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MARYLAND DEFENSE ACT 2018 REPORT



DECEMBER 2018

Introduction

During the 2017 legislative session, the Maryland General Assembly enacted the Maryland Defense Act (MDA) to enable the Attorney General to protect the State and its residents against actions by the federal government that jeopardize their health and welfare. 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.¹

In the past two years, the Trump Administration has routinely engaged in unlawful attempts to adopt or roll back laws and regulations that harm Marylanders in a myriad of ways. These efforts include stripping critical environmental protections, authorizing discriminatory policies, gutting health insurance protections, failing to hold predatory businesses accountable, and otherwise violating Marylanders' constitutional rights and protections.

Examples abound. In the environmental arena, despite his own government sounding the alarm about imminent public health, economic, and environmental disasters resulting from climate change, President Trump has attempted to dismantle the Clean Power Plan (CPP),

¹ The MDA provides that the Office of the Attorney General may file suit on behalf of Marylanders when "the federal government's action or inaction ... threatens the public interest and welfare of the residents of the State with respect to:

- (1) protecting the health of the residents of the State and ensuring the availability of affordable health care;
- (2) safeguarding public safety and security;
- (3) protecting civil liberties;
- (4) preserving and enhancing the economic security of workers and retirees;
- (5) protecting financial security of the residents of the State, including their pensions, savings, and investments, and ensuring fairness in mortgages, student loans, and the marketplace;
- (6) protecting the residents of the State against fraud and other deceptive and predatory practices;
- (7) protecting the natural resources and environment of the State; or
- (8) protecting the residents of the State against illegal and unconstitutional federal immigration and travel restrictions; or
- (9) otherwise protecting, as *parens patriae*, the State's interest in the general health and well-being of its residents..."

one of the most important steps the country has taken to slow down and curb the increasingly harmful effects of climate change. The Department of Education has undermined Obama-era regulations designed to protect students of higher education from predatory and deceptive practices of for-profit institutions. The Department of Justice has refused to defend and protect the Affordable Care Act, which has provided almost 500,000 Marylanders access to health care and has protected millions more with preexisting conditions. The Commerce Department has attempted to deprive the State of critical federal funding by adding an unlawful citizenship question to the upcoming census. The Department of Health and Human Services has threatened access to contraception for millions of women by allowing employers to deny coverage based on religious or moral objections. The Department of Homeland Security has attempted to end the Deferred Action for Childhood Arrivals (DACA), the program protecting from deportation young people brought to this country as children by their parents.

Over the past two years, the OAG has worked to safeguard Marylanders from these and many other harmful actions taken by the Trump Administration. Pursuant to its authority under the MDA, it has brought suit to protect Marylanders who need affordable and accessible healthcare, and those of diverse backgrounds at risk of discrimination on the basis of religious and national origin. It has sought to shield Marylanders vulnerable to the dismantling of critical consumer and financial protections. And it has acted on behalf of all Marylanders who will suffer from the degradation of our environment and a host of other harms resulting from the Trump Administration's dangerous and destructive agenda.

This report outlines the OAG's lawsuits brought under the MDA.¹ The critical rights and protections of Marylanders at risk in these cases make clear the MDA's importance in the ongoing effort to combat the harms resulting from the current unlawful activities and abuses of the federal government.

Fighting President Trump's Family Separation Policy

In 2018, the Office of Attorney General (OAG) joined the State of Washington's suit challenging the constitutionality of President Trump's policy of separating immigrant children from their parents when they are detained upon entry into the country.

Washington v. United States (S.D. Cal., Case No. 3:18-cv-01979-DMS). The case was

¹ In some of the cases listed, the OAG believes that it has authority independent of the Maryland Defense Act to bring an action. The OAG nevertheless provided notice to the Governor in certain cases pursuant to the MDA to avoid any future claim that the action was not authorized. In other cases, the OAG received additional authority to proceed after it initiated an action pursuant to the MDA.

initially filed in the Western District of Washington, but was moved to the Southern District of California, which was considering a related case brought by advocacy groups. It is currently pending before that court.

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

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

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

The OAG intervened in *Washington v. United States* because Maryland has a fundamental interest in ensuring that the federal government does not discriminate based on race, ethnicity, or religion, particularly in the cruel way that the family separation policy does. The suit remains pending before the federal court in California.

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.

The private defendants' motion to dismiss on the pleadings was denied on November 13, 2018. The Department of State filed a motion to stay proceedings, which will be fully briefed in December, 2018.

Defending Greenhouse Gas Emissions Standards

In 2017, the OAG intervened in a lawsuit to defend Environmental Protection Agency (EPA) greenhouse gas (GHG) emissions standards for model year 2022-2025 light-duty vehicles. The suit, *Alliance of Automobile Manufacturers v. US Environmental Protection Agency et al.*, (D.C. Cir., Case No. 17-1086), challenged the EPA's finding that the emissions standards are feasible at reasonable cost, will achieve significant CO₂ emissions reductions, and will provide significant benefits to consumers and to the public. Shortly after it was filed, its petitioners voluntarily dismissed the suit after the EPA announced that it would revisit the Obama-era GHG emissions standards.

The EPA announced in April 2018 that it no longer believes the standards are appropriate and that they should be revised. In response, the OAG joined other jurisdictions in filing a petition for review on May 1, 2018, of the EPA's decision to revise the standards. See *State of California et al. v. US Environmental Protection Agency et al.*, (D.C. Cir., Case No. 18-1114). The Trump administration has moved to dismiss the suit on procedural grounds, and the petitioning jurisdictions have opposed that motion.

This case is 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.

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 CO₂ 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.

As a critical component of broader efforts to reduce air pollution, these standards should be promulgated. 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 publish the energy efficiency standards.

Fighting President Trump's Muslim Travel Bans

In 2017, the OAG joined the State of Washington's suit challenging the constitutionality of President Trump's Muslim travel bans in *Washington v. Trump* (W.D. Wa., Case No. 2:17-cv-00141). While this litigation was proceeding, a separate lawsuit was filed, *State of Hawaii v. Trump* (D. Haw., Case No. 1:17-cv-00050).

The President's first two Executive Orders on this matter suspended entry into the United States of all persons from certain designated countries that have majority Muslim populations ("travel bans"). People who arrived in the country lawfully, expecting to be welcomed and treated with dignity, were instead detained at airports, handcuffed, denied access to counsel, and in some cases forced to leave the United States at their own expense and at their own peril. In September 2017, the President issued Presidential Proclamation 9645, a third travel ban that superseded the first two Executive Orders.

In June 2018, the Supreme Court, by a 5-4 vote, upheld the third iteration of the travel ban, and *Washington v. Trump* was dismissed following the decision. The travel ban, currently in effect, indefinitely suspends entry into the United States of certain persons from seven designated countries, five of which have majority Muslim populations: Libya, Iran, Somalia, Syria, and Yemen. The other two countries are Venezuela and North Korea.

The issues in the travel ban cases are important to Marylanders because the Proclamation impairs the ability of Maryland students who are lawful permanent residents or who are present on student visas to continue to attend Maryland's colleges and universities. That impairment will affect the ability of Maryland colleges and universities to attract and retain foreign students in the future, and with respect to public institutions, may result in a significant loss of tuition revenue to the State.

The Proclamation also hinders the research efforts of Maryland faculty members, research fellows, and graduate students whose inability to travel overseas will jeopardize their grant funding and the important academic, scientific, and medical research it supports. The Proclamation's adverse effect on researchers will also have consequences for Maryland's growing technology industry, which employs a significant number of professionals originating from the countries targeted in the orders.

The OAG intervened in *Washington v. Trump* because Maryland has a fundamental interest in ensuring the federal government does not discriminate based on race, ethnicity, or religion.

Enforcing the Emoluments Clauses

In 2017, the OAG, along with the District of Columbia, filed suit against the Trump administration to enforce the nation's original anti-corruption laws, the foreign and domestic Emoluments Clauses of the U.S. Constitution. As explained in the complaint, "President Trump's myriad international and domestic business entanglements make him 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 original complaint was amended, at the invitation of the court, to include President Trump in his personal capacity. The administration filed a motion to dismiss the complaint, which was denied by the court. The court issued two opinions denying the Justice Department's motion to dismiss, concluding that the plaintiffs have standing to pursue their claims and that they have stated a claim under the Emoluments Clauses. The motion to dismiss the personal capacity claim against President Trump has not yet been decided.

The parties held an initial discovery conference and filed a joint report to the court, and the court has issued a scheduling order allowing discovery to proceed. The Trump administration made a motion to the court to certify an interlocutory appeal and to stay all proceedings, including discovery, during the pendency of that appeal. The Court denied that motion, and the Justice Department has now indicated that it plans to file a mandamus petition.

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

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

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).

The states prevailed in the case; the court rejected EPA's jurisdictional objections to the suit, then ruled for the plaintiffs on the merits. Accordingly, the court ordered EPA to revoke all tolerances and registrations for chlorpyrifos within 60 days from the date of the mandate, which has not yet issued. A rehearing petition has been filed and remains pending before the Ninth Circuit.

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.

Limiting Methane Emissions from the Oil and Gas Sector

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

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

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

The suit is pending in the U.S. District Court of the District of Columbia. See *New York et al. v. E. Scott Pruitt et al.* (D.C. Cir., Case No. 1:18-cv-00773).

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.

In early 2018, the states and the ED filed motions for summary judgement and in March 2018, a combined amicus brief was filed by 17 organizations in support of the states' arguments. A hearing on the summary judgment motions was held on May 1, 2018. The judge considered both the threshold question of standing and the merits of the case. One day before the hearing, the ED took an initial step in the process of calculating the debt-to-earnings rates, which is required by the Gainful Employment Rule but had previously been delayed by the department. This step was one of the demands made in the states' complaint, and it is doubtful that the ED would have taken this step if not for the states' lawsuit.

After the motions hearing, the states filed an amended complaint to address further delays by the ED that had occurred since the filing of the initial complaint. The court accepted the amended complaint and permitted the states and the ED to file amendments to their motions for summary judgment to address the issues raised in the amended complaint. The motions are now fully briefed and remain pending before the court.

The ED's action will: (1) make it more likely that Marylanders are saddled with significant amounts of student loan debt that they are unable to repay; and (2) lead to Maryland students unknowingly attending institutions that fail to provide an education that leads to gainful employment.

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.

In a separate effort to weaken the amendments to the Chemical Accident Prevention Rule, in May 2018, the EPA proposed to substantively roll back aspects of the rule. The OAG joined comments opposing EPA’s proposal in a letter urging implementation of the amendments as promulgated. The State OAG’s comments to the May 2018 proposed rule were filed with the EPA in August, 2018.

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.

Defending the Affordable Care Act

Cost Sharing Reductions

Acting to protect healthcare coverage for 20 million Americans, the OAG has filed or intervened in several cases relating to the Patient Protection and Affordable Care Act (ACA).

The OAG intervened in a case in which members of the U.S. House of Representatives challenged the authorization of federal funding for cost-sharing reduction payments. See *United States House of Representatives v. Thomas E. Price, M.D., et al.* (Docket 16-5202) (U.S. Court of Appeals for the District of Columbia Circuit). Cost-sharing reductions, an important part of the ACA’s financial assistance provisions, reduce out-of-pocket costs by lowering deductibles, co-payments, and similar expenses for eligible consumers purchasing plans on state health exchanges. Several states intervened in the case because they could not rely on the Trump administration to defend the lawsuit.

The OAG and several other states filed a second suit opposing the Trump administration's abrupt decision to stop making these cost-sharing reduction payments, a decision that prompted the Maryland Insurance Commissioner to permit carriers to submit a second rate filing seeking increases in proposed 2018 rates to cover the loss of the payments.

The suit was brought to address the concern that loss of federal funding for cost-sharing reduction payments would result in higher premiums to cover the loss, which would harm the State, Maryland consumers, and the entire healthcare marketplace. More Marylanders would lose or forego coverage, and uncompensated care would increase, driving up hospital rates and Medicaid expenditures, and jeopardizing the State's federal Medicare waiver. These payments are critical to protecting millions of working families from unaffordable healthcare costs.

During the pendency of both actions, the Maryland Insurance Commissioner, along with most other intervenor states' insurance regulators, devised a work-around that protected most impacted consumers. In order to avoid disturbing the status quo given the general success of the practice commonly referred to as "silver-loading," which mostly curbed the harm caused by the federal government's unjustified cessation of cost-sharing reduction (CSR) subsidies, the states filed in their own case a Motion to Stay the Proceedings, or in the alternative, Dismissing the Action without prejudice. The action was dismissed without prejudice, and the original case brought by members of the House of Representatives was settled.

Constitutionality

The OAG filed suit in U.S. District Court for the District of Maryland on September 13, 2018, against the Trump administration for a declaratory judgment that the ACA is constitutional and the federal government must stop taking actions to dismantle it.

The lawsuit follows the Trump administration's refusal to defend the ACA in a Texas case that seeks to dismantle the law. Filed in February 2018, the Texas lawsuit alleges that the ACA is no longer constitutional due to the passage of a tax bill that eliminated the shared responsibility payment required under the ACA's individual coverage mandate. By seeking to overturn the law, the suit would throw millions of Americans off their health insurance plans by reversing Medicaid expansion, end tax credits that help people afford coverage in the health insurance marketplaces created under the law, allow insurance companies to deny coverage of pre-existing conditions, take away seniors' prescription drug discounts, and strip funding from the nation's public health system, including its work combatting the opioid epidemic.

The ACA has already twice survived review by SCOTUS, and survived over 70 unsuccessful repeal attempts in Congress.

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. However, separate from its delay action voided by the court, NHTSA is still seeking to substantively roll back the increased penalties, including reverting back to a pre-2016 penalty amount, and the OAG has joined comments opposing that proposal.

Protecting Deferred Action for Childhood Arrivals

The OAG filed suit 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.

On January 9, 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. On November 8, 2018, the Ninth Circuit issued a decision affirming the district court's grant of a preliminary injunction.

There is also litigation over DACA pending in several other courts. Notably, U.S. district courts in both New York and the District of Columbia have preliminarily enjoined the Trump Administration from terminating the program. Those decisions are currently

pending in the U.S. Courts of Appeals for the Second Circuit and the D.C. Circuit, respectively. On November 5, 2018, the Justice Department filed a petition for certiorari before judgment in all of these cases in the U.S. Supreme Court. Those petitions are currently being briefed.

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.

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.

The states and private litigants filed motions for summary judgment on March 16, 2018, to which the Department filed a cross-motion for summary judgment. Five amicus briefs were filed in support of the states' arguments. 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. The Court stayed its ruling for 30 days, during which time it denied a motion for a preliminary injunction to stop the implementation of the rule that was filed by a trade group of for-profit schools.

Because of the denial of the preliminary injunction and the ruling in the states' case, the rule became fully effective on October 16, 2018. Barring any further rulings in the case brought by the private trade group, the rule will remain in effect.

Maryland has thousands of students who have been victimized by for-profit schools, and those students will benefit by the implementation of the Borrower Defense Rule. The Court's ruling will obligate the ED to implement policies to protect those students.

Limiting Greenhouse Gas Emissions on National Highways

The OAG filed suit against the United States Department of Transportation and the Federal Highway Administration (FHWA) to challenge FHWA's continuing delays, and ultimate suspension, of the effective date of its Greenhouse Gas Performance Measure (GHG Measure) for the national highway system. See *People of the State of CA, et al. v. United States Department of Transportation, et al.*, No. 4:17-cv-5439 DMR (N.D. Cal., filed Sept. 20, 2017.)

While the case was pending in the U.S. District Court for the Northern District of California, the government initiated a rulemaking to repeal the rule. As a result, the parties agreed to voluntarily dismiss the complaint.

The GHG Measure would have required state departments of transportation (SDOTs) to track on-road GHG emissions within their jurisdictions and to set locally appropriate targets for GHG emissions on national highways. By imposing these requirements on SDOTs, the GHG Measure would have incentivized the funding of transportation strategies that helped reduced GHG emissions.

Enforcing the Clean Air Act's Smog Protections

The OAG joined a coalition of attorneys general and filed suit to challenge EPA's failure to designate areas of the country that are not in attainment with the agency's 2015 national ambient air quality standards (NAAQS) for ground-level ozone (commonly referred to as "smog"). See *State of California et al. v. Pruitt et al.*, Civ. No. 4:17-cv-06936-HSG (N.D. Cal. filed Dec. 5, 2017). The designations, which are required under the Clean Air Act, trigger an obligation on the part of states to take action to reduce smog pollution and to set deadlines for reducing pollution levels. Because smog can cause significant health problems and even death, the delay in making these designations will expose Marylanders to increased death rates and hospital visits.

In response to the coalition's motion for summary judgment, the EPA admitted that it had violated the Clean Air Act by failing to designate areas of non-attainment with ozone NAAQS. The district court in California granted our motion and ordered EPA to release almost all of the remaining designations by April 30, 2018.

EPA made the designations and they were published in the Federal Register on June 4, 2018 (83 FR 25776).

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. Briefs have been filed and oral argument was held on October 19, 2018.

Following oral argument, the U.S. Court of Appeals requested supplemental briefing on the status of the Final Rules and the impact of issuance of the Final Rules on the case pending before the Court of Appeals. The Final Rules were published on November 15, 2018. All parties filed supplement briefs, and the case remains pending before the Court of Appeals.

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.

Fighting Anti-Competitive Subsidies for Power Plants

In October 2017, the Department of Energy (DOE) used a rarely-invoked statutory provision to propose a rule for the Federal Energy Regulatory Commission (FERC) regarding electric grid reliability and resilience pricing. The DOE proposal's practical effects would have been to subsidize the operations of inefficient and high-emitting power plants, and thus to impose unnecessary and unacceptable costs and risks to the citizens of Maryland and to the environment.

The OAG submitted comments on the proposed rule and moved to intervene in FERC's docket proceedings.

On January 8, 2018, FERC issued a unanimous decision rejecting the DOE's proposed rule, concluding that rule would violate the Federal Power Act. FERC has opened a new proceeding and asked the regional transmission organizations (RTOs) for feedback on grid resiliency issues. The RTOs filed comments uniformly telling FERC that further regulation is not necessary at this time. The OAG joined reply comments underscoring the need for FERC to proceed judiciously, if at all.

Defending the Clean Power Plan

The Clean Power Plan was adopted by the Environmental Protection Agency (EPA) in 2015 in response to a provision of the Clean Air Act requiring the EPA to take steps to reduce air pollution that harms the public's health. By regulating GHG emissions from power plants, the Clean Power Plan represents an historic step in curbing and reversing climate change. It is critical to mitigating climate change's increasing harm to states' public health, environments, and economies.

Various states sued the EPA to challenge the Clean Power Plan. See *Oklahoma v. EPA*, No. 15-1364 (D.C. Cir.); *West Virginia v. U.S. EPA*, No.15-1363 (D.C. Cir.). A number of states, including Maryland, intervened in the case to defend the Clean Power Plan and to oppose the Trump administration's efforts to delay the court proceedings. This litigation over the Clean Power Plan itself remains pending, but held in abeyance, in the D.C. Circuit. The state coalition defending the Clean Power Plan has asked the court to remove the case from abeyance and issue a decision on the merits.

Separately, the EPA has proposed repealing the Clean Power Plan, and the OAG has opposed repeal. The OAG, in conjunction with the General Assembly, held a hearing in Annapolis on January 11, 2018, to gather public comment about the Clean Power Plan from Maryland residents and businesses. It was extremely well-attended and provided an opportunity for Maryland residents to be heard on the proposed repeal. All witnesses who testified at the hearing opposed repeal of the Clean Power Plan. The OAG joined multistate comments opposing repeal and submitted the testimony provided in conjunction with the Annapolis hearing (both written and oral) to the EPA on April 25, 2018.

EPA now has issued its proposal to replace the Clean Power Plan, which it calls the Affordable Clean Energy (ACE) rule. The OAG believes the ACE proposal is inadequate and has joined other states in filing comments to oppose it.

The EPA's actions to gut the Clean Power Plan will harm Maryland citizens and the environment by eliminating one of the most critical tools for addressing climate change.

Forcing Upwind States to Implement Air Pollution Controls

Maryland and eight other states submitted a Clean Air Act Section 176A Petition to the EPA on December 9, 2013, requesting that the EPA add certain states to the Ozone Transport Region under the federal Clean Air Act. This action was deemed necessary to

address the interstate transport of air pollution, which the EPA itself has acknowledged is a significant contributor to Maryland's ozone attainment problems. The EPA failed to act on the petition for several years, and then denied the petition on November 3, 2017.

A petition for judicial review of the EPA's decision was filed on December 22, 2017, and is currently pending in the U.S. Court of Appeals for the D.C. Circuit. The Utility Air Resource Group, a non-profit group representing electricity generation interests including power plants, and the states of Ohio, Indiana, Kentucky, Michigan, North Carolina, and West Virginia have intervened in support of the EPA. Oral argument took place before the D.C. Circuit on November 28, 2018.

The OAG also submitted comments opposing EPA's proposal to deny Maryland's petition under Section 126 of the Clean Air Act to impose additional emissions control requirements on certain upwind facilities interfering with Maryland's attainment and maintenance of the 2008 ozone NAAQS. EPA has finalized that denial, which the OAG has challenged by filing a petition for review in the D.C. Circuit. Delaware (which had filed four Section 126 petitions of its own) and a group of NGOs have also petitioned for review of EPA's decision, and UARG and Duke Energy have moved to intervene on EPA's side.

The EPA's denial of the Section 126 petition harms Maryland residents by continuing to allow negative health effects associated with pollution that is generated outside the State's borders. It also inequitably requires Maryland to impose more stringent regulations on its businesses in order to address transported pollution, putting the State at an economic disadvantage.

Separately, the OAG has filed comments opposing EPA's proposal to determine that the Cross-State Air Pollution Rule Update was a full remedy for upwind contributions to problems attaining and maintaining the 2008 ozone NAAQS.

Preserving the Open Internet

Net neutrality rules prohibit Internet Service Providers (ISPs) from blocking internet content or favoring some internet content over other internet content. In December 2017, the Federal Communications Commission (FCC), by a 3-2 vote, repealed the U.S. government's 2015 net neutrality rules. On May 11, 2018, the federal Office of Management and Budget completed its review of the net neutrality rollback, which became effective in June 2018.

On January 16, 2018, while waiting for the FCC's decision to roll back the net neutrality rules to be published in the Federal Register, a 21-state coalition, including Maryland, filed a protective petition for review in the U.S. Court of Appeals for the D.C. Circuit to preserve the states' claim to proceed in that venue. The states stipulated to a voluntary dismissal of that petition on February 16, 2018. In February 22, 2018, the date that the rules were published in the Federal Register, the states re-filed a petition in the D.C. Circuit.

Including the states', 14 petitions were filed—12 in the D.C. Circuit, and 2 in the Ninth Circuit. On March 8, 2018, a judicial lottery was held and the consolidated cases were assigned to the Ninth Circuit. On March 16, 2018, Maryland joined with 11 other petitioners in moving to transfer the case back to the D.C. Circuit. That motion was granted on March 28, 2018.

On August 20, 2018, the states filed their brief with the D.C. Circuit. A variety of non-governmental petitioners also filed a brief on August 20, 2018. Non-governmental intervenors filed briefs on August 27, 2018. The FCC's brief was filed in October 2018, as were briefs from intervenors supporting the FCC. Reply briefs were filed on November 16, 2018 and oral argument is set for February 1, 2019.

If the rollback of these protections is permitted to stand, ISPs could prevent Marylanders from accessing content of their choosing, could favor some internet content over other internet content by speeding up access to some sites or slowing down access to other sites, or could impose additional fees for consumers to obtain internet content of their choosing. Additionally, this repeal threatens content providers that are not affiliated with ISPs, particularly small businesses, because the content they provide may be blocked or slowed by the ISPs.

Protecting the Waters of the United States Rule

The EPA and the Army Corps of Engineers (COE) have initiated two rulemakings—one proposed and one enacted—with respect to the Waters of the United States (WOTUS) Rule. The rule was promulgated 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.

The proposed rulemaking called for rescission of the WOTUS Rule and reinstatement of prior regulations pending a later, substantive rulemaking regarding a new definition. The OAG has joined comments with the EPA and the COE opposing that proposal, which would make it more difficult for Maryland to implement its water quality protection programs and would put the State at an economic disadvantage in competition with other states.

In the meantime, the EPA and the COE have issued a rule purporting to delay the effectiveness of the WOTUS Rule for two years, and thus to reinstate the prior regulations during that period. The OAG then joined a group of states suing in the Southern District of New York to block EPA's decision to delay the effectiveness of the WOTUS Rule. The government moved to transfer the case to Texas, where another suit seeks to invalidate the WOTUS Rule, but that request was denied on May 30, 2018. In the OAG's case, the parties have completed summary judgment briefing and are awaiting a decision. In the Texas case, the OAG joined a group of states submitting an amicus brief opposing a request for a preliminary injunction against the WOTUS Rule. The OAG has also joined similar amicus

briefs opposing such requests in cases pending in the Southern District of Georgia and Southern District of New York.

Limiting Methane Emissions from Landfills

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

EPA has moved to dismiss on jurisdictional grounds, and the motion has been briefed and argued. Additionally, EPA has moved to stay the lawsuit because it has issued a proposal to retroactively extend the applicable deadlines. The multistate coalition has opposed that motion.

Protecting Workers Against Harm from Pesticides

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

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

Protecting the Vitality of the Migratory Bird Treaty Act

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

The case is pending in the Southern District of New York and has been assigned to the judge hearing two similar suits by NGOs.

Preserving Restrictions on Super-Polluting Trucks

On Scott Pruitt's last day as Administrator, the EPA announced that it would not enforce an Obama-era regulatory restriction on the manufacture and sale of “gliders,” super-polluting trucks consisting of an older engine repurposed for use in a newer chassis.

Maryland joined 16 other states and the District of Columbia in challenging this “no-action assurance” letter in the D.C. Circuit and seeking emergency relief against the EPA. Shortly after the lawsuit was filed, the EPA’s new acting administrator rescinded the no-action assurance letter, giving the outcome the plaintiffs sought in court. The Court subsequently dismissed the case as moot.

Separately, the EPA is proposing to repeal the Obama-era glider restriction as a substantive matter. Together with other states, the OAG has filed comments opposing that repeal.

Immigration and Deportation FOIA Action

On June 27, 2017, a coalition of 9 states, including Maryland, issued a FOIA request to the U.S. Immigration and Customs Enforcement (ICE), Citizenship and Immigration Services (USCIS), and Customs and Border Protection (CBP) asking for records related to DACA, the arrest/detention of individuals at sensitive locations (such as hospitals, courthouses, and school grounds), and ICE/CBP detainer requests.

After the agencies missed their deadlines to respond to the FOIA request, a complaint for declaratory and injunctive relief was filed in the District of Massachusetts on October 17, 2017. After the complaint was filed, the agencies began producing documents.

Production of documents is ongoing, and a status conference is scheduled for December 13, 2018.

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. After denying the Defendants’ motion to Stay Summary Judgment Briefing, the Court issued a scheduling

order. The states' motion for Summary Judgment and Defendants' motion to Dismiss or, in the Alternative, for Summary Judgment, are pending.

Census Citizenship Question

Maryland joined a coalition of dozens of states and municipalities challenging a proposal by the Census Bureau to add a question about respondents' citizenship to the 2020 census questionnaire. The Census Bureau has long recognized that a citizenship question could deter census participation among non-citizens, which would result in Maryland's population being undercounted, leading to a decrease in population-based federal aid, and potentially shrinking Maryland's representation in Congress and the Electoral College.

The lawsuit, pending in the Southern District of New York, went to trial over seven days in November, 2018. The parties are now involved in post-trial briefing. At the same time, the Supreme Court has agreed to review some of the issues raised in the census trial, including questions about the scope of discovery and whether Commerce Secretary Wilbur Ross could be deposed. That argument is scheduled for February 19, 2019.

Maryland has also been active as an amicus curiae in a substantially identical census lawsuit filed in the District of Maryland. That case is proceeding similarly; the Court dismissed the Census Bureau's motion to dismiss, and the case appears to be moving toward a December 2018 trial.

State and Local Tax Deductions (SALT)

The OAG filed suit with New York, New Jersey, and Connecticut in the Southern District of New York challenging a cap on the state and local taxes deduction under the Tax Cuts and Jobs Act of 2017. The lawsuit alleges that the cap is impermissible under the 10th Amendment because it 1) targets states who choose to fund public services through higher property tax rates, 2) exceeds Congress' powers under the 16th Amendment because the federal income tax has historically reserved the state's ability to tax property by allowing for (with limited exceptions) state property tax to be deducted from income tax, and 3) exceeds Congress' powers under Article I, Section 8 because it is a coercive measure.

The United States filed a dispositive motion November 2, 2018, and briefing is currently scheduled to conclude at the end of February 2019.



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