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Maryland Defense Act

2020 Report

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Introduction

This report describes the status of ongoing lawsuits the Office of the Attorney General has brought or joined with other states under the Maryland Defense Act (MDA), a statute enacted in 2017 that authorizes the Attorney General to protect the State and its residents against harmful actions by the federal government.[1] These lawsuits span a full spectrum of environmental, health, economic, public safety, civil rights and other policy arenas in which the Trump Administration has attempted to discriminate against and inflict harm on Marylanders in violation of a myriad of constitutional and statutory protections.

The efforts of Maryland and other states have resulted in significant successes. For example, the Supreme Court recently declared unlawful President Trump's attempt to rescind Deferred Action for Childhood Arrivals (DACA), which benefits thousands of Marylanders. Another challenge by states succeeded in undoing the Administration's attempt to cut SNAP benefits to hundreds of thousands of Americans in the midst of a pandemic. Thanks to a suit brought by Maryland and others, Postmaster Louis DeJoy's attempt to hinder mail delivery in the leadup to Election Day was beaten back by court order. And the Administration's attempt to strip health insurance from millions of Americans has been stymied by court challenges to attempts to dismantle the Affordable Care Act.

As the lawsuits summarized in this report demonstrate, the Trump Administration's harmful reach into the lives of Marylanders through a wide range of unconstitutional and illegal conduct is broad and deep. The Office of the Attorney General stands ready to continue to push back against actions of the federal government that threaten or jeopardize the health, safety, and well-being of the State and Marylanders.

PUBLIC CORRUPTION

Enforcing the Emoluments Clauses

In 2017, the OAG, along with the District of Columbia, filed suit against President Trump, in his official capacity, to enforce the nation's original anti-corruption laws, the foreign and domestic Emoluments Clauses of the U.S. Constitution. As explained in the complaint, "President Trump's myriad international and domestic business entanglements make him

[1] Specifically, the MDA authorizes the Attorney General to file suit when the federal government threatens affordable health care, public safety and security, civil liberties, financial and economic security, fraudulent and predatory practices, the health of the environment, illegal immigration and travel restrictions, and Marylanders' general health and well-being.

vulnerable to corrupt influence and deprive the American people of trust in their chief executive's undivided loyalty." *District of Columbia v. Trump*, 2017 WL 2559732 (D. Md. filed June 12, 2017) (No. 17-cv-01596-PJM).

The administration filed a motion to dismiss the complaint. The court issued two opinions denying the Justice Department's motion, concluding that the plaintiffs have standing to pursue their claims and that they have stated a claim under the Emoluments Clauses. In the meantime, the original complaint was amended, at the invitation of the district court, to include President Trump in his individual capacity. The President moved to certify an interlocutory appeal and to stay all proceedings, including discovery, during the pendency of that appeal. The court denied the motion and, after the parties held an initial discovery conference and filed a joint report with the court, the court issued a scheduling order allowing discovery to proceed.

In December 2018, the Justice Department filed a mandamus petition in the official capacity action and the President's personal lawyers filed an interlocutory appeal in the individual capacity action. A panel of the Fourth Circuit stayed proceedings in the district court (including discovery). In March 2019, a panel of the Fourth Circuit heard arguments in the two parallel appeals brought by the President. In July, the panel issued decisions in both cases holding that Maryland and the District lack standing to bring suit. However, that decision was vacated and the case was reheard before the entire Fourth Circuit sitting en banc. On May 14, 2020, the en banc court issued decisions denying the President's mandamus petition in his official capacity and dismissing the President's appeal in his individual capacity. On July 9, 2020, the Fourth Circuit granted the President's request, in his official capacity, to stay proceedings pending an opportunity to seek Supreme Court review, but the Fourth Circuit denied the President's request to stay proceedings with respect to the individual capacity action. Currently, the President's cert. petition in the official capacity action is pending in the Supreme Court, and the President's renewed attempt to appeal in the individual capacity action is pending in the Fourth Circuit.

President Trump's violations of the foreign and domestic Emoluments Clauses harm the interests of Maryland and its citizens. The clauses ensure that the President will act in the interests of the people and will not be swayed by the corrupting influence of money or other benefits received from foreign governments, the federal government, or state governments.

Marylanders have the right to honest government. We are entitled to know that decisions impacting Maryland are being made on the basis of merit and not on the basis of the President's personal financial gain.

IMMIGRATION AND CIVIL RIGHTS

Fighting President Trump's Family Separation Policy

In 2018, the Office of Attorney General (OAG) joined the State of Washington's suit challenging the constitutionality of President Trump's policy of separating immigrant children from their parents when they are detained upon entry into the country. *Washington v. United States* (S.D. Cal., Case No. 3:18-cv-01979-DMS). The case was initially filed in the Western District of Washington, but was moved to the Southern District of California, which was considering a related case brought by advocacy groups. It is currently pending before that court.

Under the challenged policy, when a family enters the United States along the Southwestern border, the children are separated from their parents, regardless of the family's circumstances or needs. The parents are sent to detention facilities awaiting asylum or deportation proceedings, while the children are sent to a variety of different residential facilities across the country, often without warning or an opportunity to say goodbye and without providing information about where the children are being taken or when they will next see each other. The states' interviews of detainees in their respective jurisdictions confirm the gratuitous harm that this policy inflicts on the thousands of parents and children separated under the policy, many of whom must go weeks and months without seeing or speaking with their parents.

As legal challenges to the policy mounted, President Trump signed an Executive Order purporting to suspend the Policy, but the Order said nothing about reuniting families already separated from one another. At the same time, the Administration filed an application for relief from the *Flores* Settlement, which has governed the detention, release, and treatment of all immigrant children for more than 20 years. That request seeks federal court permission to detain families together pending immigration proceedings—a plan that raises the specter of internment camps or, worse, prison-like settings. The court denied the request in July of 2018.

The issues in the family separation policy case are important to Marylanders because there are children who have been separated under the policy who have been relocated to Maryland, either in residential care facilities operated by nonprofit groups or in the private homes of sponsors. Once in Maryland, the children draw upon governmental services, including enrollment in public school and access to vaccines and other State-subsidized medical care. In addition, the State is responsible for inspecting residential care facilities to ensure that they are providing a safe and supportive environment for their residents, including the separated children. These governmental services are supported by Maryland tax dollars, which give every Marylander a financial stake in the case over and above the moral stake in ending this cruel and unlawful policy.

The OAG intervened in *Washington v. United States* because Maryland has a fundamental interest in ensuring that the federal government does not discriminate based on race,

ethnicity, or religion, particularly in the cruel way that the family separation policy does. The suit remains pending before the federal court in California.

Protecting Deferred Action for Childhood Arrivals

Joining several other states, the OAG filed suit in California to challenge the Trump administration over its decision to end Deferred Action for Childhood Arrivals (DACA). As part of their DACA applications, recipients were required to provide sensitive personal information to the federal government, and it promised that the information would remain confidential and not be used against them in later immigration enforcement proceedings. Having relied on those assurances of continuity and fair treatment, these young people now find themselves in greater peril and at higher risk of deportation than if they had not participated in the program. President Trump's elimination of the program violated both the Constitution's fundamental guarantees of equal protection and due process, and constraints on arbitrary and capricious federal agency action.

In January 2018, the U.S. District Court for the Northern District of California denied defendants' motion to dismiss and granted a preliminary injunction preventing DACA's rescission, basing its decision on the conclusion that the rescission violated the Administrative Procedure Act. In November 2018, the Ninth Circuit issued a decision affirming the district court's grant of a preliminary injunction.

Litigation over DACA was also brought in several other courts. U.S. district courts in both New York and the District of Columbia preliminarily enjoined the Trump Administration from terminating the program. In November 2018, the Justice Department filed in the Supreme Court a petition for certiorari as to the Ninth Circuit case and petitions for certiorari before judgment in the other cases. The Supreme Court granted review and on June 18, 2020 issued a decision holding that the Administration's rescission of DACA was arbitrary and capricious in violation of the Administrative Procedure Act. On remand, our case in the Northern District of California remains open with respect to those claims and legal theories that were not addressed in the Supreme Court's decision,

DACA has opened up employment and educational opportunities for thousands of Marylanders who have grown up here and are either working, going to school, or serving in the military. Hundreds are attending our public colleges and universities and benefitting from Maryland's passage of the DREAM Act. The DREAM Act extended in-State tuition rates to qualified young people raised in our State who are seeking a college education.

Apportionment of Seats in the United States House of Representatives

On July 21, 2020, President Trump announced a policy that would exclude undocumented immigrants from the population count used to apportion seats in the United States House of Representatives. *See* Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679 (July 23, 2020). In response, the OAG joined a multistate lawsuit filed in the Southern District of New York.

The complaint asserts that the policy violates: (1) the Fourteenth Amendment, which provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed," U.S. Const. amend. XIV, § 2; (2) Article I of the Constitution, which requires that the "respective Numbers" of each State be determined by an "actual Enumeration" of the total population; (3) the statutory scheme Congress enacted to implement the decennial census and reapportionment of House seats.

On September 10, 2020, a three-judge panel granted summary judgment for the plaintiffs, holding that the Presidential Memorandum violates the statutory scheme by excluding undocumented immigrants from the "whole number of persons in each State," and by requiring the Secretary of Commerce to report a set of numbers difference from the number ascertained by the decennial census. The panel noted that the merits of the dispute were "not particularly close or complicated." Nevertheless, defendants appealed the decision to the Supreme Court, which heard oral argument on November 30, 2020.

Fighting President Trump's Declaration of National Emergency at the Southern Border

On February 15, 2019, after failing to obtain funding from Congress, President Trump announced that he would invoke his emergency powers and redirect funds appropriated for other purposes to construct a wall along the southern border. In response, the OAG joined 15 other states in filing a lawsuit in the Northern District of California challenging those actions as unconstitutional and unlawful.

The sources of funding identified for diversion to border wall construction potentially include tens of millions of dollars appropriated for military construction projects at Ft. Meade and Joint Base Andrews.

The district court entered a preliminary injunction preventing the diversion of military funds in the related case filed by the Sierra Club, finding that the Department of Defense likely lacked the statutory authority to divert money for the purpose of building a border wall, and later entered a permanent injunction based on the same rationale. The Ninth Circuit denied the defendants' emergency motion to stay the permanent injunction, concluding that the public interest is "best served by respecting the Constitution's assignment of the power of the purse to Congress, and by deferring to Congress's understanding of the public interest as reflected in its repeated denial of more funding for border barrier construction." However, on July 26, 2019, the Supreme Court granted a stay of the injunction pending appeal, allowing the Trump Administration to move forward with the Department of Defense-funded border wall construction. On June 26, 2020, the Ninth Circuit Court of Appeals affirmed the district court's ruling on summary judgment; defendants filed a petition for a writ for certiorari, which was granted on October 19, 2020.

In September 2019, the federal government announced that it would divert $3.6 billion from military construction projects—including tens of millions of dollars appropriated for Ft. Meade and Joint Base Andrews—for border construction. We filed a motion for summary judgment to prevent the diversion of those funds; the district court granted that motion on December 11, 2019, but stayed the injunction based on the Supreme Court's previous stay ruling. An appeal was noticed and argued on March 10, 2020, and on October 9, 2020, the Ninth Circuit Court of Appeals affirmed the district court's decision, resulting in the stay being lifted and construction being enjoined on this portion of the wall. Defendants have filed a petition for a writ of certiorari in the Supreme Court; our response is due in mid-December.

The OAG also joined a separate, related lawsuit challenging diversions of FY 2020 military funding. On February 13, 2020, President Trump issued a reprogramming action transferring over $3.8 billion in funds appropriated by Congress for other purposes, including National Guard equipment and the procurement of Lockheed Martin-manufactured F-35 and C-130J aircraft. A motion for partial summary judgment is fully briefed and pending in that case.

Public Charge

This lawsuit challenges the legality of a Department of Homeland Security rule that would drastically expand the definition of "public charge" for the purpose of admission into the country and adjustment of immigration status. See *Washington et al. v. DHS*, No. 19-cv-5210 (E.D. Wa., filed Aug. 14, 2019).

From colonial times to present day, "public charge" meant someone who would be permanently and primarily reliant on the government for subsistence. Under the new rule, that original meaning would be redefined as a noncitizen who receives common forms of federal and state public assistance, even in small amounts and for short periods of time—including Medicaid, SNAP benefits, and housing subsidies. The rule will cause lawfully present noncitizens whom Congress specifically made eligible to participate in federal benefit programs to disenroll or forbear enrollment, harming the public health and the economic vitality of Maryland's immigrant community.

The plaintiff states filed a motion for preliminary injunction, and on October 11, 2019, the district court entered a nationwide injunction preserving the status quo and issued a stay under APA section 705. Defendants appealed the injunction order and the Ninth Circuit granted a stay of the injunction pending appeal, allowing the policy to go into effect. Oral argument on the appeal of the preliminary injunction took place on September 15, 2020.

Barring International Students

On July 6, 2020, the U.S. Immigration and Customs Enforcement announced that it would rescind a previously-issued COVID-19 exemption for international students and require all students on F-1 visas whose university classes are entirely online to depart the country,

and bar any such students currently outside the United States from entering or reentering the country. This guidance came on the heels of contrary guidance, issued in March 2020, in which ICE stated that students could participate in online or remote classes implemented as a result of the pandemic, either while present in the United States or abroad, while retaining their visa status. That guidance was to remain "in effect for the duration of the emergency." In reliance on that guidance, universities in Maryland and elsewhere incorporated remote instruction as the cornerstone of their COVID response.

In response, the State of Maryland filed a multistate lawsuit on July 13 in the District of Massachusetts. On July 14, the Administration withdrew the directive at issue; the case is currently stayed.

PUBLIC SAFETY

3-D Printed Guns

Maryland is part of a multistate coalition that sued the U.S. Department of State in the Western District of Washington after the Department of State entered into a settlement agreement with Defense Distributed, Inc. that would allow that company to distribute 3-D printed gun plans on the internet.

The court granted the plaintiff's request for a temporary restraining order on July 31, 2018, and granted plaintiff's motion for a preliminary injunction on August 27, 2018, barring the publication of those plans.

After denying the private defendants' motion to dismiss and the Department of State's motion to stay proceedings, the court granted the plaintiffs' motion to supplement the administrative record. On November 12, the district court granted our motion for summary judgment in part, vacating the Department of State's unlawful agency action. While the State Department did not appeal the final judgment, Defense Distributed did; that appeal was dismissed as moot by the Ninth Circuit Court of Appeals on July 21, 2020.

Maryland filed another multistate lawsuit related to 3-D printed guns on January 23, 2020, challenging a rule promulgated by the U.S. Departments of Commerce and State that would remove software and technology "for the production of a firearm, or firearm frame or receiver" ("3D gun files") from the U.S. Munitions List. 3D gun files have been listed on the Munitions List and subject to export control pursuant to the Arms Export Control Act and the International Traffic in Arms Regulations. The challenged rules would result in 3D gun files being universally available, which would enable anyone with access to a commercially available 3D printer to automatically manufacture a working firearm out of plastic.

On March 6, 2020, the district court granted the states' motion for a preliminary injunction in part, keeping the 3D gun files on the Munitions List. That ruling is currently on appeal in the Ninth Circuit Court of Appeals.

Protecting the Chemical Accident Prevention Rule

Together with 10 other states, Maryland filed suit to challenge a rule that delayed implementation of amendments to the Chemical Accident Prevention Rule. See *New York et al. v. Pruitt,* No. 17-1181 (D.C. Cir. filed July 24, 2017). The Chemical Accident Prevention Rule seeks to prevent explosions, fires, releases of poisonous gases, and other "accidental releases" at facilities that use or store certain extremely dangerous chemical substances. Among other things, the rule requires such facilities to enhance local emergency preparedness and response planning by coordinating with local officials. The rule was meant to protect the lives of firefighters, emergency medical responders, police, law enforcement, and those living in surrounding communities.

Further, the rule requires a facility that experiences an incident that results in, or could reasonably have resulted in, a "catastrophic release" to investigate the incident's root cause with the goal of preventing similar incidents. It also requires third-party compliance audits when incidents occur at a facility.

The case was consolidated with a related case filed by various non-governmental organizations (NGOs). The D.C. Circuit ruled in favor of the plaintiffs on August 17, 2018; specifically, it ruled that EPA's order delaying the effectiveness of the amendments at issue is unlawful. In light of the potential consequences for public health and public safety, the multistate coalition and NGOs jointly moved for the court to expedite its issuance of the mandate. The court granted that motion and issued its mandate on September 21, 2018.

In a separate effort to weaken the amendments to the Chemical Accident Prevention Rule, EPA has proposed to substantively roll back aspects of the rule through an administrative rulemaking. In August 2018, the OAG joined multistate comments opposing that proposal and urging implementation of the amendments as promulgated. On October 28, 2019, the OAG joined the same group of states in filing supplemental comments highlighting the U.S. Chemical Safety Board's preliminary investigation results regarding an explosion and fire at the Philadelphia Energy Solutions Refinery which occurred in June 2019. In November 2019, EPA issued its final rule which largely mirrored its 2018 proposed rule.

In February 2020, we joined a similar multistate coalition in seeking judicial review of the November 2019 final rule in the D.C. Circuit. Concurrent with seeking judicial review our coalition also filed a petition for administrative reconsideration of the final rule, given the information introduced by our October 2019 supplemental comments. The D.C. Circuit agreed to hold our challenge in abeyance until EPA ruled on our petition for administrative reconsideration which was denied in September 2020. We have since filed a separate petition for review of the denial of our request for administrative reconsideration and the two cases have been consolidated.

Maryland has 157 facilities, some within close proximity to schools, that have the potential to endanger the lives of citizens and businesses if there is a release of hazardous chemicals.

Delays in the implementation of this rule unnecessarily endanger our communities and emergency responders.

Protecting Maryland from Hazardous LNG Trains

On October 24, 2019, the Pipeline and Hazardous Materials Safety Administration (PHMSA), an executive agency housed within the U.S. Department of Transportation, issued a proposed rule to allow the shipment of Liquified Natural Gas (LNG) in rail tank cars with no additional safety requirements. In order for natural gas to retain its liquid state it must be stored at or below -280˚F, presenting significant logistical issues to transporting it in this form. If released from these cryogenic conditions, say during a spill from a tank car, LNG will form a liquid pool and quickly boil off into a flammable, but still dangerously cold, gaseous cloud which presents unique safety challenges to first responders and nearby communities. Despite these unique risks, PHMSA proposed allowing up to 100 tank cars, each containing over 30,000 gallons of LNG, to be transported in a single train without any independent studies showing that such movement of LNG could be done safely.

The OAG led comments from fourteen additional states and the District of Columbia urging PHMSA to shelve the rulemaking until the completion of several ongoing safety studies, and otherwise urged the agency to adopt additional safety requirements and more thoroughly evaluate the environmental impacts of allowing LNG to be shipped via rail tank car.

PHMSA published a final LNG by Rail Rule in the Federal Register on July 24, 2020. While the final rule adopted several monitoring and tank car requirements, which were not included in the 2019 proposal, PHMSA failed to include commonsense safety measures like mandatory speed restrictions and crew safety distances. Additionally, the final rule relied on a cursory assessment of its environmental impacts and did not examine either the upstream or downstream effects of allowing LNG to be transported in rail tank cars.

The OAG led the same coalition of states that commented on the proposed rule in filing a petition for review of the Final Rule in the D.C. Circuit on August 18, 2020.

Safeguarding Maryland Workers

In 2016, the Occupational Safety and Health Administration (OSHA) directed all large employers – those with 250 or more employees -- to submit to OSHA information from three different workplace injury and illness tracking forms that employers already have to maintain. Just three years later, OSHA pulled an "about face" and issued a new rule disowning that commitment to transparency and public reporting. On March 6, 2019, Maryland joined five other states in a lawsuit filed in the U.S. District Court for the District of Columbia challenging the legality of OSHA's new reporting rule.

In 2016, when it adopted the rules requiring large companies to electronically report the workplace safety information, OSHA touted the reporting requirements as vital because

they would help OSHA and states target workplace safety enforcement programs, encourage employers to abate hazards before they resulted in injury or illness, empower workers to identify risks and demand improvements, and provide information to researchers who work on occupational safety and health. Reversing those requirements will make Maryland workers less safe.

The plaintiff states await a ruling on our motion for summary judgment, which has been fully briefed since September 2019.

HEALTH CARE

Ensuring Access to Contraception

The OAG intervened in a lawsuit challenging the Trump administration's decision to allow employers to deny coverage for contraception by citing religious or moral objections. See *California v. Wright*, Case 3:17-cv-05783, (N.D. Cal., filed Oct. 6, 2017). The rollback of the ACA's guarantee of no-cost contraceptive coverage will jeopardize access to reproductive health services and counseling for thousands of Maryland women and their families. In addition to violating the Administrative Procedure Act and the Establishment Clause, the Trump administration's action violates women's constitutional rights of equal protection and freedom from discrimination, and imposes additional fiscal burdens on the State as women seek birth control through state-funded programs. Sixty-two million women have benefited from this coverage nationwide since the inception of the ACA, and the administration's interim final rules put those benefits in jeopardy.

On December 21, 2017, the Court issued a nationwide preliminary injunction that defendants are (1) preliminarily enjoined from enforcing the 2017 Interim Final Rules and, (2) required to continue under the regime in place before October 6, 2017, pending a determination on the merits. On February 16, 2018, the United States appealed to the U.S. Court of Appeals for the Ninth Circuit.

On November 15, 2018, the administration published substantively identical Final Rules, which would have gone into effect on January 14, 2019.

On December 13, 2018, the Ninth Circuit largely upheld the Court's decision, finding that the states had standing to sue and that the states were likely to succeed on the APA notice-and-comment claim. But, the Ninth Circuit limited the scope of the preliminary injunction to only the five plaintiff states (California, Delaware, Maryland, New York, and Virginia). The case was remanded back to the District Court for further proceedings. Intervenor-Defendant Little Sisters of the Poor's cert petition seeking review of the Ninth Circuit's December 2018 decision was denied.

On December 18, 2018, the original states, joined by several other states (Connecticut, DC, Hawaii, Illinois, Minnesota, North Carolina, Rhode Island, Vermont, and Washington) (other states have moved to intervene), filed a Second Amended Complaint and Motion for a Preliminary, Nationwide Injunction to enjoin enforcement of the final rules. See *California v. HHS*, Case 4:17-cv-05783, (N.D. Cal., filed Dec. 18, 2018). The district court enjoined enforcement of the final rules within the

The September 5, 2019 merits hearing on the request for injunctive relief and motion to dismiss was vacated on August 30, 2019; in vacating the hearing, the court noted that there is a nationwide injunction currently in place, issued by the Eastern District of Pennsylvania and affirmed by the Third Circuit. There is a competing nationwide permanent injunction issued by Judge Reed O'Connor of the Northern District of Texas.

On October 22, 2019, the Ninth Circuit affirmed the Northern District of California's preliminary injunction barring enforcement of the final rules in the plaintiff states. The panel held that the states had standing and that despite the nationwide injunction by another federal court in Pennsylvania, the appeal was not moot. The panel further held that the district court did not abuse its discretion in concluding that the plaintiff states were likely to succeed on the merits of their claim under the APA and were likely to suffer irreparable harm absent an injunction. Finally, the panel held that there was no basis to conclude that the district court erred by finding that the balance of equities tipped sharply in favor of the plaintiff states and the public interest tipped in favor of granting the preliminary injunction.

The Federal and Intervenor-Defendants sought certiorari review. On January 17, 2020, the Supreme Court granted two petitions for certiorari from a parallel challenge to the interim and final rules brought by the Commonwealth of Pennsylvania and the State of New Jersey in the Third Circuit: *Trump v. Pennsylvania* and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*. On June 8, 2020, the Supreme Court in a 5-2-2 vote upheld regulations that exempt employers who have religious and moral objections from complying with the Affordable Care Act's mandate that health plans provide coverage for women's contraceptives. The Court instructed the Third Circuit to dissolve the nationwide preliminary injunction the district court had issued which had prevented the regulations from taking effect and remanded for further proceedings, including review of whether the regulations are invalid for failure to comply with the Administrative Procedure Act.

In light of the decision in *Little Sisters of the Poor v. Pennsylvania*, on July 9, 2020, the Supreme Court issued an order granting cert. in our case, vacating judgment, and remanding for further proceedings. On August 13, 2020, the Ninth Circuit ordered the parties to file simultaneous supplemental briefs to address the impact of the Supreme Court's recent opinion and the propriety of remanding the case to the district court to apply the Supreme Court's opinion in the first instance.

After receiving supplemental briefing to address the impact of the Supreme Court's June decision in *Little Sisters of the Poor v. Pennsylvania*, the Ninth Circuit on October 8, 2020 vacated the preliminary injunction previously entered in our favor and remanded the case. After receiving supplemental briefing, the district court scheduled a motions hearing for December 16, 2020.

Maryland law does extend contraceptive coverage to State-regulated health plans, but more than 50-percent of Marylanders are in employer self-insured health plans. All women and their families deserve contraceptive coverage, and family planning should be in hands of workers, not employers.

Challenging Premium Billing for Abortion Coverage

State of California, et al. v. Azar, et al. **N.D. Cal. (Challenge to new rule requiring separate invoices for abortion services)** – California, Maryland and other states, on January 30, 2020, challenged the U.S. Department of Health and Human Services' (HHS) final rule relating to separate premium billing for abortion coverage. The relevant portion of the final rule, *Patient Protection and Affordable Care Act; Exchange Program Integrity*, 84 Fed. Reg. 71674 (Dec. 27, 2019) (the "Final Rule"), requires, beginning the first billing cycle following June 27, 2020, that carriers send – and consumers pay – two entirely separate monthly bills for the premium for abortion services and the premium for all other services. This rule places excessive burdens on carriers, on our health insurance markets, and on consumers, while at the same time unjustifiably restricting women's access to reproductive healthcare. On July 20, 2020, Judge Laurel Beeler granted the states' motion for summary judgment and set the rule aside. The court found that the rule was arbitrary and capricious because the Administration did not advance a reasoned explanation for deviating from its prior rule and industry practice. Judge Beeler's decision follows a similar ruling issued by the District of Maryland's Judge Catherine Blake on July 10, 2020, in *Planned Parenthood of Maryland, Inc., et al. v. Azar et al.*, No. 1:20-cv-00361-CCB (D. Md. July 10, 2020).

On September 17, 2020, the United States appealed to the U.S. Court of Appeals for the Ninth Circuit. The Appellant's opening brief is due December 28, 2020.

Protecting Maryland's Insurance Markets – Association Health Plans

On July 26, 2018, the OAG joined a coalition of 12 attorneys general in filing a lawsuit challenging the Department of Labor's Association Health Plan (AHP) Final Rule. AHPs have a long history of fraud, mismanagement, and abuse, with millions in unpaid claims for policyholders and providers that often lead to consumer bankruptcies. The rule dramatically expands the footprint of AHPs, allowing them the unprecedented ability to form in order to evade consumer protections and sabotage the ACA.

The lawsuit alleges that the Department of Labor violated the Administrative Procedure Act when it promulgated the AHP rule. The lawsuit also argues that the rule violates both the ACA and the Employment Retirement Income Security Act (ERISA), and that it unlawfully reverses decades of agency and judicial interpretation of ERISA's key terms, with the primary purpose of undermining the ACA and without accounting for increased risk of fraud and harm to consumers based on a longstanding history of such conduct by similar plans.

The case is pending in the District Court for the District of Columbia. On March 28, 2019, Judge John D. Bates of the District of Columbia found the bona fide association and working owner provisions of the final rule "unreasonable interpretations of ERISA," and "clearly an end-run around the [Affordable Care Act]." The court set aside these parts of the regulation and remanded the rule to the DOL to determine how the rule's severability provision affects the remaining provisions.

The DOL appealed the decision and the D.C. Circuit heard oral arguments on November 14, 2019.

Ensuring Access to Family Planning Services (Title X)

Title X is a federal grant program enacted in the 1970s that funds family planning services for low-income individuals. On March 4, 2019, the Department of Health and Human Services published a final rule that would impair the Title X program in several ways. In response, the OAG and 30 other states filed a lawsuit in the District of Oregon challenging the legality of the rule.

The final rule interferes with the health care provider-patient relationship. Under the rule, providers in any clinic that receives Title X funding would be barred from referring a patient for an abortion (even if she requests that information), and in many circumstances even discussing an abortion with a patient. The new rule also mandates a referral for prenatal care for every pregnant patient, regardless of the needs or the wishes of the patient.

The district court issued a nationwide preliminary injunction on April 29, 2019, barring the rule from going into effect. Defendants appealed the ruling and sought to stay the injunction pending appeal. That stay was granted by a three-judge panel of the Ninth Circuit Court of Appeals and, after en banc review, the stay was allowed to go into effect. On February 24, 2020, the Ninth Circuit ruled in favor of the Administration and upheld the final rule. On October 5, we and our fellow plaintiff states filed a cert. petition seeking Supreme Court review of the Ninth Circuit's decision, which conflicts with decisions in other courts, including the Fourth Circuit's September 3, 2020 en banc decision affirming a permanent injunction against enforcement of the rule ordered by Judge Bennett in the District of Maryland in *Baltimore v. Azar*.

Fighting Discrimination in Health Care

We have challenged the Trump administration's efforts to rollback health care civil rights protections in two cases. First, the Department of Health and Human Services (HHS) issued a rule dramatically expanding the ability of businesses and individuals to refuse to provide necessary health care based on "religious beliefs or moral convictions." The rule reinterpreted nearly thirty statutory provisions in a way that would allow almost any peripherally involved person to stand in the way of the delivery of a broad swath of health care, including contraception, sterilization, pregnancy counseling, abortion, and end of life care.

On May 21, 2019, Maryland joined a lawsuit filed in the Southern District of New York and moved for a preliminary injunction to prevent the rule from going into effect as scheduled on July 22, 2019. After negotiation, HHS agreed to delay the effective date and implementation of the rule until November 22, 2019. After briefing and argument on our motion for summary judgment, the district court entered an order on November 6, 2019 vacating the rule in its entirety without geographical limitation. HHS appealed the decision to the Second Circuit Court of Appeals. The appeal was fully briefed as of August 31, 2020.

The second case concerns Section 1557 of the Patient Protection and Affordable Care Act (ACA)—a provision that prohibits discrimination on the basis of race, color, national origin, sex, disability, and age in a broad range of health programs and activities. In 2016, HHS promulgated a final rule, developed over the course of six years, to implement the nondiscrimination requirements of Section 1557. The 2016 rule specifically defined sex to include discrimination on the basis of gender identity and sex stereotyping, among other criteria.

On June 19, 2020, HHS published a new rule, 85 Fed. Reg. 37,160 (June 19, 2020) ("2020 Rule" or "Rule"), rescinding most of the 2016 Rule's core provisions and amended other HHS regulations unrelated to Section 1557, undermining critical anti-discrimination protections that prohibit discrimination on the basis of race, color, national origin, disability, sex, and age. With next-to-no legal, medical, or reasoned policy foundation, and in the face of a Supreme Court decision, *Bostock v. Clayton County, Georgia*, which held that discrimination based on transgender status or sexual orientation "necessarily entails discrimination based on sex," the Final Rule rolls back the 2016 rule and limits the protections for LGBTQ people, among others. The Final Rule would permit discrimination in our healthcare system by narrowing the scope of the statute's protections, exempting entities that are subject to Section 1557. It also eliminates important definitions of discrimination, opening the door to discriminatory treatment based on gender identity, sex stereotyping, and pregnancy termination – effectively sanctioning discrimination against

women and LGBTQ persons.[2]

On July 20, 2020, the Attorney General joined a multistate suit filed in the Southern District of New York that challenges the legality of the federal June 2020 Final Rule. That litigation is in the motions stage, but in a similar case in the District Court for the District of Columbia, *Whitman-Walker Health v. HHS*, on September 2, 2020, Judge Boasberg issued an order preliminarily enjoining parts of the 2020 Rule. HHS will be preliminarily enjoined from enforcing the repeal of the 2016 Rule's definition of discrimination "[o]n the basis of sex" insofar as it includes "discrimination on the basis of . . . sex stereotyping." 81 Fed. Reg. at 31,467. In addition, the agency will be preliminarily enjoined from enforcing its incorporation of the religious exemption contained in Title IX. See 45 C.F.R. § 92.6(b). On October 31, 2020, the Defendants appealed to the United States Court of Appeals for the District of Columbia Circuit from the September 2, 2020 Order.

Protecting Access to Food

In December 2019, the U.S. Department of Agriculture published a final rule that would have dramatically reduced the availability of SNAP funds for Marylanders deemed "Able-Bodied Adults Without Dependents" ("ABAWDs"). In response, the OAG joined a coalition of fourteen other states in filing a lawsuit in the District of Columbia challenging the legality of the rule.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 introduced new restrictions on who was eligible for SNAP benefits, including a time limit on how long an ABAWD can receive SNAP benefits. However, waivers to this restriction were available for areas with high unemployment rates or insufficient jobs. Under the new rule, and contrary to congressional intent, the states' ability to demonstrate entitlement to a waiver would be curtailed.

On March 13, 2020, the district court issued an order enjoining the waiver portion of the rule, which would have resulted in approximately 20,000 Marylanders, including 15,000 in Baltimore City alone, losing their SNAP benefits. On October 18, 2020, the district court granted our summary judgment motion, invalidating the entire rule.

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[2] During Maryland's 2020 legislative session, in the face of legal challenges to the ACA in *Texas v. United States*, and the proposed roll back of the antidiscrimination protections, this body enacted legislation to expand Maryland's antidiscrimination protections to specifically prohibit 1) hospitals, related institutions and licensed healthcare providers from refusing, withholding from, or denying any individual with respect to their medical care because of the person's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability, 2020 Md. Laws Ch. 428 (H.B.1120); and 2) carriers from excluding consumers from participation in, denying benefits to, or otherwise subjecting consumers to discrimination because of the person's race, sex, creed, color, national origin, marital status, sexual orientation, age, gender, gender identity, or disability, 2020 Md. Laws Ch. 428 (S.B.872). In short, Maryland's public policy, as evidenced by these new laws, is far more consistent with HHS's 2016 Rule than with the 2020 Rule.

PROTECTING CONSUMERS

Defending the Gainful Employment Rule

This lawsuit, led by Maryland and joined by 17 other states, was filed against the U.S. Department of Education (ED) in October 2017 alleging it violated the Administrative Procedure Act when it delayed and rolled back various parts of a regulation created in 2014 called the Gainful Employment Rule. This rule sought to protect students and taxpayers by prohibiting institutions from participating in the federal student loan program if the institutions' educational programs consistently fail to prepare students for gainful employment, thereby burdening students with high debt loads that they are unable to repay. The ED extended several deadlines in the regulations, which it lacked legal authority to do without any public, deliberative process, rendering the regulations ineffective.

Federal law requires that all programs that receive federal grants or loans at for-profit institutions and non-degree programs at private and public institutions prepare students to be gainfully employed. The ED adopted regulations that define "gainful employment" as a job that pays a sufficient income for students to repay their student loan debts, which was intended to address concerns that some institutions were leaving students with unaffordable levels of student loan debt in relation to their earnings, eventually resulting in many students defaulting on their loans. The regulations also require institutions to provide certain disclosures, including the average earnings and debt load of their graduates.

On July 1, 2019, the ED issued a final rule that rescinded the 2014 Gainful Employment Rule (the "Repeal Rule"). The new rule took effect on July 1, 2020.

On June 26, 2020, just before the Repeal Rule took effect, the court issued an order dismissing the case. The court explained in a memorandum filed a few weeks later that it was dismissing the case because the court believed that the states lacked Article III standing. The court did not reach the merits of the states' claims. The states filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit. Because of the rescission of the 2014 Gainful Employment Rule, the states' case is now moot, and, therefore, the states asked the appellate court to vacate the order dismissing this case.

Because the ED has repealed its only way of ensuring that for-profit and vocational schools provide the education that the Higher Education Act has made a condition of the HEA, students, by the ED's own account, will enroll in "sub-optimal programs" that "have demonstrated a lower return on the student's investment, either through higher upfront costs, reduced earnings, or both." Also, students will fall prey to unscrupulous institutions that entice students to enroll in worthless programs through often fraudulent and misleading practices, increasing the number of students who will end up in programs that

offer nothing other than unmanageable debt. As a result, the Repeal Rule is inconsistent with the HEA and was adopted in violation of the Administrative Procedure Act.

On June 24, 2020, the OAG and 18 other states filed a lawsuit against Secretary DeVos and the ED in the United States District Court for the District of Columbia asking the court to vacate the Repeal Rule. The ED has filed a motion to dismiss, and the states' response is due in December.

Protecting the Borrower Defense Rule

The OAG joined litigation related to U.S. Department of Education's (ED) Borrower Defense Rule, which was created in 2016 and scheduled to go into effect on July 1, 2017. The Borrower Defense Rule was designed to hold abusive higher education institutions accountable for cheating students and taxpayers out of billions of dollars in federal loans.

The rule created efficient and improved procedures for borrowers to obtain loan forgiveness when a predatory school engages in deceptive conduct or when it suddenly closes in the midst of a student's matriculation. While providing students with relief from loans obtained as a result of deceptive conduct, the rule also protected taxpayers by strengthening the requirements for schools to prove financial responsibility, including, under certain circumstances, by posting letters of credit. The rule also limits the ability of schools to require students to sign mandatory arbitration agreements and class action waivers, commonly used by for-profit schools, to prevent public disclosure and to thwart legal actions by students who have been harmed by schools' abusive conduct. Despite the protections that the rule would provide to students, the ED, on three separate occasions, delayed the implementation of the rule.

Because each of the ED's actions to delay the implementation of the rule violated the Administrative Procedure Act, the OAG and 18 other states joined a lawsuit led by Massachusetts to challenge the Department's illegal delays. The states' suit was consolidated with a similar suit filed by a group of private citizens.

On September 12, 2018, the states' and private plaintiffs' motion for summary judgment was granted, and the Department's was denied, with the Court holding that each of the Department's three delays of the Borrower Defense Rule did not comply with the Administrative Procedure Act and must be vacated. As a result of this ruling, the Borrower Defense Rule became fully effective on October 16, 2018.

In 2019, the ED announced a new Borrower Defense Rule, drastically limiting the viable defenses to repayment of federal student loans and imposing additional requirements on misrepresentation claims that are so onerous that they make the legitimate claims difficult for student loan borrowers to assert. Those regulations also unreasonably raise the bar for students' burden of proof that their school misrepresented a material fact and requires every borrower to meet this high burden on their own, without being able to take advantage of the group discharge process in the Obama Administration's 2016 Borrower Defense Rule.

The 2019 Borrower Defense Rule, which went into effect on July 1, 2020, makes it more likely that Marylanders are saddled with significant amounts of student loan debt that they are unable to repay, promotes deceptive and predatory practices by schools that are no longer deterred by the threat of the ED seeking reimbursement for the cancellation of student loans, and wastes state grant money provided to students who attend a fraudulent program. Because the 2019 Borrower Defense Rule violates the Administrative Procedure Act, harms the public interest and welfare of the residents of the State of Maryland, and causes direct injury to the State, the OAG joined 22 other states in a lawsuit filed in the United States District Court for the Northern District of California on July 15, 2020 against Secretary DeVos and the ED. The ED filed a motion to dismiss in September, and we filed our opposition on November 20, 2020. Oral arguments on that motion are scheduled for February 10, 2021.

Safeguarding CARES Act Funds

The OAG joined with eight other states in filing a lawsuit in the Northern District of California to challenge the U.S. Department of Education's guidance surrounding the distribution of CARES Act funds intended for K-12 schools. Under Secretary DeVos's July 1, 2020 guidance, money would be distributed to private schools based on their total enrollment rather than the number of needy students served. That formula would divert approximately $15 million from Maryland public schools and redirect it to wealthy private schools, in clear contravention of the CARES Act text.

The plaintiffs moved for a preliminary injunction, which the district court granted on August 26, 2020, prohibiting enforcement of the guidance pending the disposition of the case. On November 9, the district court entered a stipulated permanent injunction against the Department of Education and on November 11, the court entered a final judgment in favor of plaintiffs.

Ensuring Mail Delivery

In July 2020, newly appointed Postmaster General Louis DeJoy announced "transformative" operational changes to the United States Postal Service. Those changes to the nature of postal services included: (i) eliminating overtime; (ii) instructing carriers to leave mail behind; (iii) decommissioning mail sorting machines; (iv) removing mailboxes; (v) reducing operating hours; and (vi) changing how election mail is classified and charged. Those changes led to nationwide mail delays and concerns that the mail-in ballots would not be timely delivered in time for the November general election. In response, Maryland filed a lawsuit with twelve other states in the Eastern District of Washington challenging the legality of Postmaster DeJoy's policies. The complaint alleged that Postmaster DeJoy failed to follow the procedural requirements laid out in the Postal Accountability and Enhancement Act in implementing his changes.

On September 17, 2020, following a hearing that day, the district court judge entered a nationwide preliminary injunction ordering USPS to: (1) immediately stop the policy changes implemented in July 2020, including the "leave mail behind" policy, where postal trucks are required to leave at specified times, regardless if there is mail still to be loaded, (2) continue its longstanding practice of treating all election mail as First Class mail, regardless of the paid postage, (3) not implement or enforce any "change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis," absent a duly issued advisory opinion of the Postal Regulatory Commission, (4) replace equipment necessary to process election mail in accordance with First Class delivery standards. Defendants have until December 9, 2020 to file an answer to the complaint or move for dismissal.

Protecting Workers from Misclassification

The U.S. Department of Labor issued a final rule in January 2020 that would narrow the definition of joint employment under the Fair Labor Standards Act. The OAG joined 17 other states in a lawsuit filed in the Southern District of New York, asserting that the rule was unlawful.

When Congress passed the FLSA in 1938, it included an extremely broad definition of "employ," which "includes to suffer or permit to work." 29 U.S.C. § 203(g). The breadth of the definition was required to accomplish the FLSA's purpose, to "eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation." *Roland v. Electric Co. v. Walling*, 326 U.S. 657, 669 (1946). Since 1939, the Department of Labor has recognized that an employee can be simultaneously employed by multiple employers, and for decades courts have employed a broad "economic reality" test to determine whether an employment relationship exists for the purposes of the FLSA. In stark contrast to this longstanding precedent, the new DOL rule would create a four-factor test for joint employer liability narrowly focused on the issue of control.

On September 8, 2020, the district court granted our motion for summary judgment, holding that the rule is contrary to law and arbitrary and capricious, and vacated the new standard for joint employer liability.

Protecting Maryland's Access to Information Regarding Employment Discrimination

On October 30, we joined a multistate lawsuit challenging the U.S. Equal Employment Opportunity Commission's decision to revoke full access to federal employment data used by state and local fair employment practice agencies ("FEPAs") to monitor and combat discrimination in the workplace. The agencies rely on employment data to identify priorities for investigation and enforcement of civil rights laws protecting workers, which includes addressing persistent gender and racial wage gaps in Maryland and across the country. Under Title VII, EEOC is required to provide FEPAs – upon request and without

cost – employment data obtained from any employer within the FEPA's jurisdiction, to support efforts to effectively fight employment discrimination. Recently, EEOC abandoned its long-established practice of sharing all "Employer Information Report EEO-1" (EEO-1) data within a FEPA's jurisdiction and now refuses to provide information until a specific employer is already under investigation. EEOC adopted the change without engaging in notice and comment rulemaking process as required by the Administrative Procedure Act.

ENVIRONMENT

Protecting the Arctic Refuge from Oil and Gas Drilling

We joined other states in bringing an action to challenge the decision of the Bureau of Land Management (BLM) to proceed with an oil and gas leasing program in the Coastal Plain region of the Arctic National Wildlife Refuge (Arctic Refuge).

The Arctic Refuge is often referred to as "America's Serengeti" and provides important habitat for caribou, polar bears, grizzly bears, wolves, and millions of migratory birds—including migratory birds that travel through Maryland. The Coastal Plain region, which is targeted for the oil and gas leasing program, is the Arctic Refuge's most biologically diverse and productive area. In addition to its harms to the Coastal Plains' ecosystem, the oil and gas leasing program would lead to an increase in greenhouse gas emissions at a time when public policy throughout the country, and in Maryland, seeks to mitigate climate change and its harmful impacts.

The action we brought challenges the leasing plan, alleging violations of a variety of federal statutes, including NEPA, the Administrative Procedure Act, the Alaska National Interest Lands Conservation Act, the National Wildlife Refuge System Administration Act, and the Tax Cuts and Jobs Act.

Preserving Regulation of Hazardous Air Pollutants from Power Plants

The Clean Air Act provides that, if EPA finds it "appropriate and necessary" to regulate a category of sources emitting hazardous air pollutants, it must do so under Section 112(d) of the Act. In 2012, EPA reaffirmed an earlier "appropriate and necessary" finding and put in place the Mercury Air Toxics Standards (the "MATS Rule"), which required coal- and oil-fired power plants to meet specified emission standards for hazardous air pollutants. In 2016, in response to the Supreme Court's decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), EPA issued a supplemental finding that again reaffirmed its "appropriate and necessary" conclusion.

Following a notice-and-comment period, in 2020 EPA completed reconsideration of that 2016 decision and concluded, in a "Revised Determination," that regulation of coal- and oil-fired power plants under Section 112 is *not* "appropriate and necessary." The Revised

Determination thus removes the predicate for promulgation of the MATS Rule, leaving it potentially vulnerable to challenge.

As part of a multistate coalition, the OAG joined a petition for review of the Revised Determination in the D.C. Circuit. Together with other coalition members, the OAG also intervened on EPA's side in a consolidated case, to defend against arguments that EPA should have taken the further step of eliminating the MATS Rule. Briefing is not yet underway.

Eliminating the MATS Rule—one possible consequence of the Revised Determination—would increase emissions of various toxic and traditional pollutants, including pollutants that reach Maryland from power plants in upwind states. Further, the Revised Determination's new approach to cost-benefit analysis—which generally disregards the co-benefits of regulation while placing far fewer limitations on the consideration of costs—could readily be employed in other circumstances to make it more difficult to regulate in service of public health and a clean environment.

Defending Greenhouse Gas Emissions Standards

In 2017, the OAG intervened in a lawsuit to defend Environmental Protection Agency (EPA) greenhouse gas (GHG) emissions standards for model year 2022-2025 light-duty vehicles. The suit, *Alliance of Automobile Manufacturers v. US Environmental Protection Agency et al.*, (D.C. Cir., Case No. 17-1086), challenged the EPA's finding that the emissions standards are feasible at reasonable cost, will achieve significant CO_2 emissions reductions, and will provide significant benefits to consumers and to the public. Shortly after it was filed, its petitioners voluntarily dismissed the suit after the EPA announced that it would revisit the Obama-era GHG emissions standards.

The EPA announced in April 2018 that it no longer believes the standards are appropriate and that they should be revised. In response, the OAG joined other jurisdictions in filing a petition for review on May 1, 2018, of the EPA's decision to revise the standards. See *State of California et al. v. US Environmental Protection Agency et al.*, (D.C. Cir., Case No. 18-1114). On November 14, 2019, the D.C. Circuit issued an opinion dismissing the case for lack of jurisdiction on the ground that the agency's decision was non-final.

In the meantime, EPA and NHTSA jointly proposed to roll back GHG emissions standards and corporate average fuel efficiency (CAFE) standards for future years. Joining a coalition of states and cities, the OAG petitioned for review of these deregulatory actions in the D.C. Circuit. The OAG, along with other coalition members, also intervened on the agencies' side in a consolidated case challenging Defendants' actions as insufficiently deregulatory. Briefing on the matters is scheduled to begin in January 2021.

These cases are important to Marylanders because of Maryland's interest in reducing air pollution. GHG emissions pose a significant threat to public health and climate stability, and Maryland has unique vehicle pollution challenges because of the high volume of out-of-state vehicles that drive through the State on I-95 and other highways.

Avoiding Venting of Potent Greenhouse Gases

Hydrofluorocarbons (HFCs) are widely used as coolants in commercial refrigeration systems. While they do not contribute to the destruction of the stratospheric ozone layer like earlier refrigerants, they are a potent class of GHG. In 2016, the Obama Administration published regulations that extended the appliance-maintenance and leak-repair standards that previously applied to earlier categories of refrigerants to HFCs. At the time, EPA asserted that extending these maintenance and repair requirements to HFC containing appliances would create a more efficient system for handling refrigerants, reduce GHG emissions, and increase compliance with the maintenance and repair standards for appliances containing older, ozone depleting substances as well.

In March 2020, the EPA published a final rule to rescind the 2016 extension of maintenance and repair standards to HFCs. The rescission failed to grapple with the 2016 rule's cost benefit analysis or the agency's previous conclusion that extending the regulations to HFCs would increase compliance for appliances containing older, ozone depleting substances. In May 2020, the OAG joined a multistate coalition in challenging the rescission in the D.C. Circuit. Opening briefs were filed in October 2020.

Fighting for Energy Efficiency and Conservation Standards

In 2017, the OAG filed suit seeking to compel the U.S. Department of Energy (DOE) to publish and make effective several final energy efficiency and conservation standards for household and industrial appliances. DOE's energy efficiency standards significantly reduce the nation's energy consumption, resulting in substantial and crucial utility cost-savings for U.S. consumers. During the Obama administration, DOE had estimated that over a 30-year period these standards would result in 99 million metric tons of reduced CO_2 emissions and save consumers and businesses $8.4 billion.

The lawsuit alleges that DOE's failure to move forward with the regulations violates the Energy Policy and Conservation Act and the Administrative Procedure Act. See *Natural Resources Defense Council, et al. v. Perry, et al.* (N.D. Ca., Case No. 3:17-cv-03404). A federal district court in California granted the plaintiffs' motion for summary judgment on February 18, 2018, concluding that DOE violated the Energy Policy and Conservation Act and ordering the agency to publish the standards. The Trump administration appealed to the Ninth Circuit, which stayed the district court's decision pending appeal. On October 10, 2019, the Ninth Circuit affirmed the District Court's holding that DOE was required to publish the final energy efficiency standards.

The Trump Administration has also missed statutorily imposed deadlines to update energy efficiency standards for 25 categories of consumer and industrial or commercial appliances as required by the Energy Policy and Conservation Act (EPCA). We joined a multistate coalition in providing DOE with notice of our intent to sue over its failure to meet these deadlines in August 2020 and sued to compel DOE to update energy efficiency standards for these categories of appliances in the Southern District of New York on November 9, 2020. *See New York v. DOE*, Case No. 1:20-cv-09362 (S.D. N.Y. filed Nov. 9, 2020).

As a critical component of broader efforts to reduce air pollution, these standards should be updated. GHG emissions pose a significant threat to public health and climate stability. Maryland has a significant interest in increased energy efficiency and reduced energy use, in protecting its population and environment, and in enforcing the provisions of its laws designed to foster energy efficiency and reduce global warming–related impacts. These efforts are harmed by the DOE's illegal decision not to update energy efficiency standards.

Preserving Energy Efficiency Standards for Lightbulbs

On January 17, 2017 the Department of Energy (DOE) published two final rules expanding the definition of general service lamp (i.e. lightbulbs) under the Energy Policy and Conservation Act (EPCA). Those rules brought several categories of bulb into EPCA's energy efficiency regime and triggered the application of a 45 lumen/watt efficiency backstop effective January 1, 2020.

However, on February 11, 2019 DOE issued a notice of proposed rulemaking to repeal the previously finalized definitions. By comment letter dated May 3, 2019 the OAG joined a multistate coalition in opposing the proposed repeal. Those comments argued that DOE's proposal would violate EPCA's anti-backsliding provision, the Administrative Procedure Act, the National Environmental Policy Act, and cause an otherwise avoidable increase in pollution.

On September 5, 2019, DOE published a final rule revoking the definitional rules that had previously expanded the scope of EPCA's general service lamp provisions. On November 3, 2019, the OAG joined 14 other state Attorneys General, the District of Columbia, and the City of New York in petitioning for review of the repeal rule in the U.S. Court of Appeals for the Second Circuit. Briefing has been completed in that matter and argument is tentatively set for February 8, 2021. *See New York v. DOE*, Case No. 19-3652 (2d Cir. Filed Nov. 3, 2019).

Fighting to Ban Chlorpyrifos

Together with other states, the OAG intervened in a lawsuit challenging the EPA's decision to allow continued use of chlorpyrifos on food crops, despite the fact that the EPA's own scientists were unable to identify a safe level for the pesticide in food. See *LULAC et al. v. Pruitt et al.*, No. 17-71636 (9th Cir. filed June 6, 2017).

A three-judge panel of the Ninth Circuit ordered EPA to revoke all tolerances and registrations for chlorpyrifos within 60 days from the date of the court's mandate. The Ninth Circuit granted EPA's petition for rehearing en banc, however, and vacated the panel decision. After hearing oral argument, in April 2019 the en banc court ordered EPA to rule on the states' administrative objections, which had long gone unanswered, within 90 days. EPA denied those objections, effectively leaving the tolerances and registrations for chlorpyrifos in place for now.

Maryland has joined other states, however, in petitioning for review of that denial, again in the Ninth Circuit. The challengers argue that EPA unlawfully left the tolerances and registrations intact without making the safety findings required by the statute. Oral argument took place before a three-judge panel earlier this year. The case remains pending. EPA's own record shows that chlorpyrifos is a toxic pesticide that has adverse neurodevelopmental effects, particularly in infants and children. EPA scientists were unable to identify a safe level for the pesticide in food. Chlorpyrifos is widely used, including in the production of fruits and vegetables consumed by millions of Americans.

Protecting Maryland from Toxic Chemicals

In July 2020, the EPA released its final Risk Evaluation for Methylene Chloride, a toxic chemical that is a common ingredient in metal degreasers, paint and coating strippers, and adhesives. Short term exposure to Methylene Chloride can lead to acute health effects, including death, while chronic exposure has been linked to cancer and other long-term conditions.

EPA's final Risk Evaluation, however, failed to consider a number of known exposure pathways when determining the public's risk from methylene chloride exposure. In August 2020, the OAG joined a multistate coalition challenging EPA's final Risk Evaluation in the Second Circuit.

Limiting Methane Emissions from the Oil and Gas Sector

In April 2018, the OAG joined a suit in the U.S. District Court for the District of Columbia seeking to compel the EPA to promulgate regulations, known as Emissions Guidelines, to limit methane emissions from existing sources in the oil and gas sector. As required by the Clean Air Act, the EPA should have addressed methane emissions from existing sources once it established standards for new and modified facilities, which was completed in June 2016. However, the EPA has to date failed to issue these standards for existing sources.

Methane is a very potent GHG; when feedback effects are included, it warms the climate about 34 times more than carbon dioxide over a 100-year period. On a 20-year timeframe, it has about 86 times the global warming potential of carbon dioxide. Oil and gas systems are the largest source of methane emissions in the United States and the second largest industrial source of U.S. GHG emissions.

Climate disruption from rising GHG concentrations is increasingly taking a toll on Maryland families and businesses. More frequent, severe, or long-lasting extreme events, such as droughts, heat waves, wildfires, and flooding from sea level rise, will occur over the coming decades due to climate change.

The suit is pending in the U.S. District Court of the District of Columbia, where EPA has sought to stay proceedings pending an ongoing rulemaking with the potential to repeal the methane emissions guidelines at issue.

Fighting for Enforcement of Stricter Fuel Efficiency Standards

The OAG filed suit challenging a rule promulgated by the National Highway Traffic Safety Administration (NHTSA). See *State of New York, et al. v. National Highway Traffic Safety Administration, et al.*, No. 17-2780 (2d Cir. filed Sept. 8, 2017). The rule would have delayed the effective date of the Civil Penalty Rule, which increases the civil penalty that can be assessed against a manufacturer for violation of the Corporate Average Fuel Economy (CAFE) standards.

The Civil Penalty Rule imposes a nearly three-fold increase in the penalty rate assessed on automakers for failure to meet fleet-wide fuel efficiency standards. If permitted, NHTSA's delay of the penalty increase would have allowed the outdated penalty rate to remain in effect, and more auto manufacturers would have likely elected to pay the penalty rather than build fleets that meet the stricter standards.

Filed in the Second Circuit, the OAG's suit was consolidated with a similar suit filed by various NGOs. The court expedited its consideration of the case, and then on April 23, 2018, just days after oral argument and in advance of issuing a written decision explaining its ruling, voided NHTSA's action to indefinitely delay the Civil Penalty Rule. In July 2019, however, NHTSA substantively rolled back the increased penalties, including reverting back to a pre-2016 penalty amount. The OAG joined a multistate challenge to NHTSA's decision, filed in the Second Circuit. On August 31, 2020, following briefing and argument, the Second Circuit issued an opinion vacating NHTSA's rollback and reinstating the inflation-adjusted penalty rate. The court subsequently denied a petition for rehearing filed by NHTSA.

Challenging the Affordable Clean Energy Rule

On August 13, 2019, the OAG, joined by 21 other states and seven cities, sued to challenge the Environmental Protection Agency's repeal of the Obama administration's Clean Power Plan and finalization of the Affordable Clean Energy (ACE) Rule. The petition was filed in the U.S. Court of Appeals for the D.C. Circuit (where it has been consolidated with other challenges to the same agency action) and calls for the rule to be vacated. The petitioners argue that the EPA's ACE rule, which it finalized in June, will not curb rising carbon emissions from power plants and will prolong the operation of dirtier coal plants.

OAG and other petitioners also intervened on EPA's side to counter certain petitioners' arguments that EPA's deregulatory actions did not go far enough. On October 8, 2020, a three-judge panel of the D.C. Circuit held more than nine hours of oral argument on the consolidated cases, which remain pending.

Forcing Upwind States to Implement Air Pollution Controls

The OAG submitted comments opposing EPA's proposal to deny Maryland's petition under Section 126 of the Clean Air Act to impose additional emissions control requirements on certain upwind facilities interfering with Maryland's attainment and maintenance of the 2008 ozone NAAQS. Once EPA finalized that denial, the OAG filed a petition for review in the D.C. Circuit. Delaware (which had filed four Section 126 petitions of its own) and a group of NGOs also petitioned for review of EPA's decision. New York, New Jersey, and New York City have intervened on the petitioners' side, while the Utility Air Regulatory Group and Duke Energy have intervened on EPA's side. After briefing and oral argument, the D.C. Circuit ruled for the OAG as to a subset of the facilities identified in the Section 126 petition, but ruled against OAG as to others.

Separately, the OAG filed comments opposing EPA's proposal to determine that the Cross-State Air Pollution Rule Update was a full remedy for upwind contributions to problems attaining and maintaining the 2008 ozone NAAQS, and that no further regulation of these contributions was appropriate. After EPA finalized that proposal—the so-called Close-Out Rule—the OAG joined other states in petitioning for review in the D.C. Circuit. On April 1, 2019, the Court granted the states' motion to expedite briefing and consideration of the case. On October 1, 2019, the D.C. Circuit vacated the Close-Out Rule because of the rule's failure to take proper account of upcoming attainment deadlines for the NAAQS. On October 29, 2020, EPA addressed the D.C. Circuit's decision by proposing certain revisions to the Cross-State Air Pollution Rule.

The challenged EPA actions harm Maryland residents by continuing to allow negative health effects associated with pollution that is generated outside the State's borders. They also inequitably require Maryland to impose more stringent regulations on its businesses in order to address transported pollution, putting the State at a potential economic disadvantage.

Preserving the Vitality of the Clean Water Act

The Obama Administration promulgated the Waters of the United States (WOTUS) Rule in 2015 in response to widespread and longstanding concerns about the lack of clarity and consistency in the definition of "waters of the United States" under the Clean Water Act and the scope of federal jurisdiction over the nation's wetlands and waterways. EPA and the Army Corps of Engineers (COE) have sought to roll back the WOTUS Rule in multiple respects.

First, EPA and the COE proposed to rescind the WOTUS Rule and reinstate prior regulations pending a later, substantive rulemaking regarding a new definition. The OAG joined comments opposing this proposal, which would make it more difficult for Maryland to implement its water quality protection programs and could put the State at an economic disadvantage in competition with other states. On October 22, 2019, EPA and the COE published a final rule rescinding the WOTUS Rule and reinstating prior regulations. Joining a coalition of states, the OAG sued to invalidate this rule in the U.S. District Court for the Southern District of New York.

Second, EPA and the COE proposed a new definition of "waters of the United States," which would significantly limit the Clean Water Act's coverage. The OAG joined comments opposing that proposal. Once EPA and the COE finalized the proposal, the OAG joined a coalition of states suing to invalidate the rule in the U.S. District Court for the Northern District of California.

In the first suit, the multistate coalition voluntarily dismissed its claims in light of the subsequent finalization of the new definition. In the second suit, the court denied the multistate coalition's request for a preliminary injunction. The multistate coalition has filed a motion for summary judgment; briefing on that motion is ongoing.

Limiting Methane Emissions from Landfills

Maryland is part of a multistate coalition suing the EPA for failing to implement its rules governing methane emissions from landfills—specifically, by reviewing and approving state implementation plans and by putting federal implementation plans in place where appropriate.

EPA moved to dismiss on jurisdictional grounds, and the court denied that motion. The court also denied a motion by EPA to stay the lawsuit in view of the agency's proposal to retroactively extend the applicable deadlines ("the Delay Rule"). On May 6, 2019, the court

granted summary judgment to the multistate group and ordered EPA to take action on state implementation plans, and promulgate a federal plan, by specified deadlines. EPA subsequently moved to alter or amend the judgment in view of its finalization of the Delay Rule. The court denied that motion, but EPA appealed. The Ninth Circuit ruled in EPA's favor, holding that the court should have amended the judgment in light of EPA's promulgation of the Delay Rule.

In parallel, the OAG joined a multistate lawsuit directly challenging the Delay Rule in the U.S. Court of Appeals for the D.C. Circuit. Briefing in that appeal is complete, with oral argument not yet scheduled.

Protecting Workers Against Harm from Pesticides

Maryland joined a multistate coalition suing the EPA for delaying the effectiveness of certain improvements to the Worker Protection Standard, which provides various protections for workers who come in contact with pesticides. Specifically, the coalition challenged the delayed effectiveness of enhanced training requirements to protect both workers and their families.

Prompted by the states' lawsuit, EPA took action to trigger the effectiveness of these requirements, and the plaintiffs subsequently consented to the case's dismissal as moot.

Protecting the Vitality of the Migratory Bird Treaty Act

On September 5, 2018, the OAG joined seven other states in filing a lawsuit challenging a U.S. Department of Interior (DOI) decision significantly narrowing the effective scope of the Migratory Bird Treaty Act, which generally prohibits "killing" or "taking" migratory birds. The DOI has long treated this prohibition as covering not only intentional killing or taking, but also killing or taking that unintentionally (but foreseeably) results from a person's activities, such as when birds become trapped in an uncovered waste pit. A recent DOI opinion, however, which purports to be binding on all agency staff, narrowly construes the prohibition as applying only to intentionally killing or taking migratory birds.

The states' suit was consolidated with cases brought by several NGOs challenging DOI's interpretation. DOI moved to dismiss on grounds of standing, absence of final agency action, and ripeness, and the states have opposed that motion. On July 31, 2019, Judge Valerie Caproni denied the federal government's motion to dismiss the states' claims, and after briefing granted summary judgment in favor of the states. *See NRDC v. U.S. Department of the Interior*, 397 F.Supp.3d 430 (S.D. N.Y. 2019). DOI has filed notice of an appeal.

Defending the Endangered Species Act

On July 25, 2018, the U.S. Fish and Wildlife Service and National Marine Fisheries Service (together "Services") published three proposed rules to amend the Endangered Species Act's

implementing regulations. The proposed rules would have greatly limited the Services' ability to consider climate change in determining whether a species was likely to go extinct in the foreseeable future, limited the scope of actions for which federal agencies had to consult with the Services, and removed default protections for newly listed threatened species. The OAG joined eight other states and the District of Columbia in commenting on those proposals. The Services finalized their proposals on August 27, 2019.

On September 25, 2019 the OAG joined sixteen other state Attorneys General, the District of Columbia, and the City of New York in challenging the Services' final rules in the U.S. District Court for the Northern District of California (N.D. Cal. 4:19-cv-06013).[3]

Among other things the complaint challenges regulatory changes that make it more difficult to designate critical habitat, allow for the introduction of economic data into the administrative record informing listing determinations, limit the consideration of climate science in determining a species likely status in the foreseeable future, eliminate recovery as a basis for delisting, allow for the piecemeal destruction of critical habitat, narrow the definition of "effects of an action" during consultation, and revoke the default protection from take for threatened species.

The Services' attempt to dismiss our complaint for lack of standing was rejected by the Court in May 2020 and the parties are now preparing to brief cross-motions for summary judgment.

Defending the National Environmental Policy Act (NEPA)

In January 2020, the White House Council on Environmental Quality (CEQ) proposed revisions to the regulations that implement the National Environmental Policy Act (NEPA). Passed in 1969, NEPA has long served as our national charter for the environment. The statute requires federal agencies to evaluate the environmental impacts of their actions before embarking on a chosen course and to consider alternatives to the proposed action which may be less harmful to the environment. CEQ's proposed rule offered to significantly limit the situations where such an environmental review was required prior to federal action and unreasonably constrain the scope of environmental impacts that an agency would have to consider under the now uncommon circumstance that NEPA was triggered.

In March 2020, we joined multistate comments opposing CEQ's proposal. Despite our comments, CEQ issued a final rule, largely instituting the same changes it had proposed in January 2020, on July 16, 2020. The OAG joined a multistate coalition in quickly challenging those rules in the U.S. District Court for the Northern District of California. *See California v. Council on Environmental Quality*, Case No. 3:20-cv-06057 (N.D. Cal. filed Aug. 28, 2020). The states have since amended their complaint to include claims that CEQ

[2] Two other states, Minnesota and Wisconsin, later joined our coalition.

failed to consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service as required by the Endangered Species Act, prior to promulgating the final rule.

Blocking Seismic Testing in the Atlantic Ocean

In connection with its plans to open the Atlantic Ocean to oil and gas drilling, the Trump Administration proposed to allow five companies to explore the ocean floor for oil and gas by firing arrays of airguns underwater. This "seismic testing" activity is dangerous to the marine mammals that frequent our coastal waters; has the potential to disrupt tourism and recreational uses of the ocean; and is widely viewed as a precursor to offshore drilling.

On November 30, 2018, the National Marine Fisheries Service (NMFS) authorized the five companies to harass tens of thousands of marine mammals—including endangered species—as an incident of their seismic testing activity. A group of non-governmental organizations sued to block these "incidental harassment authorizations" (IHAs) in the District of South Carolina. The OAG led a coalition of nine Atlantic Coast states in intervening on the side of the plaintiffs, and in supporting the plaintiffs' request for a preliminary injunction against the IHAs. The preliminary injunction motion was denied, with leave to re-file, on the ground that seismic testing no longer appears imminent.

In order to be allowed to conduct seismic testing, the five companies were required to obtain a separate set of permits from the Bureau of Ocean Energy Management (BOEM). BOEM, however, did not issue those permits, and the IHAs were to expire on November 30, 2020. As that date approached, the Trump Administration advised the court that the IHAs could not be extended without a new regulatory proceeding, and the testing companies advised the court that it would not be economically practicable to conduct any testing before the IHAs expired. Accordingly, the court issued an order conditionally dismissing the case as moot.

Strengthening Asbestos Reporting Requirements

In January 2019, the OAG joined 13 other states and the District of Columbia in petitioning EPA to initiate a rulemaking to close certain loopholes in the reporting requirements for the importation and manufacture of asbestos and asbestos-containing products. Under the current rules, EPA does not require companies to report the importation of raw asbestos, finished articles containing asbestos, or products that contain asbestos impurities. EPA has long recognized that "asbestos is one of the most hazardous substances to which humans are exposed in both occupational and non-occupational settings," but nonetheless denied our petition to gain a more complete picture of the routes by which Maryland residents are exposed to this harmful chemical in their everyday lives.

On June 28, 2019, the OAG joined nine other states and the District of Columbia in challenging the denial of the rulemaking petition in the Northern District of California. *California v. EPA*, (Case No. 3:19-cv-03807). Without the reporting

requirements that the petition seeks to put in place, EPA will have incomplete information when it finalizes an ongoing risk assessment for asbestos under section 6 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2605, and the states will not fully know how asbestos continues to affect their residents. The court heard arguments on the merits in November 2020 and a decision is pending.

Defending States' Rights to Set Vehicle Emissions Limits

On September 20, 2019, the OAG joined California, 21 other states, and three cities to sue the National Highway Traffic Safety Administration (NHTSA) in the U.S. District Court for the District of Columbia over its elimination of California's ability to create its own greenhouse gas (GHG) emission standards for cars and other vehicles, as well as other states' ability to adopt those standards.

The lawsuit was filed one day after the EPA and NHTSA jointly issued their "One National Program" rule, targeting state regulation of vehicle emissions. The lawsuit challenges one aspect of that rule—namely, NHTSA's determination that the Energy Policy and Conservation Act preempts state efforts to adopt or implement their own GHG vehicle emission standards or zero-emission vehicle (ZEV) mandates. NHTSA has moved to dismiss on the ground that the challenge should have been brought in the court of appeals in the first instance.

In addition to that NHTSA determination, the "One National Program" rule rescinds a Clean Air Act waiver, granted by EPA, that allows California to set its own GHG tailpipe emission standards and implement a ZEV program. The rule also makes a determination that, even if California's waiver is valid, other states (such as Maryland) cannot take advantage of it by adopting California's standards themselves. On November 15, 2019, the OAG joined California, 21 other states, and three cities in petitioning the D.C. Circuit for review of EPA's waiver determinations. The same petition also included a protective challenge to NHTSA's determination discussed above, in the event that jurisdiction is found lacking in the district court. Briefing in the D.C. Circuit case is complete, with oral argument not yet scheduled.