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Maryland Defense Act

2021 Report

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Introduction

This 2021 report describes the status of ongoing lawsuits the Office of the Attorney General 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 attempted to discriminate against and inflict harm upon Marylanders in violation of a myriad of constitutional and statutory protections.

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 was broad and deep. The Office of the Attorney General pushed back against actions of the federal government that threatened or jeopardized the health, safety, and well-being of the State and Marylanders. In the wake of President Biden's inauguration, many of the harmful rules and regulations promulgated by the prior Administration have been stayed or rescinded. Our Office is proud to continue to prevent harms to 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 ma[d]e him 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 Trump administration filed a motion to dismiss the complaint. The district court issued two opinions denying the Justice Department's motion, concluding that the plaintiffs had standing to pursue their claims and that they had stated a claim under the Emoluments Clauses. In the meantime, the original complaint was amended, at the invitation of the

[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.

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 lacked 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. President Trump sought Supreme Court review of the en banc court's decision. Following President Biden's inauguration, the Supreme Court granted the President's petition in the official capacity action, vacated the Fourth Circuit judgment, and remanded with instructions to dismiss the case as moot. The Fourth Circuit subsequently dismissed the individual capacity appeal as moot and vacated the two district court opinions.

The foreign and domestic Emoluments Clauses were designed to 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. President Trump's violations of the foreign and domestic Emoluments Clauses harmed the interests of Maryland and its citizens.

IMMIGRATION AND CIVIL RIGHTS

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 remained open with respect to those claims and legal theories that were not addressed in the Supreme Court's decision.

After President Biden issued an executive order stating that he would take action to preserve and fortify DACA, the parties in the Northern District of California litigation voluntarily agreed to hold the case in abeyance pending further court order and to file regular status reports with the court. In September 2021, the Department of Homeland Security issued a proposed rule continuing and fortifying DACA. On November 19, 2021, the Attorney General joined a coalition of 24 attorneys general in support of the proposed rule.

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 different from the number ascertained by the decennial census. The panel noted that the merits of the dispute were "not particularly close or complicated." The Supreme Court heard oral argument on November 30, 2020, and on December 18, 2020 issued an opinion vacating the lower court's ruling and holding that the issue was not yet ripe and the states had not yet demonstrated injury. On Inauguration Day, January 20, 2021, President Biden signed an executive order reversing the Presidential Memorandum so that all U.S. residents are counted for purposes of apportionment.

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 included 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 filed a petition for a writ of certiorari in the Supreme Court.

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.

On January 20, 2021, President Biden terminated the national emergency giving rise to these cases, issued a proclamation barring the use of additional taxpayer funds to build the border wall, and directed the Secretaries of Defense and Homeland Security to halt construction. In light of the policy change, the cessation of construction, and the restoration of funding to military construction projects that had been deferred—including the Maryland projects— the Supreme Court vacated the lower court judgments. Upon remand, the district court judge referred all the cases to a magistrate judge for settlement discussions, which are ongoing.

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 and the Ninth Circuit granted

a stay of the injunction pending appeal, allowing the policy to go into effect. On December 2, 2020, a Ninth Circuit panel affirmed the merits of the preliminary injunction. In January, Defendants filed a cert. petition and a motion to stay the mandate, which the Ninth Circuit granted on January 20. On February 22, 2021, the Supreme Court granted cert. in *DHS v. New York*. On March 9, on the joint motions of the parties, the Supreme Court dismissed the federal government's appeals of the preliminary injunctions in our case related cases, and DHS confirmed that the 2019 rule was vacated.

A coalition of 11 states led by Arizona then moved to intervene in the Ninth Circuit to seek certiorari; we opposed the motion to intervene, and on April 8 the motion was denied. Arizona then filed a motion to intervene in the Supreme Court, then filed a petition for a writ of certiorari challenging the Ninth Circuit's denial of the motion to intervene, as well as the merits of the Ninth Circuit's decision affirming the preliminary injunction. We filed opposition to the cert. petition, as did the federal government. On October 29, 2021, the Supreme Court granted Arizona's cert. petition as to the question of whether states with interests should be permitted to intervene to defend a rule when the United States ceases to defend.

Rulemaking is ongoing in the Department of Homeland Security to replace the 2019 rule, with an Advance Notice of Proposed Rulemaking issued on August 23, 2021.

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. 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 more widely available, enabling those with access to a commercially available 3D printer to 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. The Ninth Circuit Court of Appeals issued an opinion on April 27, 2021 vacating the preliminary injunction. However, the Department of Commerce has since announced that 3D software files are subject to Export Administration Regulations, requiring a license for those who seek to post 3D gun files online.

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. The Biden Administration quickly signaled that it would revisit the LNG by Rail Final Rule and our case was placed into abeyance on March 16, 2021. PHMSA then announced that it would conduct a two-stage rulemaking to suspend and then reevaluate the LNG by Rail Rule. A proposed suspension rule was published in the Federal Register on November 8, 2021, with public comment closing on December 23, 2021. The stage two rulemaking is expected to occur in Summer 2022 following the completion of several Department of Transportation studies concerning LNG by Rail safety.

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 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.

After the district court denied the states' motion for summary judgment and granted OSHA's cross-motion on January 11, 2021, we filed an appeal. That appeal is stayed through December 31, 2021, and the Department of Labor has agreed to issue a Notice of Proposed Rulemaking to reinstate the 2016 workplace injury provisions by the end of the year.

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.

Following oral argument held on December 16, 2020, the United States moved to suspend the proceedings to allow new HHS agency officials sufficient time to become familiar with the issues and to proceed with new rulemaking. The proceedings are currently in abeyance awaiting rulemaking. (Gilliam Order 8/17/21)

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.

Following the change in Administration, the United States moved to suspend appellate proceedings to allow new HHS agency officials sufficient time to become familiar with the issues, and the proceedings were held in abeyance. Following the issuance of HHS final rulemaking repealing the portion of the regulation challenged in the appeal, the appeal was voluntarily dismissed on September 30, 2021.

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. On January 28, 2021, the United States moved to suspend the proceedings to allow new DOL agency officials sufficient time to become familiar with the issues and to determine how they wished to proceed with new rulemaking. The proceedings are currently in abeyance. (2/8/21 Order)

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*. That cert. petition was granted on February 22, 2021.

Following the change in Administration, HHS began a review of the 2019 rule and determined in March 2021 that it would commence a rulemaking process to replace the 2019 rule with a rule that is substantively similar to the rule that was in place from 2000 to 2019. A proposed rule was published on April 15, 2021. On May 17, 2021 the Supreme Court granted the stipulated dismissal of our case, and on June 25, 2021, we voluntarily dismissed our case in the District of Oregon.

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. On February 5, 2021, the Second Circuit granted a motion to adjourn oral argument and hold the appeal in abeyance while the new administration reviewed the rule; it remains in abeyance as of the publication of this report.

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.

Following the change in Administration, on February 10, 2021, the United States moved to suspend the multistate suit filed in the Southern District of New York to allow new HHS agency officials sufficient time to become familiar with the issues, and the proceedings were held in abeyance.

In a required Joint Status Report, HHS reported that it intended to initiate a rulemaking proceeding on Section 1557, which will provide for the reconsideration of many or all of the provisions of the Section 1557 regulations that were challenged in the multistate litigation. HHS also reported that, on May 10, 2021, it issued a Notification of Interpretation and Enforcement of Section 1557 providing that the agency will interpret and enforce Section

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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.

1557's prohibition on discrimination on the basis of sex to include (1) discrimination on the basis of sexual orientation and (2) discrimination on the basis of gender identity.

On July 23, 2021, the parties filed a Joint Motion to Stay Proceedings and Hold Motions in Abeyance, noting as reflected in the 2021 Spring Unified Agency of Federal Regulatory and Deregulatory Actions, that HHS anticipates a Notice of Proposed Rulemaking to be issued no later than April 2022. Though no Order has been issued on that Motion, the proceedings remain in abeyance.

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. The Circuit Court granted the states' request and vacated the district court's order.

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 filed a motion to dismiss; the states filed an opposition to the motion; and the parties filed supplemental briefings with the court. The parties subsequently notified the district court that they are engaged in settlement discussions. On November 12, 2021, the court stayed the case pending the filing of a joint status report in December of 2021.

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.

The ED has proposed revising the Borrower Defense Rule promulgated under Secretary DeVos and the district court has stayed the case.

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 appealed the decision, then decided to voluntarily dismiss the appeal. The states voluntarily dismissed the district court case in February 2021.

On October 7, 2021, OAG filed a multistate administrative complaint with the Postal Regulatory Commission objecting to the Postal Service's failure to request an advisory opinion from the Commission on its 10-year strategic plan as required by law. The 10-year plan reflects sweeping changes to how the Postal Service operates—reworking transportation models, overhauling its processing and logistics network, enacting slower service standards, reconfiguring where customers can obtain postal products and services, and adjusting rates, among other changes. Despite the breadth of the proposed changes, only select aspects of the plan have been submitted to the Commission for public and independent comment. USPS filed a motion to dismiss the complaint on October 27, 2021; we filed our opposition to the motion to dismiss on November 10, 2021.

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.

The federal defendants appealed the decision to the Second Circuit Court of Appeals, which was fully briefed on May 28, 2021. However, the Department of Labor subsequently rescinded the 2020 rule, and the Department of Labor moved to dismiss the appeal on mootness grounds on October 7, 2021. The Second Circuit dismissed the appeal and vacated the district court's judgment on October 29, 2021.

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.

On July 12, 2021, the parties filed a joint stipulation of dismissal, which acknowledged that EEOC would provide the data that had previously been withheld.

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.

The case is stayed while the Biden Administration revisits the issues raised by the litigation.

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. The consolidated cases have been placed in abeyance while EPA revisits the Revised Determination.

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.

Preserving Robust Regulation of Hazardous Air Pollutants

The Clean Air Act requires all "major sources" of hazardous air pollutants (HAPs), defined as sources that emit specified amounts of HAPs, to reduce their emissions by installing the maximum achievable control technology (MACT). EPA's "once in, always in" policy had long prevented major sources from avoiding certain MACT requirements by reducing their "potential to emit." In November 2020, however, EPA issued a final rule eliminating this policy, enabling a major source to reclassify as an "area source"—and thus to escape MACT requirements to which it is already subject—by reducing its potential to emit. The likely consequence will be increased emissions of HAPs, a wide variety of which are harmful to the environment and public health.

In January 2021, the OAG joined a lawsuit challenging the rule in the D.C. Circuit. The lawsuit has been placed in abeyance while EPA revisits the issues addressed by the challenged rule.

Maintaining the Integrity of New Source Review

Under the Clean Air Act, certain modifications to polluting sources are subject to "new source review" (NSR), which encompasses a suite of requirements more stringent than those that otherwise apply to existing sources. Whether a modification subjects a source to NSR depends on, among other things, whether it is expected to significantly increase emissions from the source. That determination can entail netting modifications at different units against each other, so that emissions reductions at one unit can prevent emissions increases at another unit from triggering NSR.

In 2020, EPA issued a rule making it easier for polluters to claim that a modification's emissions increases are sufficiently offset by emissions reductions and thus do not trigger NSR. In January 2021, the OAG joined a multistate lawsuit challenging the rule in the D.C. Circuit. The lawsuit has been placed in abeyance while EPA revisits the issues addressed by the challenged rule.

If it survives, the challenged rule will weaken the NSR program and thus will likely lead to increased emissions by sources that otherwise would be subject to more stringent emission control requirements. It will also make it more difficult for states to attain and maintain national ambient air quality standards for criteria pollutants.

Strengthening the National Ambient Air Quality Standards

Periodically, EPA reviews its national ambient air quality standards (NAAQS) for each of six criteria pollutants and determines whether to modify them. In 2020, the Trump EPA concluded its review of the NAAQS for ozone, as well as the NAAQS for particulate matter (PM). In each instance, EPA opted to leave the NAAQS unchanged, despite increased evidence of health and welfare harms resulting from each pollutant.

The OAG joined lawsuits in the D.C. Circuit challenging EPA's decision with respect to the ozone NAAQS, as well as EPA's decision with respect to the PM NAAQS. Both cases are currently in abeyance while EPA reconsiders its decisions to leave the NAAQS for these two pollutants unchanged.

Ozone and particulate matter are harmful to the environment and public health, especially the health of people who already suffer from respiratory problems. Strong federal regulation is important to ensure that other states do their part to reduce these pollutants, which often cross state lines into Maryland.

Defending Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Light-Duty Vehicles

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.

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 decided 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 the agencies' actions as insufficiently deregulatory. The cases have been placed in abeyance while the agencies revisit those actions.

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.

Strengthening Greenhouse Gas Emission Standards for Aircraft

The Clean Air Act directs EPA to issue appropriate emission standards for pollutants from aircraft that may reasonably be anticipated to endanger public health and welfare. In 2016, EPA found that GHG emissions fall into this category. That finding triggered EPA's duty to issue regulations governing GHG emissions from aircraft. The regulations that EPA issued, however, merely adopted existing standards developed by the International Civil Aviation Organization, which significantly lag existing technology.

In January 2021, the OAG joined a lawsuit challenging the regulations in question. That lawsuit was placed into abeyance while EPA revisited the regulations. EPA has determined not to revise the regulations, however, so the agency and the petitioners are seeking to have the case removed from abeyance.

GHG emissions from aircraft are an important contributor to climate change, which affects Marylanders in myriad ways.

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 2020. The case is being held in abeyance while the Biden Administration revisits the challenged rule.

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 OAG subsequently intervened in an industry backed effort to further delay promulgation of those standards.

The Trump Administration 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. *See New York v. DOE*, Case No. 19-3652 (2d Cir. Filed Nov. 3, 2019). DOE published proposed rules that would revoke the Trump era definitions and reinstate the broader 2016 definitions of General Service Lamps in October 2021.

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 joined other states, however, in petitioning for review of that denial, again in the Ninth Circuit. The challengers argued that EPA unlawfully left the tolerances and registrations intact without making the safety findings required by the statute. Ultimately, the Ninth Circuit agreed with the challengers and ordered EPA to either make those safety findings or revoke the tolerances (and cancel the registrations in a timely fashion). EPA has responded by revoking the tolerances.

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 2016 Congress substantially amended the Toxic Substances Control Act (TSCA) for the first time in over 30 years. Those amendments instructed EPA to conduct risk evaluations for several high profile toxic chemicals and empowered the agency to prohibit certain uses of those chemicals based on those evaluations. The Trump EPA had first crack at implementing those amendments and took several steps that significantly undermined the

risk evaluation process. Those measures included categorically excluding certain conditions of use from the risk evaluation scoping stage, assuming that workers exposed to chemicals would be using personal protective equipment, and neglecting to consider the impact of exposure on sensitive populations. These shortcomings pervaded the TSCA Risk Evaluation process from January 2017 – January 2021.

We joined multistate coalitions in challenging EPA's completed Risk Evaluations for Methylene Chloride in August 2020 and for 1,4 Dioxane in March 2021 respectively. Methylene Chloride is a toxic chemical commonly found 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. 1,4 Dioxane is a toxic chemical that has been linked to acute health effects and chronic conditions. It is commonly used as a solvent in chemical manufacturing and is a known byproduct of the breakdown of household goods like detergents, cleaning supplies, and personal care products. EPA's final Risk Evaluations for these chemicals suffered from the flawed approach outlined above.

The Biden Administration signaled that it would revisit the prior administration's approach to conducting Risk Evaluations under the Toxic Substances Control Act (TSCA) – and explicitly stated that it would reevaluate any determinations made under the prior EPA, including Methylene Chloride and 1,4 Dioxane.

On July 4, 2021, the Ninth Circuit granted EPA's request to remand the final Risk Evaluation for Methylene Chloride without vacatur and did the same for the final 1,4 Dioxane Risk Evaluation on August 10, 2021. EPA continues to provide status reports on both matters and we anticipate regulatory action on these chemicals in 2022.

Limiting Methane and Other 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 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, EPA should have addressed methane emissions from existing sources once it established standards for new and modified sources, which was completed in June 2016. The suit was filed in the U.S. District Court of the District of Columbia, where EPA sought to stay proceedings pending an ongoing rulemaking with the potential to repeal the methane emission standards for new and modified sources.

The Trump EPA did in fact repeal those standards in 2020, in a rule known as the "Policy Amendments Rule." In a separate companion rule, known as the "Technical Amendments Rule," the Trump EPA rolled back certain monitoring and repair requirements meant to limit emissions of volatile organic compounds (VOCs) and methane from new and modified oil and gas sources. The OAG joined lawsuits challenging both of these rules in the D.C. Circuit.

In 2021, President Biden signed a Congressional Review Act resolution disapproving of the Policy Amendments Rule. As a result, that rule is no longer in effect, and the lawsuit challenging it has been dismissed. The lawsuit challenging the Technical Amendments Rule is in abeyance while EPA revisits the rule. The lawsuit seeking to compel EPA to promulgate emissions guidelines for existing sources is likewise in abeyance.

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.

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.

Then, in the waning days of the Trump Administration, NHTSA issued an interim final rule in which it purported to delay the applicability of the inflation-adjusted penalties until model year 2022. The OAG joined a multistate coalition challenging the interim final rule in the Second Circuit. That litigation has been placed in abeyance while NHTSA considers whether to revoke the interim final rule.

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 was consolidated with other challenges to the same agency action) and called for the rule to be vacated. The petitioners argued that the ACE rule would not curb rising carbon emissions from power plants and would prolong the operation of dirtier coal plants.

The 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. In October 2020, a three-judge panel of the D.C. Circuit held more than nine hours of oral argument on the consolidated cases. Then, in January 2021, the court issued an opinion holding unlawful the ACE Rule and the repeal of the Clean Power Plan.

In October 2021, the Supreme Court granted multiple petitions for certiorari to review the D.C. Circuit's decision. The consolidated cases are scheduled for argument in 2022.

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. After the change in presidential administration, the district court stayed the case while the agencies revisited the rule, then granted the agencies' motion for voluntary remand.

Limiting Methane Emissions from Landfills

Landfills are a significant source of emissions of methane, a relatively short-lived but extremely potent greenhouse gas. 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. In April 2021, after another decision eliminated a legal predicate for the Delay Rule, the D.C. Circuit granted a joint motion for voluntary vacatur and remand of the Delay Rule. In addition, EPA finalized a federal implementation plan in May 2021.

Protecting Workers Against Harm from Pesticides

Maryland joined a multistate coalition suing EPA for certain modifications to the Worker Protection Standard, which provides various protections for workers who come in contact with pesticides. Specifically, the coalition challenged EPA's revisions to the "application exclusion zone" requirements, which are meant to lessen the chances that people other than applicators will come into contact with pesticides. The court preliminarily enjoined EPA from implementing the revisions and placed the case into abeyance while EPA determines whether to rescind or modify the revisions.

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 legal opinion from the DOI's Solicitor's office, issued in 2017, however, narrowly construed 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.

DOI then embarked upon a regulatory approach to codify the narrow interpretation offered in its 2017 Solicitor's Opinion. The OAG joined a similar coalition of states in filing comments opposing that rulemaking. DOI largely ignored our comments and finalized its regulations on January 7, 2021. Our coalition sued in the Southern District of New York, and on October 4, 2021, prior to argument being held on our challenge, DOI published a proposed rule to revoke the January 7 regulations effective December 3, 2021.

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

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

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. The states filed motions for summary judgment on October 15, 2021 and are awaiting the federal defendant's response and cross-motions for summary judgment on December 10, 2021.

The OAG has also been instrumental in protecting the Endangered Species Act's "Critical Habitat" provisions. Through two rules published in the waning months of the Trump Administration, the Services attempted to constrain the scope of their own discretion to designate areas as "critical habitat", a designation envisioned by the Endangered Species Act to promote preservation of areas that are essential to the conservation of a listed species. The OAG joined the same multistate coalition in challenging these rules in the Northern District of California and on October 27, 2021 the Services published proposed rules to rescind the Trump Era regulations.

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 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.

The Biden Administration quickly signaled that it would reevaluate the 2020 NEPA revisions through a two-step rulemaking process. In step one, CEQ would repeal several of the clearly illegal portions of the new regulations. A proposed rule has been published

which would repeal the new "effects" definition, remove the cap on agency specific NEPA procedures, and remove language allowing a project proponent to define its purpose. We joined multistate comments supporting those changes on November 22, 2021. CEQ's step two rulemaking is likely to be much broader.

Our case has been stayed since Spring 2021 and DOJ has recently moved to extend the stay another 120 days as they continue to advance their two step regulatory approach.

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 ruled in favor of the states on December 22, 2020. Following a dispute over the scope of the ordered remedy our coalition settled with EPA in April 2021. Under the terms of that settlement EPA will take further regulatory action to address the concerns raised in our petition.

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. That case has been placed in abeyance while EPA and NHTSA consider whether to withdraw or modify their respective components of the "One National Program" rule.

Preserving the Integrity of Clean Air Act Rulemakings

The Clean Air Act authorizes or directs EPA to regulate air pollution in a broad array of circumstances. Historically, EPA's rulemakings under the Clean Air Act have evaluated the costs and benefits of regulation in a variety of different ways that reflect particular factual, statutory, and regulatory circumstances. On December 8, 2020, EPA finalized a rule that mandates benefit-cost analysis for all "significant" rulemakings under the Clean Air Act, prescribes a form that this benefit-cost analysis must take, and specifies how this analysis must be presented. The rule would make it more difficult for EPA to efficiently regulate emissions that are harmful to Maryland's environment and Marylanders' health.

In January 2021, the OAG joined a lawsuit challenging the rule in the D.C. Circuit. The case is currently in abeyance while EPA revisits the issues addressed by the rule. In that vein, in May 2021 the Biden EPA issued and sought comment on an interim final rule rescinding the challenged rule. The OAG joined comments supporting rescission.

Protecting Marylanders from Lead in Drinking Water

The Safe Drinking Water Act requires EPA to establish primary drinking water regulations for public water systems, so as to limit exposure to contaminants—such as lead—that EPA determines may adversely affect human health. Pursuant to these statutory directives, in 1991 EPA promulgated the Lead and Copper Rule, which includes a treatment-based standard for reducing exposure to lead in drinking water. In January 2021, EPA issued a final rule that significantly revises aspects of the Lead and Copper Rule for the first time since 1991.

Although certain aspects of the revisions constitute improvements, others squander opportunities to make progress, or even amount to backsliding from the prior version. Most notably, the revisions would reduce the pace at which public water system are required to replace lead service lines. In these and other ways, the revisions will harm Marylanders' interest in safe drinking water. They would be especially harmful to low-income and minority communities, which often are disproportionately affected by lead in drinking water.

In February 2021, the OAG joined a lawsuit challenging the revisions in the D.C. Circuit. The case is currently in abeyance while EPA revisits the issues addressed by the challenged revisions. In addition, EPA has finalized a separate rule that delays the revisions' effective date.