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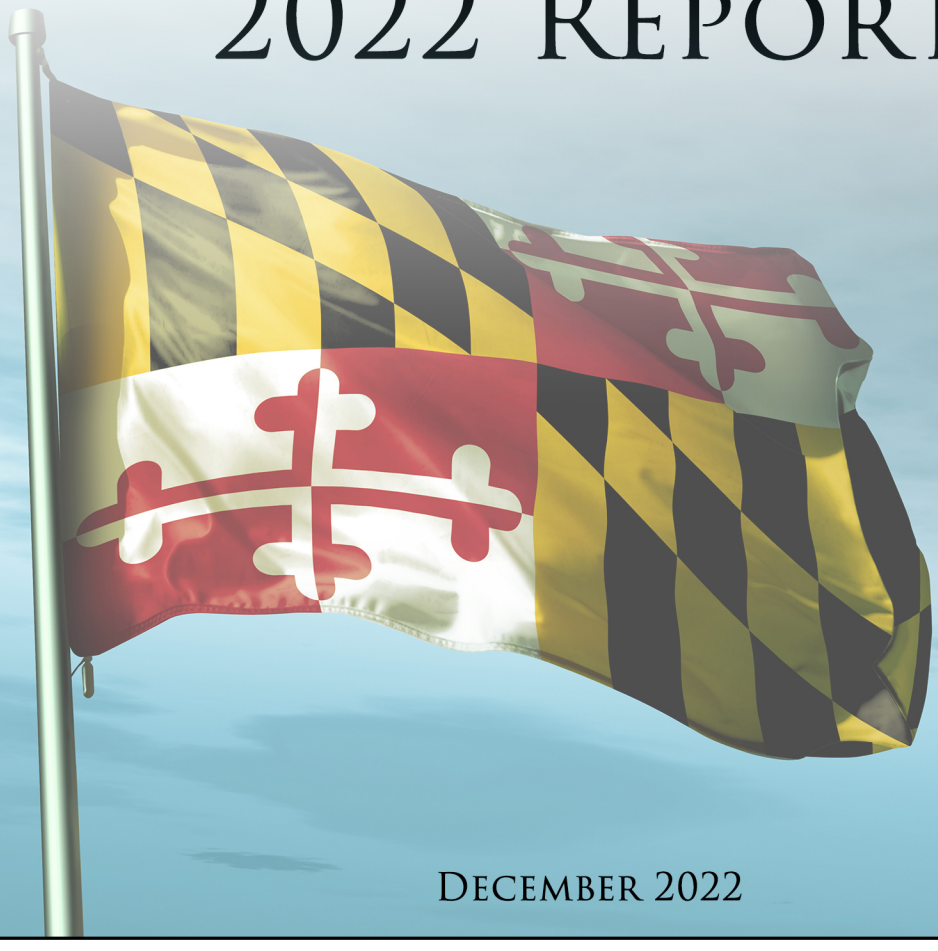
# Maryland Defense Act

## 2022 Report



December 2022

## Introduction

This report describes the status of ongoing lawsuits the Office of the Attorney General has brought or joined with other states under the Maryland Defense Act (MDA), a statute enacted in 2017 that authorizes the Attorney General to protect the State and its residents against harmful actions by the federal government.[1] The vast majority of these suits were brought during the Trump Administration and 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. Many of the cases have been held in abeyance or dismissed as the Biden Administration has reviewed, rescinded, or made improvements to the underlying federal rulemaking or other actions that gave rise to the harms the lawsuits sought to address. In other instances, Maryland has joined other states in intervening on behalf of the Biden Administration to fend off challenges to its efforts to improve the environmental, public safety, civil rights, and economic protections rolled back during the Trump Administration.

The efforts of Maryland and other states have resulted in significant successes. For example, the Supreme Court declared unlawful President Trump's attempt to rescind Deferred Action for Childhood Arrivals (DACA), and the Biden Administration has adopted a final rule preserving DACA. Although litigation over the final rule is ongoing, thousands of Marylanders have benefitted from these efforts to save the program. Maryland and other states also fought the Trump Administration's multiple attempts to undermine the Clean Water Act, which is vital to preserving the Chesapeake Bay and Maryland's other waterways. In response, the Biden Administration has proposed a new rule that will preserve the protections of this critical environmental law. In a few instances, Maryland and other states have also taken action to challenge the Biden Administration, like the United States Postal Service's decision to forego the opportunity to commit to a clean-energy future by replacing its 165,000-vehicle delivery fleet with largely internal combustion engines rather than battery electric vehicles

As the lawsuits summarized in this report demonstrate, the actions of the federal government have profound and far-reaching effects on the lives of Marylanders. The Maryland Defense Act has enabled the State to be vigilant in holding the government accountable when its actions violate the constitutional and statutory protections that safeguard the rights and well-being of Marylanders. It has also enabled the State to play a critical role in supporting the federal government against attempts to thwart its efforts to

[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.

improve safety, health, environmental justice, civil rights, and economic well-being. In sum, this law has proven to be an important tool in helping the State ensure that the federal government acts in the best interests of Marylanders.

## 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, the 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. The Department of Homeland Security adopted a final rule preserving DACA on August 30, 2022.

Meanwhile, in a separate case brought by the State of Texas to challenge DACA, the Attorney General joined a multistate amicus brief supporting the United States' appeal from a July 16, 2021 district court decision permanently enjoining further implementation of the DACA program. On October 5, 2022, the U.S. Court of Appeals for the Fifth Circuit issued a decision affirming the permanent injunction in part, but remanding the case to the district court for consideration of Texas' challenge to the August 30, 2022 final rule that had been issued by the Department of Homeland Security while the appeal was pending. *See Texas v. United States*, 50 F.4th 498 (5th Cir. 2022). The Fifth Circuit's decision stays the effect of its ruling with respect to existing DACA recipients, so that anyone already taking part in the DACA program will continue to be protected pending the outcome of further proceedings pertaining to the August 30, 2022 final 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 public colleges and universities and benefiting from Maryland's passage of the DREAM Act. The DREAM Act extended in-State tuition rates to qualified young people raised in the State who are seeking a college education.

## Public Charge

This lawsuit challenged the legality of a 2019 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 2019 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 would have caused 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 related cases, and on March 15, 2021, DHS issued a notice confirming that the 2019 rule was vacated.

A coalition of 11 states led by Arizona then moved to intervene in the Ninth Circuit in order to seek certiorari; the plaintiff states opposed the motion to intervene, and on April 8, 2021 the motion was denied. Arizona then filed a motion to intervene in the Supreme Court, and 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. The plaintiff states filed an 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. On June 15, 2022, the Supreme Court dismissed the writ of certiorari as improvidently granted, but Chief Justice Roberts, joined by Justices Thomas, Alito, and Gorsuch, wrote a concurrence expressing their view that the Biden Administration had departed from the usual notice and comment requirements of the Administrative Procedure Act when it rescinded the 2019 rule. Arizona v. City & Cnty. of San Francisco, California, 213 L. Ed. 2d 284, 142 S. Ct. 1926 (2022)

On February 24, 2022, the Department issued a notice of proposed rulemaking, and in April 2022, the Attorney General joined a multistate comment letter supporting the proposed rule and urging its prompt adoption. On Sept. 8, 2022, DHS announced a final rule that will be effective on Dec. 23, 2022. DHS believes that, in contrast to the 2019 rule, the new final rule will effectuate a more faithful interpretation of the governing statute; avoid unnecessary burdens on applicants, officers, and benefits-granting agencies; and mitigate the possibility of widespread "chilling effects" with respect to individuals disenrolling or declining to enroll themselves or family members in public benefits programs for which they are eligible.

## PUBLIC SAFETY

### 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 proposed to substantively roll back aspects of the rule through 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, the OAG 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 the coalition also filed a petition for administrative reconsideration of the final rule, given the information introduced by the coalition's October 2019 supplemental comments. The D.C. Circuit agreed to hold this challenge in abeyance until EPA ruled on the coalition's petition for administrative reconsideration which was denied in September 2020. The same multistate coalition then filed a separate petition for review of the denial of our request for administrative reconsideration and the two cases have been consolidated.

EPA signaled an intent to review the 2019 Final Rule following the change in presidential administrations and the multistate coalition subsequently agreed to hold its litigation in abeyance. On August 31, 2022 EPA issued a Proposed Rule that would reinstate several of the most critical parts of the 2016 Rule. Maryland joined multistate comments on that proposal urging EPA to act promptly to restore important safeguards for fence line and environmental justice communities and to go even further where the proposal falls short of the 2016 standards.

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 Maryland 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, like 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 its intent to reconsider the LNG by Rail Rule and the D.C. Circuit placed the case into abeyance shortly thereafter.

PHMSA published a proposed rule to suspend the authorization of LNG by Rail on November 8, 2021. The OAG led multistate comments supporting the prompt finalization of that suspension rule though the agency has not yet published a final version.

## Safeguarding Maryland Workers

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

In 2016, when it adopted the rules requiring large companies to electronically report the workplace safety information, OSHA touted the reporting requirements as vital because they would help OSHA and states target workplace safety enforcement programs,

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

After the district court denied the states' motion for summary judgment and granted OSHA's cross-motion on January 11, 2021, the OAG filed an appeal. That appeal has been held in abeyance pending new rulemaking that would reinstate the 2016 workplace injury provisions by the end of the year. On March 30, 2022, OSHA published a proposed rule, Improve Tracking of Workplace Injuries and Illnesses. The agency intends to complete the rulemaking process and issue a final rule by March 31, 2023.

## HEALTH CARE

### Fighting Discrimination in Health Care

The OAG has 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 plaintiffs' 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.

In a November 7, 2022, Status Report to the Court, HHS reported that it had submitted a draft proposed rule to the Office of Management and Budget (OMB) on March 25, 2022, for review by its OIRA, and that the draft notice remains under review.

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 the 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 was in the motions stage, when 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 was 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 was 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.

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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, the General Assembly 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.

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 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.

On August 4, 2022, HHS issued a notice of proposed rulemaking, which significantly mirrors the Obama-era rule, reverses major portions of the 2020 Final Rule, and includes new policies that would go beyond the 2016 rule, including, extending the rule to Medicare Part B providers, preventing discrimination based on marital, family or parental status, extending the rule to include telehealth services and clinical algorithms, inclusion of compliance training requirements and creating a process for entities to voice federal conscience or religious freedom objections. The comment period closed on October 3, 2022. The Attorney General's Office joined twenty-one other states in a comment letter largely supporting HHS for returning to the protections against discrimination in healthcare clearly envisioned by the ACA.

## 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.

ED has announced that it is planning to issue a new Gainful Employment Rule. This case currently is stayed, with the parties submitting periodic status reports.

## 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, made it more likely that Marylanders would be saddled with significant amounts of student loan debt , promoted deceptive and predatory practices by schools, and wasted state grant money provided to students who attend a fraudulent program. Because the 2019 Borrower Defense Rule violated the Administrative Procedure Act, harmed the public interest and welfare of the residents of the State of Maryland, and caused 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 proposed revising the Borrower Defense Rule promulgated under Secretary DeVos and the district court has stayed the case. On November 1, 2022, ED issued a new Borrower Defense Rule designed to improve borrower defense, ensure that borrowers get their day in court, and limit student loan interest capitalization. The new regulations will take effect July 1, 2023. In light of the new rule, the parties stipulated to a stay of the case until July 18, 2023.

## ENVIRONMENT

### Protecting the Arctic Refuge from Oil and Gas Drilling

The OAG 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.

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

### Preserving Regulation of Hazardous Air Pollutants from Power Plants

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

Following a notice-and-comment period, in 2020 EPA completed reconsideration of that 2016 decision and concluded, in a "Revised Determination," that regulation of coal- and oil-fired power plants under Section 112 is *not* "appropriate and necessary." The Revised Determination thus removes the predicate for promulgation of the MATS Rule, leaving it potentially vulnerable to challenge.

As part of a multistate coalition, the OAG joined a petition for review of the Revised Determination in the D.C. Circuit. Together with other coalition members, the OAG also intervened on EPA's side in a consolidated case, to defend against arguments that EPA should have taken the further step of eliminating the MATS Rule. The consolidated cases were placed in abeyance following the change in administration, where they remain 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.

## 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 believed the standards were 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.

EPA published updated GHG emissions standards in December 2021 and was promptly sued in the D.C. Circuit. Maryland joined a multistate coalition intervening in defense of EPA's standards. Briefing is ongoing.

NHTSA published its updated CAFÉ standards for Model Years 2024-2026 in May 2022. That rule was challenged in the D.C. Circuit and Maryland joined a multistate coalition intervening to defend NHTSA's standards. Briefing is ongoing.

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 determined not to revise the regulations, however, so the case was removed from abeyance and has proceeded through briefing and oral argument.

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

## 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). Maryland joined a multistate coalition in providing DOE with notice of 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). In September 2022 the OAG joined all parties in entering a consent decree that established ambitious yet accomplishable timelines for DOE to issue final determinations regarding all categories of appliances named in the complaint.

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 any delay by DOE in updating 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. DOE finalized a rule returning to the 2016 definition of General Service Lamps in May 2022 and the OAG subsequently moved to voluntarily dismiss its lawsuit in the Second Circuit.

## 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 the 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.

Maryland 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, including death, 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 has taken several steps to provide a more robust risk evaluation for each chemical during 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

In September 2017, 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 was placed in abeyance while NHTSA considers whether to revoke the interim final rule. NHTSA did in fact revoke the interim final rule, and the litigation was voluntarily dismissed in June 2022.

## 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 EPA's ACE rule, which it finalized in June 2019, will not curb rising carbon emissions from power plants and will 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. Argument was held on February 28, 2022 and an opinion issued on June 30. The Court reversed the D.C. Circuit, holding that the Clean Power Plan was unlawful and further curtailing EPA's discretion to determine the "best system of emissions reductions" under section 111(d) of the Clean Air Act. The case was then remanded back to

the DC Circuit which has placed the matter into abeyance pending EPA's plan to complete a new rulemaking to replace the ACE Rule.

## 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. EPA and COE have since proposed a new definition of "waters of the United States," as to which OAG has joined comments.

In parallel, a group of private parties had appealed the district court's denial of their motion to intervene on the agencies' side in the second suit. In January 2022, those parties voluntarily dismissed their appeal.

## 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 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 the coalition's comments and finalized its regulations on January 7, 2021. The states' coalition sued in the Southern District of New York, and on October 4, 2021, prior to argument being held on their challenge, DOI published a proposed rule to revoke the January 7 regulations effective December 3, 2021. Once the revocation rule was finalized and the January 7 regulations repealed, the coalition agreed to voluntarily dismiss the case.

## 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 challenged regulatory changes that: made it more difficult to designate critical habitat, allowed for the introduction of economic data into the administrative record informing listing determinations, limited the consideration of climate science in determining a species likely status in the foreseeable future, eliminated recovery as a basis for delisting, allowed for the piecemeal destruction of critical habitat, narrowed

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

the definition of "effects of an action" during consultation, and revoked the default protection from take for threatened species.

In May of 2020, the Court rejected the Services' attempt to dismiss the complaint for lack of standing. The states filed motions for summary judgment on October 15, 2021, to which the Federal Defendants responded by moving to remand the regulations without vacatur. The states opposed such relief given that it would have left the regulations in place indefinitely. Instead, the coalition of states argued that equity required the court to vacate the rules upon remand. On July 5, 2022 Judge Tigar issued an order vacating and remanding the Trump era regulations. Defendant-Intervenors quickly appealed to the Ninth Circuit and sought to stay Judge Tigar's order pending resolution of their appeal. In filing that motion they relied heavily upon an unexplained order issued from the Supreme Court's emergency docket in a separate case that held that a district court judge cannot vacate a rule without reaching its merits. Given that intervening ruling and the prospect that the states' case would become tangled in a procedural morass upon appeal, the coalition timely moved to have Judge Tigar amend the July 5 Order to either reach the merits of the agencies' NEPA compliance or restart summary judgment. That motion effectively denied the Ninth Circuit of jurisdiction over Defendant-Intervenor's appeal while it was pending, and they thereafter sought mandamus to stay the July 5 vacatur order. A three-judge panel granted the requested mandamus, holding that it was clear error for a district court judge to vacate a rule without reaching its merits, and on November 16 Judge Tigar amended his previous order to remand the regulations without vacatur.

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. The states agreed to voluntarily dismiss their lawsuit following the repeal of those regulation in September 2022.

## 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 the 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, the OAG joined multistate comments opposing CEQ's proposal. Despite these 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 repealed several of the clearly illegal portions of the new regulations including the new "effects" definition, the cap on agency specific NEPA procedures, and language allowing a project proponent to define its purpose. CEQ's step two rulemaking is likely to be much broader.

The states' case has been stayed since Spring 2021.

## 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 the 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 sought by the petition, EPA would have incomplete information as 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, the states' 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 the 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.

In addition to that NHTSA determination, the "One National Program" rule rescinded 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 determined 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 was 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.

In March 2022, EPA published a final rule that retracted its previous, waiver revoking, interpretation of the statute. That determination was challenged by a number of petitioners in the DC Circuit. The OAG joined a multistate coalition of intervenors in defense of EPA and briefing is ongoing in that matter. *Ohio v. EPA*, 22-1081 (D.C. Cir.).

## 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 systems 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 was placed in abeyance while EPA revisited the issues addressed by the challenged revisions, but it has since been removed from abeyance and briefing is underway.

## Ensuring The Postal Service Commits to A Green Future

The U.S. Postal Service (USPS) operates one of the largest fleets of civilian vehicles in the world. Most of its 212,000 delivery vehicles, however, were manufactured between 1986 and 1994 and have long since outlived their intended service life. On February 23, 2021 USPS announced that it had entered into a contract with Oshkosh Defense, LLC for the production of up to 165,000 custom built vehicles to replace its aging delivery fleet. It was not until August 2021, six months after signing the contract with Oshkosh that USPS released a draft Environmental Impact Statement and January 2022 that a Final EIS was published. Accompanying the Final EIS was a Record of Decision (ROD) wherein USPS selected a vehicle mix of 90% internal combustion engine and 10% battery electric vehicles.

In April 2022, the OAG joined a multistate coalition alleging that the USPS violated the National Environmental Policy Act (NEPA) when it signed its contract with Oshkosh prior to completion of an EIS and that its subsequent EIS and ROD were significantly flawed. Specifically, the complaint alleges that USPS failed to consider an adequate range of alternatives for the percentage of battery electric vehicles in its fleet, overestimated the costs of owning and operating an EV, underestimated fuel costs for internal combustion engine vehicles, and violated NEPA by making, and continuing to make, an irretrievable commitment of resources prior to its completion of an adequate environmental review. That case is currently pending in the Northern District of California.