powers, subjects a defendant to unlawful search and seizure, and compels a defendant to incriminate himself.⁴⁶ The plaintiff argued that the Attorney General determines the issue of a civil violation or of criminal guilt in a judicial manner, has power to conduct an investigation so broad that it amounts to search and seizure, and compels self-incrimination because the statute's immunity clause was removed.⁴⁷ The Court of Appeals of New York held that the Attorney General does not act judicially in determining if unlawful practices should be enjoined, the statute does not authorize unreasonable search and seizure, and that the power to subpoena and examine witnesses is necessary to ensure proper supervision of a corporations' affairs.⁴⁸

After Ottinger, later Attorneys General overlooked the statute until Eliot Spitzer used it as a tool for investigating and prosecuting large financial firms.⁴⁹ The additional threat of criminal penalties in the Act allowed Spitzer to obtain multi-million dollar settlements from national financial giants despite the two thousand dollar statutory limit on fines.⁵⁰

Spitzer opened a Martin Act investigation into Merrill Lynch after De-bases Kanjilal, a pediatrician, brought an arbitration action in early 2001 against Merill Lynch stock analyst Henry Blodget.⁵¹ Kanjilal claimed he lost over five hundred thousand dollars by investing in companies recom-

⁴² *Id.* at 50.

⁴³ *Id.* at 51.

⁴⁴ *Id.* Ottinger used the Martin Act to close the Consolidated Stock Exchange. *Id.*

⁴⁵ *Dunham v. Ottinger*, 154 N.E. 298, 299–300, 302 (N.Y. 1926).

⁴⁶ *Id.* at 298–300.

⁴⁷ *See id.* at 299–300.

⁴⁸ *Id.* at 300.

⁴⁹ *See* Thompson, *supra* note 27, at 52.

⁵⁰ *See* Walha & Filusch, *supra* note 31, at 1116; *see infra* notes 68, 73 and accompanying text.

⁵¹ Thompson, *supra* note 27, at 53; Barbara Moses, *The "Discovery" of Analyst Conflicts on Wall Street*, 70 BROOK. L. REV. 89, 99 (2004).

mended by Blodget.⁵² Kanjilal said that Blodget advised him to refrain from selling his stock in the internet company InfoSpace as its price declined because of an undisclosed connection between Merrill Lynch's investment banking business and InfoSpace.⁵³ Under Merrill Lynch's compensation scheme, this conflict of interest benefited Blodget.⁵⁴ In July 2001, Merrill Lynch settled with Kanjilal for four hundred thousand dollars in order to avoid the cost of litigation.⁵⁵

Spitzer intensified discovery efforts when Merrill Lynch settled with Kanjilal on favorable terms to its former client, suggesting to Spitzer that the company was hiding something.⁵⁶ After a year of investigation, in April 2002, his office contacted Kanjilal's lawyer, who shared his insight to further the Attorney General's investigation.⁵⁷

During the summer of 2001, Spitzer's office conducted numerous interviews with Blodget.⁵⁸ If a defendant in a Martin Act investigation refuses to be examined, answer material questions, or produce documents relevant to the inquiry when ordered to by the judge conducting the inquiry, the refusal will be prima facie evidence of the defendant's fraud.⁵⁹ After the defendant's refusal, the New York court overseeing the investigation may issue a permanent injunction without further showing of fault by the Attorney General.⁶⁰ Nevertheless, Blodget, who was well known as a star analyst for his accurate recommendations regarding internet stocks, seemed mostly unfazed by the investigation and corresponding interviews.⁶¹

⁵² Moses, *supra* note 51, at 99.

⁵³ Charles Gasparino, *All-Star Analyst Faces Arbitration After Internet Picks Hit the Skids*, WALL ST. J. (Mar. 2, 2001, 12:19 AM), <http://www.wsj.com/articles/SB98349748239270607> [<https://perma.cc/GJR7-YW6G>].

⁵⁴ *Id.*

⁵⁵ Charles Gasparino, *Merrill Settles with Former Client in Wake of Analyst's Stock Call*, WALL ST. J. (July 20, 2001, 12:01 AM), <http://www.wsj.com/articles/SB99558452775686457> [<https://perma.cc/PYW8-G8DP>].

⁵⁶ Thompson, *supra* note 27, at 53.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ N.Y. GEN. BUS. LAW § 353 (McKinney 2016). After an Attorney General decides to commence a Martin Act action, he or she makes a request in writing to a New York State Supreme Court justice asking for an order that mandates a person to appear and answer certain questions or produce relevant documentation. *Id.* § 354. It is the justice's duty to grant the application so long as the Attorney General has shown that this information is necessary based on the belief of the Attorney General. *Id.* The Attorney General's decision to commence a Martin Act proceeding is not subject to judicial review; the only issue "subject to judicial scrutiny is whether a sufficient factual showing has been made to warrant issuance of the order . . ." *Gonkjur Assocs. v. Abrams*, 443 N.Y.S.2d 69, 74 (App. Div. 1981).

⁶⁰ N.Y. GEN. BUS. LAW § 353.

⁶¹ John Cassidy, *The Investigation*, NEW YORKER (April 7, 2003), <http://www.newyorker.com/magazine/2003/04/07/the-investigation> [<https://perma.cc/8RRM-2P5U>].

Attorney General Spitzer commenced a Martin Act proceeding against Merrill Lynch, Blodget, and seven other employees.⁶² Subpoenas from the investigation uncovered emails showing that brokers gave investment advice to clients based on promises of future investment banking business with Merrill Lynch.⁶³ The investigation resulted in a court order that required Merrill Lynch to disclose any prior, current, or potential investment banking relationships with the companies for which it was issuing investment advice.⁶⁴

By taking the proceeding public through press conferences and public statements, Spitzer demonstrated another strength of the Act.⁶⁵ In the week after he publicized the complaint against Merrill Lynch, the company's stock price plummeted, resulting in a five billion dollar decrease in market value.⁶⁶ At the end of six weeks, Merrill Lynch settled with Spitzer's office, agreeing to pay a one hundred million dollar civil penalty.⁶⁷ The company agreed to disclose its investment banking relationships.⁶⁸ As part of the settlement, Merrill Lynch also created an internal Research Recommendation Committee to monitor its analysts, and to remove any connection between the investment banking group's performance and analysts' compensation.⁶⁹

After settling with Merrill Lynch, Spitzer joined with the Securities and Exchange Commission ("SEC"), the National Association of Securities Dealers, the New York Stock Exchange, and the North American Securities Administrators Association to investigate investment banking practices in New York's ten largest investment firms, including Merrill Lynch.⁷⁰ Ultimately, Credit Suisse, First Boston, Goldman Sachs, Morgan Stanley, Salomon Smith Barney, Bear Sterns, Deutsche Bank, JPMorgan Chase, Leh-

⁶² Moses, *supra* note 51, at 99.

⁶³ Thompson, *supra* note 27, at 53; Moses, *supra* note 51, at 100.

⁶⁴ Order Pursuant to General Business Law Section 354 at 4, *In re Spitzer*, No. 02-401522 (N.Y. Sup. Ct. Apr. 8, 2002), http://www.ag.ny.gov/sites/default/files/press-releases/archived/apr_08b_02_attach.pdf [<https://perma.cc/W35N-BDKA>]. One of the Martin Act's unique strengths is the discovery power it gives to the Attorney General through subpoena and information-gathering before even filing a lawsuit. Walha & Filusch, *supra* note 31, at 1116.

⁶⁵ See Thompson, *supra* note 27, at 53.

⁶⁶ *Id.*

⁶⁷ Moses, *supra* note 51, at 101.

⁶⁸ *Id.*

⁶⁹ See *id.* In 2003, the SEC separately banned Blodget from the securities industry permanently, and settled with a fine of four million dollars. *The Securities and Exchange Commission, NASD and the New York Stock Exchange Permanently Bar Henry Blodget from the Securities Industry and Require \$4 Million Payment*, SEC. & EXCH. COMM'N (Dec. 20, 2002), <https://www.sec.gov/news/press/2003-56.htm> [<https://perma.cc/T39S-WG3X>]. In 2007, Blodget co-founded the online financial and news site Business Insider, which he sold eighty eight percent of for 343 million dollars. Press Release, Axel Springer, Leading Digital Publisher Axel Springer Acquires *Business Insider* (Sept. 29, 2015), http://www.axelspringer.de/en/presse/Leading-Digital-Publisher-Axel-Springer-Acquires-Business-Insider_24619096.html [<https://perma.cc/APK7-DNPR>]. Blodget remains the site's CEO and Editor in Chief. *Id.*

⁷⁰ Moses, *supra* note 51, at 102.

man Brothers, and UBS all agreed to the disclosure requirements imposed on Merrill Lynch as a result of the Martin Act proceeding.⁷¹ The firms also agreed to pay over 1.4 billion dollars in penalties, restitution, and funds for investor education, well above the two thousand dollar limit that the New York Attorney General could seek in a civil case.⁷²

Spitzer went on to attack the hedge fund and mutual fund industries using the Act.⁷³ He obtained a forty million dollar settlement with the hedge fund Canary Capital Partners for its illegal trades with mutual funds.⁷⁴ His successor, Andrew Cuomo, used the Act similarly to investigate Ernst & Young for approving an accounting technique at Lehman Brothers that enabled fraud.⁷⁵

Cuomo's successor Schneiderman used the Act in both financial and environmental matters.⁷⁶ Since taking the office of Attorney General in 2011, Schneiderman has reached settlements with Bank of New York Mellon, JPMorgan Chase, and BlackRock for violations of the Martin Act.⁷⁷ Schneiderman also investigated natural gas companies regarding public disclosures of information related to the financial risks of fracking.⁷⁸ As part of an agreement reached in October 2014, Anadarko Petroleum Corp. and EOG Resources committed to disclose financial risks posed by the environmental impacts of fracking.⁷⁹ At the time, Schneiderman said his office was still

⁷¹ See Press Release, Sec. & Exch. Comm'n, *SEC, NY Attorney General, NASD, NASAA, and State Regulators Announce Historic Agreement to Reform Investment Practices; \$1.4 Billion Global Settlement Includes Penalties and Funds for Investors* (Dec. 20, 2002), <https://www.sec.gov/news/press/2002-179.htm> [<https://perma.cc/46A2-2N45>].

⁷² *Id.*; Walha & Filusch, *supra* note 31, at 1116.

⁷³ Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107, 119 (2005).

⁷⁴ *Id.*

⁷⁵ Michael J. de la Merced, *In JPMorgan Case, the Martin Act Rides Again*, N.Y. TIMES: DEAL BOOK (Oct. 2, 2012, 12:06 PM), <http://dealbook.nytimes.com/2012/10/02/in-jpmorgan-case-the-martin-act-rides-again/> [<https://perma.cc/7XRF-8G72>].

⁷⁶ Nina Hart, *Moving at a Glacial Pace: What Can State Attorneys General Do About SEC Inattention to Nondisclosure of Financially Material Risks Arising from Climate Change?*, 40 COLUM. J. ENVTL. L. 99, 134–35 (2015); Press Release, N.Y. State Office of the Att'y Gen., A.G. Schneiderman Reaches Agreement with Natural Gas Developers to Increase Disclosure of Fracking Risks to Investors, (Oct. 3, 2014), <http://www.ag.ny.gov/press-release/ag-schneiderman-reaches-agreement-natural-gas-developers-increase-disclosure-fracking> [<https://perma.cc/W7UF-6NUN>] [hereinafter *Fracking Disclosure Press Release*].

⁷⁷ Hart, *supra* note 76, at 135.

⁷⁸ *Fracking Disclosure Press Release*, *supra* note 76.

⁷⁹ *Id.*

looking into other companies' disclosure practices.⁸⁰ A month later, the Attorney General began his investigation of ExxonMobil.⁸¹

II. AN INTERSTATE EFFORT TO TAKE ON BIG TOBACCO: REACHING THE MASTER SETTLEMENT AGREEMENT

States' Attorneys General have worked together to jointly prosecute cross-border violations of federal and state laws when the underlying statutes and bad acts are sufficiently similar.⁸² States' Attorneys General may share information with each other pursuant to confidentiality agreements.⁸³ A prime example of this type of inter-state cooperation is the so-called "Master Settlement Agreement" ("the Agreement") reached between Attorneys General from forty-six states and the four largest tobacco companies—Philip Morris Inc., R.J. Reynolds Tobacco Company, Brown and Williamson Tobacco Corp., and Lorillard Tobacco Company—for 206 billion dollars.⁸⁴

Anti-tobacco activists classify tobacco litigation in waves, beginning in the 1950s and continuing today.⁸⁵ In the first and second waves of litigation, private plaintiffs brought cases against tobacco companies seeking to recover for medical expenses related to smoking.⁸⁶ In the 1950s through the 1980s, tobacco companies successfully dismissed or settled these private cases by denying that smoking caused lung cancer, and claiming that such a connection was dubious given available research.⁸⁷ In the next wave of litigation from the 1980s through the early 1990s, the companies maintained a nearly spotless record in defending themselves against private individuals by using mounting legal costs and delay tactics to push these individuals out of court.⁸⁸ In 1995, President William Clinton approved legislation declaring nicotine an addictive drug, and authorized the Food and Drug Admin-

⁸⁰ Keith Goldberg, *Anadarko, EOG Agree to Disclose Fracking Financial Risks*, LAW360 (Oct. 3, 2014, 2:50 PM), <http://www.law360.com/articles/584056/anadarko-eog-agree-to-disclose-fracking-financial-risks> [<https://perma.cc/HV4D-ZY5N>].

⁸¹ See Gillis & Krauss, *supra* note 1. As Schneiderman's investigation remains private, the basis for his subpoenas and legal arguments cannot be verified. *Id.*

⁸² See Seth M. Wood, Note, *The Master Settlement Agreement as Class Action: An Evaluative Framework for Settlements of Publicly Initiated Litigation*, 89 VA. L. REV. 597, 599, 610 (2003).

⁸³ John Schwartz, *ExxonMobil Climate Change Inquiry in New York Gains Allies*, N.Y. TIMES (Mar. 29, 2016), http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=0 [<https://perma.cc/L45A-HXR8>].

⁸⁴ See Lori Ann Luka, *The Tobacco Industry and the First Amendment—An Analysis of the 1998 Master Settlement Agreement*, 14 J. L. & HEALTH 297, 298 & nn.6–7 (2000).

⁸⁵ Caplan, *supra* note 6.

⁸⁶ *See id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

istration (FDA) to regulate tobacco products.⁸⁹ Clinton also announced regulations that would restrict the sale and distribution of tobacco products.⁹⁰

Attorneys General from Mississippi, Florida, Texas, and Minnesota first filed lawsuits against Philip Morris, R.J. Reynolds, Brown and Williamson Tobacco Corp., and Lorillard Tobacco Company.⁹¹ Mississippi's Attorney General Mike Moore said the lawsuit simply placed the cost of the health crisis on the companies that caused it.⁹² The Attorneys Generals' claims varied from case to case and included unjust enrichment, public nuisance, negligence, antitrust conspiracy, consumer fraud, and racketeering.⁹³ The theory underlying these claims was the belief that the tobacco companies should repay the state Medicaid funds spent on treating smoking-related illnesses.⁹⁴ Each state eventually signed individual settlements with the tobacco companies.⁹⁵

Over the next few years, more states' Attorneys General filed lawsuits against the same four tobacco companies in order to seek compensation for the costs of treating cigarette-related disease and illness.⁹⁶ Under this legal theory, the tobacco companies could not use the defense that smoking is a personal choice and smokers therefore subjected themselves to harm.⁹⁷ The states alleged a number of claims including conspiracy, product liability, racketeering, fraud, and violations of antitrust, unfair trade, and public nuisance laws.⁹⁸ Specifically, the lawsuits alleged the tobacco companies had

⁸⁹ Luka, *supra* note 84, at 298. As a result, the Food and Drug Administration adopted and published findings categorizing nicotine in tobacco products as a drug to be regulated under the Food, Drug, and Cosmetic Act. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,314 (Aug. 11, 1995) (to be codified at 21 C.F.R. pts. 801, 803, 804, 897). The FDA now has authority to regulate tobacco products. 21 U.S.C. § 387a (2012).

⁹⁰ Luka, *supra* note 84, at 298.

⁹¹ Wood, *supra* note 82, at 597–98, 598 n.4.

⁹² Michael Janofsky, *Mississippi Seeks Damages from Tobacco Companies*, N.Y. TIMES (May 24, 1994), <http://www.nytimes.com/1994/05/24/us/mississippi-seeks-damages-from-tobacco-companies.html> [<https://perma.cc/44YM-3PAX>].

⁹³ See, e.g. *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 969–72 (E.D. Tex. 1997) (analyzing Texas' statutory claims of racketeering, antitrust, and consumer fraud, and its common law claims of unjust enrichment, public nuisance, and negligence); *Minnesota v. Philip Morris, Inc.*, 1995 WL 1937124 at *3–4 (Minn. Dist. Ct. 1995) (analyzing Minnesota's claim of antitrust conspiracy).

⁹⁴ See Wood, *supra* note 82, at 598; Caplan, *supra* note 6.

⁹⁵ Wood, *supra* note 82, at 598.

⁹⁶ *Star Scientific Inc. v. Beales*, 278 F.3d 339, 344 (4th Cir. 2002).

⁹⁷ See Frank J. Vandall, *The Legal Theory and the Visionaries that Led to the Proposed \$368.5 Billion Tobacco Settlement*, 27 SW. U.L. REV. 473, 477 (2008).

⁹⁸ See, e.g. *Connecticut Tobacco Suit Survives Challenge but Firms Play Down Ruling*, WASH. POST, Dec. 27, 1999, at A15; David Phelps, *Tobacco Goes on Trial*, STAR TRIB. (Minneapolis), Jan. 18, 1998, at D1; Michele Kay, *Texas to Take Tobacco Case to Court*, AUSTIN AM. STATESMAN, Sept. 9, 1997, at A1; *Maryland and Connecticut Join States Seeking Tobacco Money*, N.Y. TIMES, May 2, 1996, at A20.

misled and deceived consumers by restricting access to their scientific research regarding the risks of cigarettes; committed fraud and racketeering by publicizing false statements about nicotine's addictiveness and smoking's health effects; and violated antitrust laws by stifling the development of safer cigarettes.⁹⁹

As even more states' Attorneys General filed lawsuits over the next three years, the tobacco manufacturers negotiated towards a Tobacco Resolution, a bill which was contingent on congressional approval.¹⁰⁰ The Tobacco Resolution failed when it appeared that it would subject the companies to higher fines and more regulations than they were willing to accept.¹⁰¹

In November 1998, forty-five states' Attorneys General along with Attorneys General from the District of Columbia and six territories adopted a different strategy to end litigation, signing the Master Settlement Agreement.¹⁰² The Agreement granted participating states and territories the power to enforce the agreement, bypassing the need for Congressional approval.¹⁰³ In addition to obligating the four tobacco companies to pay 206 billion dollars in compensation to the states for health expenditures related to smoking, the Agreement also created restrictions on advertising to limit the attractiveness of cigarettes, especially to children.¹⁰⁴ In exchange, the participating states and territories released the companies from all past claims related to tobacco sale, use, and marketing, and from any future monetary claims in connection to exposure to tobacco products or reimbursement for healthcare costs.¹⁰⁵

Because of the significant financial burden to the participating tobacco companies under the Agreement, it included a provision that would decrease the four tobacco companies' payments if they lost market share in that year.¹⁰⁶ The Agreement also required participating states and territories to each adopt statutes that effectively neutralized the competitive disadvantages of complying with the Agreement for the participating tobacco

⁹⁹ *Star Scientific Inc.*, 278 F.3d at 344. The Racketeer Influenced and Corrupt Organizations Act is a federal statute that could be used against ExxonMobil in litigation. Schwartz, *supra* note 83.

¹⁰⁰ *Star Scientific Inc.*, 278 F.3d at 344. Under the Tobacco Resolution, the tobacco companies would: (1) be subject to regulation by the Food and Drug Administration, (2) agree to restrictions on their advertising, and (3) assume the responsibility for reducing underage smoking. National Tobacco Policy and Youth Smoking Reduction Act, S. 1415, 105th Cong. (1998).

¹⁰¹ *Star Scientific Inc.*, 278 F.3d at 344.

¹⁰² Wood, *supra* note 82, at 634, 639.

¹⁰³ *Id.* at 597.

¹⁰⁴ Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 346 (2003).

¹⁰⁵ *Star Scientific Inc.*, 278 F.3d at 345.

¹⁰⁶ *Id.* at 345–46.

companies.¹⁰⁷ If a state or territory failed to adopt this legislation, it could lose future payments pursuant to the Agreement.¹⁰⁸ The novel structure of the Agreement, therefore, allowed a majority of states to use state legislation to create national regulation of the tobacco industry.¹⁰⁹

The Agreement steered by multiple Attorneys General serves as a useful potential blueprint for future litigation against oil and gas companies if they similarly misled investors about the effects of their activities on climate change.¹¹⁰ In addition to other reforms mandated by the Agreement, it required the participating tobacco companies to disclose thirty-five million pages of their research and marketing documents, which opened the door to

¹⁰⁷ *Id.* at 346.

¹⁰⁸ *Id.*

¹⁰⁹ See Greve, *supra* note 104, at 356. Shortly after the tobacco companies entered the Agreement, Star Scientific, a non-participating cigarette manufacturing company, challenged it. Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J. L. & SOC. PROBS. 511, 519 (2009). Because of its smaller size, the participating plaintiffs to the Agreement had not sued Star Scientific. *Star Scientific Inc.*, 278 F.3d at 343. The company argued it was unduly burdened by the Agreement, which protected the four participating tobacco manufacturers from losing the market share they enjoyed when entering the Agreement. *Id.* Star Scientific also protested the subsequent state legislation enacted pursuant to the Agreement as unconstitutional. *Id.* To comply with the state legislation, Star Scientific placed approximately 11.6 million dollars in escrow to compensate the participating states for its sales of tobacco products. *Id.* at 346. One of Star Scientific's claims was a violation of the Compact Clause, which prevents states from entering into agreements or compacts with other states without the consent of Congress. U.S. CONST. art. I, § 10, cl. 3 (prohibiting states from "enter[ing] into any Agreement or Compact with another State . . . unless actually invaded, or in . . . imminent [d]anger"). The United States Court of Appeals for the Fourth Circuit noted that the Compact Clause does not require congressional approval of every interstate agreement. *Star Scientific Inc.*, 278 F.3d at 359. Instead, the Compact Clause only applies to agreements that may increase the power of the states in a way that encroaches on powers that have been explicitly granted to the federal government. *Id.* (citing *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)). The Fourth Circuit concluded that, because the Agreement operated through enforcement at the state level, it was a vertical agreement between each state and the participating tobacco companies, and therefore did not infringe on federal supremacy. *Id.* at 360.

¹¹⁰ See Caplan, *supra* note 6. Not all Attorneys General view a collaborative strategy as an appropriate approach. See John W. Suthers, *The State Attorney General's Role in Global Climate Change*, 85 DENV. L. REV. 757, 758–59 (2008) (noting that joint action between states is appropriate only if a state's local executive branch directs the Attorney General to join such an action). In 2008, Colorado Attorney General John Suthers defined the Master Settlement Agreement and Spitzer's regulation of Wall Street as "Attorney General activism," or attempts to act in "the broader national . . . interest" by commencing litigation without statutory authority, thereby undermining "the jurisdictional authority of Congress and federal regulatory agencies." *Id.* at 758–60. He said that any action he could take in litigating environmental issues would be limited to pursuing violations of state law. *Id.* at 763. Suthers also attributed Attorney General activism to political ambition, saying he would "not be surprised to see the Attorney General of California or the Attorney General of New York up the ante in the near future" by bringing international lawsuits against carbon dioxide emitters as an extension of their jurisdictional power to act in the interests of citizens from their respective states, rather than on legislative grounds. *Id.* at 764.

a lawsuit from Congress and the FDA.¹¹¹ The documents revealed that the companies deceived the public through marketing campaigns, intentionally made their products addictive, and concealed the effect tobacco has on health.¹¹² The United States Court of Appeals for the District of Columbia Circuit found the defendant tobacco companies guilty of racketeering, or illegally collaborating, in order to defraud the American public about the harms of tobacco.¹¹³

III. THE MARTIN ACT AND EXXONMOBIL

A. *Early Energy Investigations: Xcel and Peabody Spark Attorneys Generals' Interest*

On December 12, 2015, the global community agreed to take steps to mitigate climate change with the adoption of the Paris Agreement; however, domestic litigation to hold corporations liable for past contributions to climate change have been largely unsuccessful.¹¹⁴ New York Attorney General

¹¹¹ Caplan, *supra* note 6. This disclosure allowed for further information-gathering from Congress and the FDA, which enabled the Justice Department to bring its own lawsuit. *Id.*

¹¹² *Id.*

¹¹³ *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1207–08 (D.C. Cir. 2005). The Department of Justice (“DOJ”) attorney who led the government’s prosecution in the racketeering case, Sharon Eubanks, has called on the DOJ to investigate ExxonMobil and other energy companies for similar racketeering violations. Emily Atkin, *Exxon’s Climate Cover-Up Should Be Investigated by DOJ, Tobacco Prosecutor Says*, THINK PROGRESS (Oct. 20, 2015, 8:17 AM), <http://thinkprogress.org/climate/2015/10/20/3713761/exxon-climate-denial/> [<https://perma.cc/V9SQ-J2LL>]. Eubanks said it appears that ExxonMobil and others “actively den[ie]d] the impact of human-caused carbon commissions, even when their own research showed otherwise.” *Id.*

¹¹⁴ U.N. Framework Convention on Climate Change, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015), <http://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf> [<https://perma.cc/5ERF-WHD3>]; Gillis & Krauss, *supra* note 1. Under the Paris Agreement, the United States agreed to reduce greenhouse gas emissions by twenty six percent of 2005 levels by 2025. Benjamin Avi Harris, *What the Supreme Court’s Stay of the Clean Power Plan Means for the EPA’s Greenhouse Gas Regulation Moving Forward*, UCLA J. ENVTL. L. & POL’Y (Feb. 15, 2016), published online through the *Environmental Law Review Syndicate*, <http://harvardelr.com/2016/02/15/elrs-what-the-supreme-courts-stay-of-the-clean-power-plan-means-for-the-epas-greenhouse-gas-regulation-moving-forward/> [<https://perma.cc/2S6K-KBS4>]. In 2015, the Environmental Protection Agency promulgated the final Clean Power Plan Rule, which would achieve a thirty two percent reduction in carbon dioxide from 2005 levels by 2030. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,665 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60). On February 10, 2016, the United States Supreme Court granted a petition staying the Clean Power Plan until a legal challenge can proceed on its merits before the District of Columbia Circuit Court of Appeals. Harris, *supra*. An official from the Obama administration stated that the Court’s stay on the Clean Power Plan should not affect implementation of the Paris Agreement. Fiona Harvey & Suzanne Goldenberg, *US Clean Power Plan Setback “Will Not Affect Paris Climate Change Deal,”* THE GUARDIAN (Feb. 10, 2016, 12:27 PM), <http://www.theguardian.com/environment/2016/feb/10/us-clean-power-plan-setback-will-not-affect-paris-climate-change-deal> [<https://perma.cc/D726-53NW>]. While running for President, Donald Trump pledged that he would withdraw the United States from the Paris Agreement, though he has not yet taken

Eric Schneiderman's Martin Act investigation into ExxonMobil has the potential to spur the kind of broad national reform that the Agreement created for the tobacco industry.¹¹⁵ The strengths of the Martin Act ("the Act") make New York the ideal venue for the first state action against ExxonMobil.¹¹⁶ The statute's strengths, especially its ability to force the disclosure of corporate information, may lead the way for subsequent federal actions.¹¹⁷

The broad subpoena powers of the Act allow the Attorney General to gain a great deal of otherwise confidential information.¹¹⁸ In 2007, Attorney General Andrew Cuomo used the statute to subpoena five energy companies that either have or planned to have coal-fired power plants.¹¹⁹ In August 2008, Cuomo reached an agreement with Xcel Energy, requiring the company to disclose the financial risks that climate change can pose.¹²⁰ This was the first enforceable agreement at the state or federal level that required a public company to disclose the risks of climate change in filings with the Securities and Exchange Commission ("SEC").¹²¹ In the press release announcing the agreement with Xcel Energy, Cuomo said that distorting facts about climate change is misleading and must be stopped.¹²² Months later, in October 2008, Cuomo followed through with his pledge to continue fighting for transparency regarding climate change by reaching a similar agreement with the national energy company Dynegy Inc.¹²³ Energy com-

action to do so. Amy Harder & Peter Nicholas, *Kushner, Ivanka Trump Pushed to Remove Words Critical of Climate Deal from Executive Order*, WALL ST. J. (Feb. 23, 2017, 6:10 PM), <https://www.wsj.com/articles/ivanka-trump-jared-kushner-pushed-to-remove-language-critical-of-climate-deal-from-executive-order-1487889272> [https://perma.cc/K44R-KEN2]. President Trump plans to dismantle the Clean Power Plan, which could signal that the United States does not plan to adhere to the Paris Agreement. Tatiana Schlossberg, *What to Know About Trump's Order to Dismantle the Clean Power Plan*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/science/what-to-know-about-trumps-order-to-dismantle-the-clean-power-plan.html> [https://perma.cc/8KDK-X36D].

¹¹⁵ See Caplan, *supra* note 6.

¹¹⁶ Hart, *supra* note 76, at 127–36.

¹¹⁷ See *id.* at 128; see Jones, *supra* note 73, at 122.

¹¹⁸ N.Y. GEN. BUS. LAW § 352 (McKinney 2016); *Dunham v. Ottinger*, 243 N.E. 298, 302 (N.Y. 1926); *supra* notes 26–40 and accompanying text.

¹¹⁹ RICHARD R. CAPOZZA, CLIMATE CHANGE ISSUES AFFECT CORPORATE RISKS AND OPPORTUNITIES 34 (2008) (part of the *Aspatore* series of books authored by leading practitioners).

¹²⁰ See Press Release, Xcel Energy, Xcel Energy, New York Attorney General Resolve Carbon disclosure Issues (Aug. 27, 2008), <http://investors.xcelenergy.com/File/Index?KeyFile=6589815> [https://perma.cc/6MR7-RRPX].

¹²¹ Capozza, *supra* note 119, at 34.

¹²² Press Release, N.Y. State Office of the Att'y Gen., Cuomo Announces Entergy to Back-off on Plan That Would Have Cost NYS \$432 Million Dollars (Aug. 27, 2008), <http://www.ag.ny.gov/press-release/cuomo-announces-entergy-back-plan-would-have-cost-nys-432-million-dollars> [http://perma.cc/X8FS-PG2C].

¹²³ Press Release, N.Y. State Office of the Att'y Gen., Attorney General Cuomo, Joined by Vice President Gore, Announces Agreement with Major Energy Company, Dynegy Inc. (Oct. 23, 2008), <http://www.ag.ny.gov/press-release/attorney-general-cuomo-joined-vice-president-gore-announces-agreement-major-energy> [https://perma.cc/4R57-2MMN].

pany AES Corp. also entered a similar agreement with Cuomo's office in November 2009.¹²⁴

Since his first election to the office of Attorney General in 2010, Schniederman has followed in Cuomo's footsteps.¹²⁵ He used the Act to investigate Peabody Energy Corp., the world's largest publicly traded coal company, which resulted in a settlement in November 2015.¹²⁶ The two-year investigation found that Peabody violated the Act's prohibition of false and misleading statements in securities transactions.¹²⁷ Specifically, Schneiderman found that Peabody Energy Corp. violated the Act because it publicly stated that the company could not predict the impact of climate change laws or regulations on its performance, even though an internal projection contained specific predictions for regulatory actions.¹²⁸ Although the Peabody Energy Corp. settlement is unrelated to the ExxonMobil investigation, it demonstrates Schneiderman's broader goal of seeking greater disclosure and transparency from other energy companies.¹²⁹

¹²⁴ Press Release, N.Y. State Office of the Att'y Gen., Attorney General Cuomo Announces Agreement with Aes to Disclose Climate Change Risks to Investors (Nov. 19, 2009), <http://www.ag.ny.gov/press-release/attorney-general-cuomo-announces-agreement-aes-disclose-climate-change-risks-investors> [<https://perma.cc/BX5B-PHUZ>].

¹²⁵ *About Eric*, ERIC SCHNEIDERMAN FOR ATT'Y GEN., <https://ericsschneiderman.com/about-eric/> [<https://perma.cc/2M27-YU3C>].

¹²⁶ See Press Release, N.Y. State Office of the Att'y Gen., A.G. Schneiderman Secures Unprecedented Agreement with Peabody Energy to End Misleading Statements and Disclose Risks Arising from Climate Change (Nov. 9, 2015), <https://ag.ny.gov/press-release/ag-schneiderman-secures-unprecedented-agreement-peabody-energy-end-misleading> [<https://perma.cc/PS4R-ATP5>] [hereinafter Peabody Energy Press Release]. In April 2016, Peabody Energy Corp. filed for Chapter 11 bankruptcy protection, citing a challenging market. John W. Miller & Matt Jarzemsky, *Peabody Energy Files for Chapter 11 Bankruptcy Protection*, WALL ST. J. (Apr. 14 2016, 6:37 PM), <http://www.wsj.com/articles/peabody-energy-files-for-chapter-11-protection-from-creditors-1460533760> [<https://perma.cc/AS6M-V6TF>]. The company emerged from bankruptcy protection in August 2016 and will continue to operate in a reorganized manner. Press Release, Peabody Energy, Peabody Energy Business Plan Approved by Debtor-In-Possession Lenders; Business Plan to Form Foundation for Plan of Reorganization (Aug. 10, 2016), <http://www.pnewswire.com/news-releases/peabody-energy-business-plan-approved-by-debtor-in-possession-lenders-business-plan-to-form-foundation-for-plan-of-reorganization-300311714.html> [<https://perma.cc/K5L9-P822>].

¹²⁷ See Peabody Energy Press Release, *supra* note 126.

¹²⁸ *Id.*

¹²⁹ David Hasemyer, *Peabody Settlement Shows Muscle of Law Now Aimed at Exxon*, INSIDECLIMATE NEWS (Nov. 10, 2015), <http://insideclimatenews.org/news/10112015/peabody-coal-climate-change-settlement-new-york-ag-exxon-subpoena-investigation> [<https://perma.cc/S3NL-6QC3>]. A former federal prosecutor in the U.S. Attorney's Office for the District of Minnesota commented on the similarity of the Peabody and ExxonMobil investigations saying, "[t]he central question in both cases is what were Exxon and Peabody saying publically [sic] compared to what they knew internally." *Id.*

B. Refining a Theory of Fraud

In the mid-1980s, legislators in the United States began to call for action that would address the trend of climate change.¹³⁰ Fearing the impact of restrictive legislation or regulation on its business, Exxon and other energy companies including Mobil Oil and Shell Oil formed the Global Climate Coalition.¹³¹ This lobbying group made public statements that cast doubt on the scientific certainty of climate change and warned of the negative impact climate change regulation would have on the American economy.¹³²

The Global Climate Coalition spent money in the years preceding the Kyoto Protocol to lobby and advance public relations campaigns suggesting that higher levels of carbon dioxide could benefit crop production, which might in turn help combat world hunger.¹³³ ExxonMobil continued to lobby against fossil fuel legislation and regulation during the Bush-Cheney administration spanning 2001 through 2009 by forcefully undermining mainstream science regarding climate change.¹³⁴

If ExxonMobil made these business decisions based on the negative ramifications of climate change, while outwardly stating that the science surrounding climate change was too uncertain to act on, this contradiction could amount to a violation of the Martin Act.¹³⁵ ExxonMobil again publicly cast doubt conclusions drawn by the company's researchers regarding

¹³⁰ *Id.*; Philip Shabecoff, *Global Warming Has Begun, Expert Tells Senate*, N.Y. TIMES (June 24, 1988), <http://www.nytimes.com/1988/06/24/us/global-warming-has-begun-expert-tells-senate.html> [<https://perma.cc/GK2A-CZUQ>].

¹³¹ See Amy Lieberman & Susanne Rust, *Big Oil Braced for Global Warming While It Fought Regulations*, L.A. TIMES (Dec. 31, 2015), <http://graphics.latimes.com/oil-operations/> [<https://perma.cc/UA27-3QJ7>].

¹³² *Id.*

¹³³ *Id.* The United States did not ratify the Kyoto Protocol, an international treaty committing to mandatory greenhouse gas emissions targets. See *id.* In 1997, Exxon's chairman and CEO, Lee Raymond, said "it is highly unlikely that the temperature in the middle of the next century will be significantly affected whether policies are enacted now or 20 years from now." Neela Banerjee et al., *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago*, INSIDECLIMATE NEWS (Sept. 16, 2015), <http://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming> [<https://perma.cc/HJZ9-4Y6Q>].

¹³⁴ David Hasemyer & John H. Cushman Jr., *Exxon Sowed Doubt About Climate Science for Decades by Stressing Uncertainty*, INSIDECLIMATE NEWS (Oct. 22, 2015), <http://insideclimatenews.org/news/22102015/Exxon-Sowed-Doubt-about-Climate-Science-for-Decades-by-Stressing-Uncertainty> [<https://perma.cc/L3G4-B7HR>]. If Exxon incorporated climate change concerns into its business decisions while executives publicly stated the company could not rely on uncertain climate change science to inform its business decisions, this discrepancy could amount to fraud under the Act. See *People v. Federated Radio Corp.*, 154 N.E. 655, 657 (N.Y. 1926) (adopting a broad definition of fraud under the Martin Act).

¹³⁵ See Banerjee et al., *supra* note 133. Schneiderman's investigation and theory of the case remain private, but it is widely believed that an alleged discrepancy between ExxonMobil's internal conduct and external statements regarding climate change is the basis for the Martin Act action. Gillis & Krauss, *supra* note 1.

climate change in 1989, despite the fact that the company already incorporated climate change considerations into its business decisions.¹³⁶ For example, InsideClimate News interviews with former ExxonMobil executives and federal officials, and examinations of historical archives show that Exxon's climate research program between 1977 and 1986 demonstrated that the company took the potential threat of climate change very seriously.¹³⁷ Company executives adopted a long-term corporate strategy based on their scientists' predictions that the realities of climate change would eventually force a global transition away from fossil fuels.¹³⁸

In addition to creating momentum for investigations and actions from other states' Attorneys General and private plaintiffs, Schneiderman's investigation into ExxonMobil may generate more widespread litigation around climate change through actions against other large energy companies.¹³⁹ The *Los Angeles Times*' investigation into ExxonMobil also uncovered similar discrepancies between company policy and internal findings at Mobil Oil and Shell Oil.¹⁴⁰ The *Los Angeles Times* story highlights that while these Global Climate Coalition companies fought climate change regulations in the 1990s, they designed and constructed protections to insulate

¹³⁶ Lisa Song et al., *Exxon Confirmed Global Warming Consensus in 1982 with In-House Climate Models*, INSIDECLIMATE NEWS (Sep. 22, 2015), <http://insideclimatenews.org/news/18092015/exxon-confirmed-global-warming-consensus-in-1982-with-in-house-climate-models> [<https://perma.cc/FK7R-6QUA>]; see Neela Banerjee & Lisa Song, *Exxon's Business Ambition Collided with Climate Change Under a Distant Sea*, INSIDECLIMATE NEWS (Oct. 8, 2015), <http://insideclimatenews.org/news/08102015/Exxons-Business-Ambition-Collided-with-Climate-Change-Under-a-Distant-Sea> [<http://perma.cc/8U79-ANU5>].

¹³⁷ Banerjee & Song, *supra* note 136.

¹³⁸ *Id.* Exxon's scientists looked specifically to how quickly oceans could absorb atmospheric carbon dioxide and used this measurement to speculate the amount of time before a transition away from fossil fuels was forced. *Id.*

¹³⁹ See Lieberman & Rust, *supra* note 131 (outlining similarly deceptive practices at Exxon's peer companies Shell Oil, Conoco, and Total). In February 2017, *The Guardian* uncovered a film produced by Shell Oil in 1991 titled "Climate of Concern," that warned of the risks of climate change. Damian Carrington & Jelmer Mommers, "*Shell Knew*": *Oil Giant's 1991 Film Warned of Climate Change Danger*, THE GUARDIAN (Feb. 28, 2017, 5:20 AM), <https://www.theguardian.com/environment/2017/feb/28/shell-knew-oil-giants-1991-film-warned-climate-change-danger> [<https://perma.cc/V8MM-98JW>]. Chevron disclosed in its 2016 year-end financial report filed with the SEC that increased public concern regarding climate change could bring pressure to the company in the form of regulation or litigation. Keith Goldberg, *Chevron Admits Risks of Climate Change Probes, Litigation*, LAW360, <https://www.law360.com/articles/895590/chevron-admits-risks-of-climate-change-probes-litigation> [<https://perma.cc/397W-6CPL>]. Neither company has become the subject of litigation or an investigation to date. See Carrington & Mommers, *supra*; see also Goldberg, *supra*.

¹⁴⁰ Lieberman & Rust, *supra* note 131 (detailing how Mobil Oil and Shell Oil fought regulations addressing climate change which would harm their business, while simultaneously developing methods to protect their infrastructure from climate change's predicted effects). Mobil Oil later merged with Exxon to form ExxonMobil. *Exxon: The Road Not Taken*, *supra* note 10.

infrastructure from the rising sea levels and more turbulent storms associated with climate change.¹⁴¹

C. Schneiderman and the SEC's Overlapping Jurisdiction Over Investor Protection, Asset Write-Downs, and Booking Reserves

Schneiderman's powers under the Martin Act coexist with the Securities and Exchange Commission's powers under the Securities Act of 1933 and Securities Exchange Act of 1934.¹⁴² The Securities and Exchange Commission ("SEC") is the federal agency responsible for protecting investors by enforcing the Securities Act of 1933 and Securities Exchange Act of 1934, which require publicly traded companies to disclose material facts, including the costs and effects of complying with environmental laws.¹⁴³ Though the SEC bristled at Spitzer's Merrill Lynch investigation, viewing the Martin Act and Spitzer's actions as an intrusion into federal securities regulation, the Securities Act of 1933 and Securities Exchange Act of 1934 do not expressly preempt the Martin Act.¹⁴⁴ The issue of potential preemption—whereby federal law supersedes a state law—appeared in the form of the proposed Securities Fraud Deterrence and Investor Restitution Act of 2003, which would have added to the SEC's powers and precluded states from reaching separate settlements that differed from or added to requirements set by the SEC.¹⁴⁵ Congress never enacted this bill.¹⁴⁶

The expansion of Schneiderman's investigation into ExxonMobil's accounting practices in September 2016 also stems from his power under the Martin Act, and involves overlapping jurisdiction with the SEC.¹⁴⁷ In 2015, then-CEO Rex Tillerson said the company avoided write-downs because of the pressure placed on executives to keep operating costs low.¹⁴⁸ He ex-

¹⁴¹ Lieberman & Rust, *supra* note 131. A spokesperson for ExxonMobil explained, "there is nothing inconsistent about ExxonMobil managing potential environmental risks while speaking publicly about the limits of scientific knowledge and advocating for effective public policy approaches." *Id.*

¹⁴² 15 U.S.C. §§ 77a–78a (2012); *The Laws That Govern the Securities Industry*, SEC. & EXCH. COMM'N, <https://www.sec.gov/about/laws.shtml> [<https://perma.cc/XV2C-YWHS>]; Capozza, *supra* note 119, at 32.

¹⁴³ 15 U.S.C. §§ 77a–78a; *What We Do*, SEC. & EXCH. COMM'N, <https://www.sec.gov/Article/whatwedo.html> [<https://perma.cc/25HK-3J3G>].

¹⁴⁴ *See* 15 U.S.C. §§ 77a–78a; Jonathan R. Macey, *Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951, 958 (2005).

¹⁴⁵ Macey, *supra* note 144, at 957.

¹⁴⁶ *Id.* at 957–58.

¹⁴⁷ *See* Olson, *supra* note 13 (describing Schneiderman's intent to uncover why ExxonMobil had historically not written down the value of its oil and gas reserves).

¹⁴⁸ *Id.* In February 2017, the Senate confirmed President Donald Trump's selection of Rex Tillerson as Secretary of State. Gardiner Harris, *Rex Tillerson Is Confirmed as Secretary of State*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/us/politics/rex-tillerson-secretary-of->

plained the longstanding practice of not writing down assets because in the company's view, temporary fluctuations do not make ExxonMobil's existing oil and gas reserves permanently less valuable or prohibitively expensive to drill.¹⁴⁹ The company's prediction for energy trends closely relates to how it accounts for the price of its existing oil and gas wells, and also reflects how it views climate change and potential future regulation.¹⁵⁰ These valuations are important because they affect the current and forecasted value of the company overall.¹⁵¹

Despite pushback from ExxonMobil,¹⁵² Schneiderman continued his investigation: on October 14, 2016, he moved to compel production from ExxonMobil's auditor PricewaterhouseCoopers LLP ("PwC") after the company refused to respond to Schneiderman's August 2016 subpoena, claiming attorney-client privilege under Texas law.¹⁵³ Judge Barry R. Ostrager found that Texas' attorney-client statute did not preclude PwC from complying with the subpoena, and also that New York law—not Texas law—governs the subpoena and investigation.¹⁵⁴

state-confirmed.html [https://perma.cc/24UR-25W9]. President Trump has not spoken specifically to the potential ExxonMobil investigations, but has called climate change a hoax. *But see* Holly Ellyatt, *Think Trump Dismisses Climate Change? Think Again*, CNBC (May 27, 2016, 4:06 AM), <http://www.cnbc.com/2016/05/27/think-trump-dismisses-climate-change-think-again.html> [https://perma.cc/774Z-RGD4]. Contrary to his public statements, in May 2016 he took action to build a sea wall to protect one of his golf courses in Ireland. *Id.* The sea wall is a necessary precaution to protect the golf course from rising sea levels associated with global warming. *Id.*

¹⁴⁹ Olson, *supra* note 13.

¹⁵⁰ *Id.*

¹⁵¹ Michael Rapoport et al., *When Should a Company Write Down Assets*, WALL ST. J. (Sept. 16, 2016, 6:21 PM), <http://www.wsj.com/articles/when-should-a-company-write-down-assets-1474064470> [https://perma.cc/5JMK-EYXL]. Companies have some discretion in valuation, but ExxonMobil was alone among energy companies in failing to write-down its assets. *Id.*

¹⁵² *See supra* notes 184–193 and accompanying text (describing ExxonMobil's lawsuits filed against Healey and Schneiderman).

¹⁵³ *People v. PricewaterhouseCoopers LLP*, No. 451962/16, 2016 WL 6330156, at *3 (N.Y. Sup. Ct. Oct. 25, 2016).

¹⁵⁴ *Id.*, at *1. In March 2017, Schneiderman learned that former chief executive Rex Tillerson had used an email alias—wayne.tracker@exxonmobil.com—in some conversations around climate change. Ailworth, *supra* note 14. Schneiderman's office argued to Judge Ostrager that concealing the existence and use of this email address was misleading, and indicated ExxonMobil's unwillingness to fully cooperate with proper search, collection, and production procedures related to the investigation. Letter from John Oleske, Senior Enforcement Counsel, N.Y. State Office of the Att'y Gen., to J. Barry R. Ostrager, Supreme Court, New York County (Mar. 13, 2017), <https://www.documentcloud.org/documents/3516559-TILLERSON-NY-AG-LETTER.html> [https://perma.cc/9QSG-JN9R]. ExxonMobil responded that Tillerson's use of the email alias was proper and necessary to allow the executive to receive important, time-sensitive messages separately from his main email address. Ailworth, *supra* note 14. Wayne is Tillerson's middle name; Tracker may refer to his past role as president of the Boy Scouts of America. Ernest Scheyder, *Tillerson's Email Alias Was Prompted by Business Needs, Exxon Says*, REUTERS (Mar. 14, 2017, 6:16 PM), <http://www.reuters.com/article/us-usa-tillerson-email-idUSKBN16L2QD> [https://perma.cc/Q8CY-ST8R].

A few days after Schneiderman's office expanded its investigation into ExxonMobil's accounting practices, the SEC announced it too had begun investigating ExxonMobil and its auditor, PwC.¹⁵⁵ The SEC's investigation focuses on ExxonMobil's calculation of how the escalating global response to climate change may impact its business by looking into the company's practice of not writing down the values of its oil and gas reserves.¹⁵⁶ President Trump's choice for the new chairman of the SEC, Jay Clayton, has previously encouraged his clients to provide more climate change disclosures as a partner at Sullivan & Cromwell.¹⁵⁷

In early 2017, in an apparent response to mounting pressure from Schneiderman and the SEC, ExxonMobil wrote down the value of more than two billion dollars in its natural gas assets in the Rocky Mountains.¹⁵⁸ ExxonMobil also took the value of 3.5 billion barrels of its Canadian oil reserves off of its book, a signal that it would not be profitable to extract.¹⁵⁹ Neither Schneiderman nor the SEC have commented on ExxonMobil's actions or any effect these actions might have on the respective investigations.¹⁶⁰

¹⁵⁵ Olson & Viswanatha, *supra* note 16.

¹⁵⁶ *Id.* The House Science, Space, and Technology Committee sent a letter to the SEC expressing its concern that the investigative action may discourage the scientific research underlying the asset valuations. Press Release, Comm. on Sci., Space, & Tech., Committee Probes SEC's Investigation of Exxon (Sept. 29, 2016), <https://science.house.gov/news/press-releases/committee-probes-sec-s-investigation-exxon> [<https://perma.cc/Q6QQ-6H5C>]. At the time of publication, the case was ongoing. *See id.*

¹⁵⁷ Francine McKenna, *Trump's SEC Pick Pushed Clients to Say More About Climate-Change Risks*, MARKETWATCH (Jan. 5, 2017, 1:35 PM), <http://www.marketwatch.com/story/trumps-sec-pick-pushed-clients-to-say-more-about-climate-change-risks-2017-01-05> [<https://perma.cc/3YV5-NPZG>]. Clayton himself has not publicly weighed in on the SEC's ExxonMobil investigation. *Id.* Clayton's confirmation hearings were ongoing through March 2017. Matt Egan, *Trump's Wall Street Cop Is a Big Defender of Wall Street*, CNN: MONEY (Mar. 22, 2017, 10:53 AM), <http://money.cnn.com/2017/03/22/investing/jay-clayton-sec-hearing-wall-street-defender/> [<http://perma.cc/PVL7-GG4K>].

¹⁵⁸ Olson, *supra* note 13. Since ExxonMobil purchased the natural gas reserves from XTO Energy in 2010, the price of natural gas has fallen significantly due to a drilling boom. *Id.*

¹⁵⁹ Smith, *supra* note 19. The Canadian oil reserves are a less attractive source of energy now than they were when ExxonMobil initially invested in them due to a combination of the growth of newer sources of crude oil that is cheaper to extract, and Canadian regulations that make its oil more expensive to extract and refine. Sarah Kent et al., *Energy Companies Face Crude Reality: Better to Leave It in the Ground*, WALL ST. J. (Feb. 17, 2017, 1:22 PM), <https://www.wsj.com/articles/energy-companies-face-crude-reality-better-to-leave-it-in-the-ground-1487327406> [<https://perma.cc/C5VX-B29N>].

¹⁶⁰ *See* Smith, *supra* note 19.

IV. THE STATES TAKE SIDES

A. *The Green 20 Comes Together*

Schneiderman's investigation has created momentum for additional state-level litigation.¹⁶¹ On January 20, 2016, the *Los Angeles Times* reported that California Attorney General Kamala D. Harris was investigating ExxonMobil's climate change statements made to the public.¹⁶² Harris' investigation presumably focused on whether ExxonMobil's internal research regarding the impact of climate change diverged with the company's public statements.¹⁶³ This inconsistency may violate California's securities and environmental laws.¹⁶⁴ Harris won her bid for U.S. Senate in November 2016, and resigned from the office of the Attorney General.¹⁶⁵ On January 24, 2017, former member of the House of Representatives Xavier Becerra was sworn in as California's new Attorney General.¹⁶⁶ A couple of weeks later, members of Congress including Ted Lieu, Mark DeSaulnier, Jared Huffman, and Zoe Lofgren sent a letter to Becerra, urging him to continue the investigation into ExxonMobil.¹⁶⁷

In March 2016, Attorneys General Maura Healey of Massachusetts and Claude Walker of the U.S. Virgin Islands also announced investigations into ExxonMobil's knowledge of climate change at a news conference which

¹⁶¹ Ivan Penn, *California to Investigate Whether ExxonMobil Lied About Climate-Change Risks*, L.A. TIMES (Jan. 20, 2016, 3:00 AM), <http://www.latimes.com/business/la-fi-exxon-global-warming-20160120-story.html> [<https://perma.cc/AX6B-4WRW>].

¹⁶² *Id.* Commenting on the potential strength of cooperative action among states' Attorneys General, Missouri assistant attorney general Chuck Hatfield compared New York and California to "small countries," noting that "all of the states look to them to see what they are doing" for potential leadership. Jenny Anderson, *New Cops on the Beat*, INST. INV'R (July 1, 2002), <http://www.institutionalinvestor.com/article/1027367/new-cops-on-the-beat.html#.VtTyZMrJE4> [<http://perma.cc/4GEF-RKW2>].

¹⁶³ Penn, *supra* note 161.

¹⁶⁴ *See, e.g.*, CAL. CORP. CODE § 25401 (West 2016) (prohibiting fraudulent or misleading actions or statements in the sale of securities); CAL. PUB. RES. CODE § 21083.05 (West 2016) (creating the obligation for the Office of Planning and Research and the Natural Resources Agency to maintain guidelines for mitigating greenhouse gas emissions in California). The reports of Harris' investigation failed to mention any particular state or federal statute the California Attorney General might rely on. Penn, *supra* note 161.

¹⁶⁵ Patrick McGreevy, *Assembly Sets Confirmation Hearing After Gov. Brown Formally Nominates Becerra as State Attorney General*, L.A. TIMES (Jan. 3, 2017, 10:07 AM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-gov-brown-formally-nominates-rep-1483466541-htlmlstory.html> [<https://perma.cc/B79G-KK3J>].

¹⁶⁶ *Attorney General Xavier Becerra*, STATE OF CAL. DEP'T OF JUSTICE, <https://oag.ca.gov/about> [<https://perma.cc/X33C-BWB9>].

¹⁶⁷ Press Release, Rep. Huffman, Lofgren, Lieu, DeSaulnier, CA Members Urge Attorney General Becerra to Investigate ExxonMobil's Role in Misleading Public on Climate Change (Feb. 6, 2017), <https://huffman.house.gov/media-center/press-releases/rep-huffman-lofgren-lieu-desaulnier-ca-members-urge-attorney-general> [<https://perma.cc/3SLC-S4PP>].

coincided with an Attorneys General climate change conference.¹⁶⁸ Attorneys General from the District of Columbia, Illinois, Iowa, Maine, Maryland, Minnesota, New Mexico, New York, Oregon, Rhode Island, Virginia, Vermont, and Washington State also attended the conference, but did not officially announce investigations into ExxonMobil.¹⁶⁹ Schneiderman suggested that their presence at the climate change conference was indicative of support for the investigations, adding that not all investigations are publicized.¹⁷⁰

Schneiderman said that the scope of climate change and the size of the energy companies are massive, and require a multistate effort to combat.¹⁷¹ In the press conference, former Vice President Gore explicitly compared the joint action to the 1990s investigation of Big Tobacco,¹⁷² In response, ExxonMobil issued a statement saying the Attorneys General were politically motivated and the accusations were based on discredited news reports.¹⁷³

¹⁶⁸ Schwartz, *supra* note 83; Press Release, N.Y. State Office of the Att’y Gen., A.G. Schneiderman, Former Vice President Al Gore and a Coalition of Attorneys General from Across the Country Announce Historic State-Based Effort to Combat Climate Change (Mar. 29, 2016), <http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across> [https://perma.cc/E9GD-YNNG] [hereinafter Coalition Press Release].

¹⁶⁹ Coalition Press Release, *supra* note 168. The Attorneys General together formed a new coalition of twenty-five states, cities, and counties that have submitted a brief as interveners to the United States Court of Appeals for the District of Columbia Circuit supporting the Clean Power Plan. *Id.* Collectively, the Attorneys General have called themselves “AGs United for Clean Power” or the “Green 20.” *See id.* Walker is a political independent; the other Attorneys General in the coalition identify as Democrats. David Hasemyer & Sabrina Shankman, *Climate Fraud Investigation of ExxonMobil Draws Attention of 17 Attorneys General*, INSIDECLIMATE NEWS (Mar. 30, 2016), <https://insideclimatenews.org/news/30032016/climate-change-fraud-investigation-exxon-eric-shneiderman-18-attorneys-general> [https://perma.cc/BJ6W-NYHS].

¹⁷⁰ Schwartz, *supra* note 83. In August 2016, the Energy & Environmental Legal Institute and the Free Market Environmental Law Clinic sued Schneiderman, asking him to produce records between his office and any others that may be coordinating in the ExxonMobil investigation, including Kamala Harris, climate activists, and environmental attorneys. Stan Parker, *NY AG Sued for Emails on Climate Probe Coordination*, LAW360 (Aug. 2, 2016, 6:43 PM), <https://www.law360.com/articles/824217/ny-ag-sued-for-emails-on-climate-probe-coordination> [https://perma.cc/T3TL-TMKA]. The case, which is ongoing, revealed that Schneiderman had been in contact with environmental activists before he opened the Martin Act investigation. Carl Campanile, *Schneiderman Talked with Environmental Activists Ahead of Exxon Probe*, N.Y. POST (Feb. 13, 2017), <http://nypost.com/2017/02/13/schneiderman-talked-with-environmental-activists-ahead-of-exxon-probe/> [https://perma.cc/CT2F-ZTUV].

¹⁷¹ Hasemyer & Shankman, *supra* note 169.

¹⁷² *Id.*

¹⁷³ Press Release, ExxonMobil’s Perspectives Blog, ExxonMobil Responds to State AGs, (Mar. 29, 2016), <https://energyfactor.exxonmobil.com/exxonmobil-responds-state-ags/> [https://perma.cc/447V-HX9A?type=image]. Separately, the libertarian think tank Competitive Enterprise Institute filed a lawsuit against Schneiderman’s office at the end of August 2016, seeking to discover if the Attorneys General entered into an agreement to keep records uncovered in the investigations confidential by using New York’s Freedom of Information Law. David Hasemyer, *Conservative Think Tank Sues Attorney General Over Exxon Documents*, INSIDECLIMATE NEWS (Aug. 31,

B. Attorney General Walker and ExxonMobil Settle

Claude Walker, the Attorney General for the U.S. Virgin Islands, served a subpoena on ExxonMobil in March 2016 based on its local anti-racketeering law, the Criminally Influenced and Corrupt Organizations Act (“CICO”).¹⁷⁴ To allege a violation of CICO, the subpoena also necessarily alleged violations of the territory’s criminal fraud laws, which prevent false representation and conspiracy to obtain money.¹⁷⁵ In early April, Walker subpoenaed the non-profit policy organization Competitive Enterprise Institute (“CEI”) and public relations and lobbying firm DCI Group for communications with ExxonMobil regarding its climate change studies.¹⁷⁶ In mid-April 2016, ExxonMobil responded to Walker’s subpoena by suing Walker’s office, claiming the subpoena is invalid because it extends beyond the statute of limitations, violates the company’s constitutional rights of freedom of speech and freedom from unreasonable search and seizure, and constitutes an abuse of process.¹⁷⁷ In May, the Virgin Islands successfully petitioned for the removal of the case to federal court because the company’s underlying conduct on which the state and federal claims were based are identical.¹⁷⁸ Attorneys General Ken Paxton of Texas and Luther Strange of Alabama, both Republicans, joined the fray in July, joining the lawsuit as intervenors siding with ExxonMobil.¹⁷⁹

In late July, the two parties came to an agreement: ExxonMobil would drop its lawsuit, and the Virgin Islands would withdraw its subpoena.¹⁸⁰ The

2016), <https://insideclimatenews.org/news/31082016/conservative-think-tank-cei-sues-new-york-attorney-general-eric-schneiderman-exxon-climate> [<https://perma.cc/6GZ7-E5KD>].

¹⁷⁴ Lauren Kurtz, *Increasing Number of Investigations into Fossil Fuel Industry’s “Disinformation Campaign,”* COLUM. LAW SCH.: SABIN CTR. FOR CLIMATE CHANGE LAW, CLIMATE LAW BLOG (May 6, 2016), <http://blogs.law.columbia.edu/climatechange/2016/05/06/increasing-number-of-investigations-into-fossil-fuel-disinformation/> [<https://perma.cc/Q6T9-37UH>]; see V.I. CODE ANN. tit. 14 §§ 600–614 2016.

¹⁷⁵ V.I. CODE ANN. tit. 14 §§ 600–614 2016; Kurtz, *supra* note 175.

¹⁷⁶ Kurtz, *supra* note 174.

¹⁷⁷ Plaintiff’s Original Petition for Declaratory Relief at 1, *ExxonMobil Corp. v. Walker*, No. 017-284780-16 (Tex. Dist. Apr. 13, 2016), <http://amlawdaily.typepad.com/0000exxon%20suit.pdf> [<https://perma.cc/DDU4-3DLR>].

¹⁷⁸ Jess Davis, *Virgin Islands Bumps Exxon Climate Probe to Fed. Court*, LAW360 (May 19, 2016), <http://www.law360.com/articles/798169/virgin-islands-bumps-exxon-climate-probe-to-fed-court> [<https://perma.cc/63E8-TJHH>].

¹⁷⁹ Jim Malewitz, *A Closer Look at the Texas Twist in Fight Between Exxon, Virgin Islands*, TEX. TRIB. (June 27, 2016), <https://www.texastribune.org/2016/06/27/texas-paxton-exxon-virgin-islands-climate/> [<https://perma.cc/P8HA-LLBZ>]. Environmental law scholars have noted that this coordinated involvement by the Attorneys General on behalf of a single company was a rare move. *Id.*

¹⁸⁰ Joint Stipulation of Dismissal at 1–2, *ExxonMobil Corp. v. Walker*, No. 4:16-CV-00364-K (N.D. Tex. June 26, 2016); James Osborne, *U.S. Virgin Island Withdraws Subpoena of Exxon in Climate Probe*, HOUS. CHRON.: FUELFIX (June 30, 2016), <http://fuelfix.com/blog/2016/06/30/usvi-ag-drops-exxon-subpoena-in-climate-investigation/> [<https://perma.cc/4KEJ-VLDX>].

Virgin Islands also withdrew its subpoenas issued to CEI and the DCI Group.¹⁸¹ Walker said that the Virgin Islands would continue its cooperation with other states in investigating ExxonMobil.¹⁸²

C. Exxon Adds Fuel to the Fire by Suing Healey and Schneiderman

Massachusetts Attorney General Maura Healey acted shortly after the joint statement of support in March, opening an investigation into ExxonMobil on April 19, 2016 by issuing a civil investigative demand based on Exxon's sale of fossil fuels and marketing and sales of securities.¹⁸³ Healey alleged that these sales violated Massachusetts' consumer protection statute.¹⁸⁴ The investigation intended to seek "information whether Exxon may have misled consumers and/or investors with respect to the impact of fossil fuels on climate change."¹⁸⁵

ExxonMobil responded on June 15, 2016 by filing a motion—in a case that was removed from a Texas state court to federal court—seeking to block the demand, calling it an abuse of power and biased against the company.¹⁸⁶ On October 13, Judge Ed Kinkeade issued an order that concluded that Healey's investigation may have been in bad faith, and allowed Exx-

¹⁸¹ Phil McKenna, *Virgin Islands and Exxon Agree to Uneasy Truce Over Climate Probe*, INSIDECLIMATE NEWS (July 7, 2016), <https://insideclimatenews.org/news/06072016/virgin-islands-exxon-agree-climate-probe-subpoena-claude-walker-schneiderman-healey> [<https://perma.cc/3E9N-42MT>].

¹⁸² Osborne, *supra* note 180.

¹⁸³ *AGO's Exxon Investigation*, ATT'Y GEN. OF MASS., <http://www.mass.gov/ago/bureaus/eeb/the-environmental-protection-division/exxon-investigation.html> [<https://perma.cc/8955-6G4F>].

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ ExxonMobil's Complaint for Declaratory and Injunctive Relief at 32, ExxonMobil Corp. v. Healey at *1, No. 4:16-CV-00469 (N.D. Tex. Dec. 15, 2016), 2016 WL 6091249 (docket entry one) (court filings and orders related to this case are available by viewing the *ExxonMobil Corp. v. Healey* docket or, on a more limited basis, through the unique West Law identifier); John Schwartz, *ExxonMobil Fights Back at State Inquiries into Climate Change Research*, N.Y. TIMES (June 16, 2016), <http://www.nytimes.com/2016/06/17/science/exxon-mobil-fights-back-at-state-inquiries-into-climate-change-research.html?> [<https://perma.cc/J3J8-N6DQ>]. In September 2016, a group of eleven Attorneys General filed an amicus brief in support of ExxonMobil's request that the court enjoin Healey's investigation. Brief of Texas, Louisiana, South Carolina, Alabama, Michigan, Arizona, Wisconsin, Nebraska, Oklahoma, Utah, and Nevada as *Amici Curiae* in Support of Plaintiff's Motion for Preliminary Injunction at 1–2, 9, *Exxon Mobil Corp. v. Healey*, No. 4:16-CV-00469, 2016 WL 7433124. Earlier in the summer, these same Attorneys General issued a letter expressing their opposition to legal action as the proper arena "to resolve a public policy debate," stating that any litigation "undermines the trust invested in our offices and threatens free speech." News Advisory, Ala. Att'y Gen., Attorney General Strange Leads Dear Colleague Letter to Fellow Attorneys General Opposing Use of Subpoenas to Enforce Their Climate Agenda Views (June 16, 2016), <http://www.ago.state.al.us/news/852.pdf> [<https://perma.cc/5BKC-4W68>]. The letter stated that the investigation was out of the ordinary in that it "targets a particular type of market participant . . . the Attorneys General identify themselves with the competitors of their investigative targets . . . the investigation implicates an ongoing public policy debate." *Id.*

onMobil to proceed with its discovery request seeking internal communications surrounding the investigation, dismissing her request to dismiss the suit entirely.¹⁸⁷

The next week, ExxonMobil moved to join Schneiderman as a defendant in the case, signaling the end of the company's cooperation with the investigation.¹⁸⁸ In a memo supporting the joinder, Exxon argued that Schneiderman's purpose is politically motivated, and aimed at suppressing speech the Green 20 disagrees with.¹⁸⁹ The company also moved to add claims of federal preemption and conspiracy.¹⁹⁰ Judge Kinkeade allowed the joinder on November 10, 2016.¹⁹¹ The same day, ExxonMobil filed an amended complaint adding Schneiderman to the case, alleging the same complaints filed against Healey of unlawfully using his power for political reasons.¹⁹²

In November 2016, ExxonMobil sent letters to the Union of Concerned Scientists and the Rockefeller Family Fund, warning the groups to preserve their communications for later potential discovery, presumably relying on Judge Kinkeade's October 13 order allowing the company to proceed with discovery.¹⁹³ ExxonMobil followed through on its threat, issuing a subpoena to the Union of Concerned Scientists on November 7, 2016 to access documents related to Healey and Schneiderman's investigations.¹⁹⁴

On November 17, Judge Kinkeade ordered Healey and Schneiderman to appear before him for deposition on December 13, but on December 12,

¹⁸⁷ Order at *2, *Exxon Mobil Corp. v. Healey*, No. 4:16-CV-00469, 2016 WL 6091249 (docket entry seventy three).

¹⁸⁸ ExxonMobil Corporation's Memorandum of Law in Support of Its Motion for Leave to File a First Amended Complaint, *supra* note 14, at *4–9.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* The memorandum argues that complying with Healey and Schneiderman's investigations would subject ExxonMobil to a higher disclosure burden than is required by federal law under the SEC, and therefore violates constitutional federalism principles. *Id.* The memorandum does not specifically name any enumerated constitutional rights. *Id.*

¹⁹¹ Order Granting Motion for Leave to File First Amended Complaint, *ExxonMobil Corp. v. Healey*, No. 4:16-CV-00469, 2016 WL 6091249 (docket entry ninety-nine).

¹⁹² First Amended Complaint for Declaratory and Injunctive Relief at 1, 41–47, *ExxonMobil Corp. v. Healey*, No. 4:16-CV-469-K, 2016 WL 6091249 (docket entry ninety-nine).

¹⁹³ Steven Mufson, *ExxonMobil Tells Independent Groups to Preserve Records of Their Climate Case Communications—Including with the Press*, WASH. POST (Nov. 3, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/11/03/exxonmobil-tells-independent-groups-to-preserve-records-of-their-climate-case-communications-including-with-the-press/?utm_term=.656148fcb059 [<https://perma.cc/K67J-FR94>].

¹⁹⁴ Kathy Mulvey, *Post-Election, ExxonMobil Goes After Scientists and Climate Advocates*, UNION OF CONCERNED SCI.: BLOG (Nov. 16, 2016), http://blog.ucsusa.org/kathy-mulvey/post-election-exxonmobil-goes-after-scientists-and-climate-advocates?_ga=1.215575252.296557775.1479469100 [<https://perma.cc/ZG6R-NH7D>].

he voided the order without explanation.¹⁹⁵ In February 2017, ExxonMobil, Schneiderman, and Healey filed briefs arguing whether or not the United States District Court for the Northern District of Texas has jurisdiction over the matter.¹⁹⁶

ExxonMobil filed a parallel lawsuit in the Suffolk Superior Court in the Commonwealth of Massachusetts in June 2016, seeking to block Healey's investigation.¹⁹⁷ In January 2017, Judge Heidi Brieger affirmed Healey's authority to investigate the company, and ordered it to comply with the Attorney General's investigative demand for its records.¹⁹⁸

D. The Science, Space, and Technology Committee Subpoenas

Separately, in May 2016, the House Committee on Science, Space, and Technology (the "Committee") began an escalating series of requests to the Attorneys General investigating ExxonMobil.¹⁹⁹ In a series of letters addressed to the seventeen Attorneys General, the Committee expressed its concern that the investigations were politically motivated, misaligned with an Attorney General's duty to defend the rights of the people, and may constitute an abuse of prosecutorial discretion.²⁰⁰

¹⁹⁵ David Hasemyer, *Mass. AG Appeals Exxon Ruling; Asks New Judge to Toss Oil Giant's Case*, INSIDECLIMATE NEWS (Dec. 12, 2016), <https://insideclimatenews.org/news/08122016/exxon-climate-change-research-investigation-maura-healey-attorney-general> [<https://perma.cc/P9R2-9XKW>].

¹⁹⁶ Brief in Support of This Court's Personal Jurisdiction Over the Defendants, *ExxonMobil Corp. v. Healey*, No. 4:16-CV-469-K, 2016 WL 6091249 (docket entry 174); Memorandum of Law in Further Support of Motion to Dismiss the First Amended Complaint for Lack of Personal Jurisdiction, *ExxonMobil Corp. v. Healey*, No. 4:16-CV-469-K, 2016 WL 6091249 (docket entry 176); Attorney General Maura Healey's Brief in Support of Dismissal for Lack of Personal Jurisdiction, *Exxon Mobil Corp. v. Healey*, No. 4:16-CV-469-K, 2016 WL 6091249 (docket entry 172). Litigation is ongoing. See *AGO's Exxon Investigation*, *supra* note 183.

¹⁹⁷ Emergency Motion of ExxonMobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, *In re Civil Investigative Demand No. 2016-EPD-36* Issued by the Office of the Attorney General, No. 2016-1888-F (Mass. Sup. Ct. Jan 11, 2017), <http://www.mass.gov/ago/docs/energy-utilities/exxon/04-emergency-motion.pdf> [<https://perma.cc/PNJ4-2LUN>].

¹⁹⁸ Order on Emergency Motion of ExxonMobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order and the Commonwealth's Cross-Motion to Compel ExxonMobil Corporation to Comply with Civil Investigative Demand No. 2016-EPD-36, *In re Civil Investigative Demand No. 2016-EPD-36, Civil Investigative Demand*, No. 2016-1888-F (Mass. Supp. Ct. Jan. 11, 2017), <http://www.mass.gov/ago/docs/energy-utilities/exxon/order-on-emergency-motion-superior-court.pdf> [<https://perma.cc/JC7S-FA7A>].

¹⁹⁹ *E.g.*, Letter from Lamar Smith et al., Comm. on Sci., Space, & Tech., to Eric Schneiderman, Att'y Gen. of N.Y. (May 18, 2016), <https://science.house.gov/sites/republicans.science.house.gov/files/documents/05.18.16%20SST%20Letter%20to%20NY%20AG.pdf> [<https://perma.cc/LM7B-TLLM>] (requesting information from Schneiderman's office to deliver documents and communications between the Attorney General's office and companies, non-profit organizations, and government entities related to climate change).

²⁰⁰ *See id.*

The letter cited media reports of an initial strategy meeting in 2012 and a January 2016 meeting with environmental activists held at the Rockefeller Family Fund, intended to formulate a strategy to convince the public that ExxonMobil has significantly contributed to climate change.²⁰¹ The letter requested the Attorneys General to present documentation that would demonstrate their impartiality, including communications with the environmental activist groups, communications among Attorneys General regarding the investigations, and communications between the Attorneys General's offices and the executive branch regarding potential prosecution related to climate change.²⁰²

Some states responded to question the Committee's jurisdiction over the issue, but none of the Attorneys General provided substantive responses to the requests for communication.²⁰³ The Committee reiterated its request for information in letters sent to each Attorney General on June 17, 2016, explaining that its jurisdiction to investigate environmental matters stems from Congress' constitutional power to legislate.²⁰⁴ The letters further elaborated that the Committee was established to aid the House of Representatives in its oversight regarding environmental research and development.²⁰⁵

On July 13, 2016, the Committee again escalated its opposition to the investigations by issuing a subpoena to Attorney General Eric Schneiderman, Attorney General Maura Healey, and the eight environmental nonprofits to obtain any documents showing coordinated efforts to limit companies, nonprofit organizations, or scientists' First Amendment freedoms.²⁰⁶ A spokeswoman for Healey suggested that Chairman of the Committee Lamar

²⁰¹ *Id.* (citing Hardler et al., *supra* note 23.)

²⁰² *Id.*

²⁰³ Press Release, Comm. on Sci., Space, & Tech., Committee Stands Firm on Investigation into Green 20 (June 20, 2016), <https://science.house.gov/news/press-releases/committee-stands-firm-investigation-green-20> [<https://perma.cc/6BJJ-DQ6D>].

²⁰⁴ *E.g.*, Letter from Lamar Smith et al., Comm. on Sci., Space, & Tech., to Eric Schneiderman, Att'y Gen. of N.Y. (June 17, 2016), <https://science.house.gov/sites/republicans.science.house.gov/files/documents/06.17.2016%20SST%20Letter%20to%20AG%20Schneiderman.pdf> [<https://perma.cc/C4FP-EG6T>] (citing the Constitution and Rule X of the Rules of the House of Representatives, which grant the Committee legislative and oversight over environmental issues).

²⁰⁵ *Id.*

²⁰⁶ Press Release, Comm. on Sci., Space, & Tech., Smith Subpoenas MA, NY Attorneys General, Environmental Groups (July 13, 2016), <https://science.house.gov/news/press-releases/smith-subpoenas-ma-ny-attorneys-general-environmental-groups> [<https://perma.cc/6C8L-Z8VN>]. The Committee threatened to take this action in letters sent July 6, 2016. Press Release, Comm. on Sci., Space, & Tech., Committee Ramps Up Investigation, Threatens Use of Compulsory Process Against Members of Green 20 (July 6, 2016), <https://science.house.gov/news/press-releases/committee-ramps-investigation-threatens-use-compulsory-process-against-members> [<https://perma.cc/669W-YC8T>].

Smith and the other Committee members were acting on behalf of Big Oil, and stated that the Committee's subpoenas offended states' rights.²⁰⁷

Healey and Schneiderman's general counsels each sent letters to Lamar Smith on July 26, 2016, stating that they would not comply with the subpoenas.²⁰⁸ The letter from Schneiderman's counsel stated that the subpoena raises significant federal concerns and that such a subpoena from the House of Representatives to an Attorney General's office was unprecedented.²⁰⁹ It also repeated the offer from Schneiderman's office to meet with the Committee to discuss the investigations outside of a subpoena.²¹⁰ The letter from Healey's chief legal counsel called the subpoena unprecedented and unconstitutional, argued that the majority of the requested documents are protected by attorney-client privilege or as attorney work product, and faulted the Committee for ignoring her office's offer to discuss the investigations over a conference call.²¹¹

Lamar Smith responded with a letter of his own on August 23, 2016, defending the subpoenas as respective of federalist principles and within its jurisdiction as a federal legislative body overseeing national scientific research and its effects.²¹² On February 16, 2017, Smith reissued the subpoena

²⁰⁷ David Hasemyer, *State Attorneys General Subpoenaed by Rep. Lamar Smith for Exxon Fraud Probe*, INSIDECLIMATE NEWS (July 13, 2016), <https://insideclimateneews.org/news/13072016/lamar-smith-exxon-climate-probes-subpoenas-state-ags-eric-schneiderman-maura-healey> [https://perma.cc/GU2T-4LJ2].

²⁰⁸ Letter from Leslie Dubeck, Counsel, State of N.Y. Office of the Att'y Gen., to Lamar Smith, Chairman, Comm. on Sci., Space, & Tech., (July 26, 2016), https://ag.ny.gov/sites/default/files/2016_07_26_nyoag_letter_to_sst_objecting_to_subpoena.pdf [https://perma.cc/SB9L-87NP]; Letter from Richard A. Johnson, *supra* note 15. The environmental groups also refused to comply with the subpoena. David Hasemyer, *State AGs and Groups Defy Lamar Smith's Subpoena Over Exxon Climate Probes*, INSIDECLIMATE NEWS (July 27, 2016), <https://insideclimateneews.org/news/27072016/new-york-massachusetts-eric-schneiderman-maura-healey-defy-lamar-smith-subpoena-exxon-climate> [https://perma.cc/2EP4-6MS3].

²⁰⁹ Letter from Leslie Dubeck, *supra* note 208.

²¹⁰ *Id.*

²¹¹ Letter from Richard A. Johnson, *supra* note 15. Massachusetts senators and members of Congress, led by Katherine Clark and Elizabeth Warren, wrote a letter to Smith supporting Healey and denouncing the subpoenas from his office. Letter from Katherine Clark et al., Mass. Representatives, to Lamar Smith, Chairman, Comm. on Sci., Space, & Tech. (Aug. 3, 2016), <http://www.warren.senate.gov/files/documents/2016-8-4MADelegationLettertoLamarSmithSigned.pdf> [https://perma.cc/W6E5-PCWR]. This letter echoed the arguments from Healey's office and added that the subpoenas "materially mischaracterize the actions of the Massachusetts and New York Attorneys General, and the claims they make are patently false." *Id.*

²¹² Letter from Lamar Smith, Chairman, Comm. on Sci., Space, & Tech., to Eric Schneiderman, Att'y Gen., State of N.Y. (Aug. 23, 2016), https://science.house.gov/sites/republicans.science.house.gov/files/documents/08_23_2016%20CLS%20to%20Schneiderman.pdf [https://perma.cc/TP8P-F797]. Legal scholars have supported both sides of the debate. Letter from Abrams Inst. for Freedom of Expression, Yale Law School et al., to Lamar Smith, Chairman, Comm. on Sci., Space, & Tech. (Sept. 12, 2016), https://www.law.yale.edu/system/files/area/center/mfia/2016.09.12_letter_to_chairman_smith_re_subpoenas_distribution.pdf [https://perma.cc/FDL3-ZA3U] (legal scholars writing in opposition to the actions of the committee stating that the subpoenas violate

nas to Schneiderman and Healey.²¹³ Neither Attorney General plans to comply with the information request.²¹⁴

CONCLUSION

The evidence supporting human-induced climate change is broadly accepted among scientists. Corporations have also largely come to accept that climate change poses risks to the way they operate. Energy companies in particular have a vested interest in the politics and popular perception of climate change research. Oil and gas companies funded a good deal of early climate change research, and these same companies have much to lose if legislative and regulatory initiatives limit their activities.

While federal and state governments aim to limit corporations' contributions to climate change through statutes and regulations, there is also a steady attempt to pursue legal remedies that will hold those corporations accountable for their role in contributing to and accelerating climate change. By investigating ExxonMobil using the Martin Act, Eric Schneiderman follows his predecessors in the New York Attorney General's office in seeking to catalyze more successful litigation through securities law.

Schneiderman is particularly well situated to bring this case against ExxonMobil because of the unique power of the Martin Act. Its broad scope and low burdens, along with its civil and criminal penalties, equip Schneiderman with a powerful fact-finding tool. Whether or not ExxonMobil has been honest about its stance on climate change given available scientific research, the mere disclosure of previously confidential information alone can prove useful to other plaintiffs seeking to establish a case against ExxonMobil using common law or federal securities law.

If Schneiderman's Martin Act investigation proves successful, Spitzer's overhaul of the financial industry provides a useful template for New York-led regulation in cooperation with the SEC. Because the Martin Act has withstood judicial challenges regarding potential federal preemption, Schneider-

principles of federalism, go beyond the scope of the committee's authority, and infringe on the constitutional right to free speech); *Full Committee Hearing—Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*, COMM. ON SCI., SPACE, & TECH. (Sept. 14, 2016, 10:00 AM), <https://science.house.gov/legislation/hearings/full-committee-hearing-affirming-congress-constitutional-oversight> [<https://perma.cc/LU2F-ZJ7P>] (legal scholars testifying before the committee in support of the actions of Committee and stating that the information requested in the subpoena would provide additional clarity to the situation rather than impede the Attorneys General).

²¹³ Laura Krantz, *Healey Won't Heed New Subpoena*, BOS. GLOBE, Feb. 17, 2017, at B2.

²¹⁴ Chelsea Harvey, *House Republicans Demand Climate Documents from State Attorneys General—Again*, WASH. POST (Feb. 17, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/02/17/house-republicans-demand-climate-documents-from-state-attorneys-general-again/?utm_term=.e6c742717f32 [<https://perma.cc/5HZH-EFA3>].

man, the SEC, and other federal agencies may work together to bring more transparency to energy companies' disclosures to investors and the public. The Master Settlement Agreement jointly entered by the majority of the United States' Attorneys General and the four largest tobacco companies serves as another blueprint for a state-led initiative to litigate climate change.

