

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMALGAMATED TRANSIT UNION, AFL-
CIO-CLC,
10000 New Hampshire Avenue
Silver Spring, MD 20903;

AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS,
815 16th Street N.W.
Washington, D.C. 20006;

AMERICAN FEDERATION OF TEACHERS, AFL-
CIO,
555 New Jersey Avenue N.W.
Washington, D.C. 20001;

ASSOCIATION OF FLIGHT ATTENDANTS-CWA,
501 3rd Street N.W.
Washington, D.C. 20001;

CENTER FOR BIOLOGICAL DIVERSITY,
1411 K Street N.W., Suite 1300
Washington, D.C. 20005;

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,
501 3rd Street N.W.
Washington, D.C. 20001;

FRIENDS OF THE EARTH,
1101 15th Street N.W., 11th Floor
Washington, D.C. 20005;

LABOR NETWORK FOR SUSTAINABILITY,
P.O. Box #5780
Takoma Park, MD 20913;

SERVICE EMPLOYEES INTERNATIONAL UNION,
1800 Massachusetts Avenue N.W.
Washington, D.C. 20036;

TRANSPORT WORKERS UNION OF AMERICA,
AFL-CIO,
501 3rd Street N.W., 9th Floor
Washington, D.C. 20001;

Case No.: _____

**COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

(Administrative Procedure Act,
5 U.S.C. § 551, *et seq.*)

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO,
1775 K St. N.W.
Washington, D.C. 20006; and

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO-CLC,
60 Boulevard of the Allies
Pittsburgh, PA 15222,

Plaintiffs,

v.

ALEX AZAR,
in his official capacity as Secretary of the
U.S. Department of Health and Human Services,
200 Independence Avenue S.W.
Washington, D.C. 20201-0004;

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES,
200 Independence Avenue S.W.
Washington, D.C. 20201-0004;

CHAD WOLF,
in his official capacity as Secretary of the
U.S. Department of Homeland Security,
245 Murray Lane S.W.
Washington, D.C. 20528; and

U.S. DEPARTMENT OF HOMELAND SECURITY,
245 Murray Lane S.W.
Washington, D.C. 20528,

Defendants.

INTRODUCTION

1. This case challenges the federal government’s refusal to address a crucial and ongoing crisis striking the country: the grave shortage of personal protective equipment (“PPE”) for the nation’s essential workers during the 2019 novel coronavirus (“COVID-19”) pandemic. Two months ago, Plaintiffs submitted an emergency rulemaking petition to Secretary Alex Azar of the U.S. Department of Health and Human Services and Secretary Chad Wolf of the U.S. Department of Homeland Security (collectively, with their agencies, “the Departments”) demanding that they exercise their delegated authorities under the Defense Production Act, 50 U.S.C. § 4567 *et seq.* (“DPA”), to both assess PPE scarcity in essential worker sectors and take wholesale, comprehensive action to ensure that adequate supplies of PPE—including reusable and N95 respirators, protective garments, and ventilators—are urgently manufactured and allocated to essential workers. *See* Exhibit A (“Emergency PPE Petition”). Yet to date, in a stunning act of agency nonfeasance during this unprecedented health and national security emergency, the Departments have ignored the Petition. Plaintiffs thus seek injunctive relief directing the Departments to immediately respond to the Petition—with the mammoth action necessary to safeguard the millions of essential workers powering the country’s survival, in spite of their own devastatingly disproportionate rates of mortality and morbidity.

2. The United States is the global epicenter of COVID-19, harboring the highest number of fatalities and infections in the world. One in five people on the planet who have died from COVID-19 or contracted the SARS-CoV-2 virus (hereinafter, “coronavirus”) reside in America. Since February 2020, the coronavirus has killed over 211,000 people in the United States. The nation now has over 7.5 million COVID-19 cases, and the rate of infection continues to rapidly swell due to the premature opening of state economies, major workplace outbreaks, and the failure to widely enforce social distancing and mask-wearing public health measures. In

the last eight weeks since the Petition's filing alone, the number of coronavirus infections has ballooned by 50 percent—or a staggering 2.5 million cases. Public health experts anticipate that COVID-19 cases will further surge in the fall and winter during flu season and as people spend more time indoors, where the coronavirus spreads more easily.

3. A significant portion of those who have died from and contracted the coronavirus are classified as “essential” workers, a lucidly precise term for the people who have shouldered the country's survival during this public health catastrophe. Since the pandemic's start, the country's essential workers have been disproportionately exposed to and impacted by COVID-19. While state economies shuttered and shelter-in-place orders proliferated, essential workers did not physically isolate from others but instead continued to provide the services and goods foundational to the nation's endurance. Currently, as shelter-in-place orders are lifted, the same essential workers, as well as new workers returning to the physical workplace, experience increased contraction risk because their work requires exposure to infected persons or is subject to repeated exposure to members of the public. Throughout this period, frontline healthcare workers have provided critical medical care to confirmed and suspected COVID-19 patients, despite risks of deadly exposure. Grocery store workers, farm workers, and meat processing workers have continued to feed the country, even as retail stores, fields and factories have experienced colossal coronavirus outbreaks. Mass transit, transport, and airline workers have delivered essential goods, while utility and communications workers have sustained access to fundamental human needs of water, electricity, and internet. Many teachers have now commenced educating students in person. And caregivers, nursing home assistants, and domestic workers have care-taken vulnerable populations, including the elderly, absent the ability to ensure safe social distancing. Many of these essential workers are members of Plaintiff unions and organizations.

4. Despite their role as the engines of America’s survival in this pandemic, essential workers have been denied adequate respirators and other PPE to guard against contracting the coronavirus and, as a result, have disproportionately experienced COVID-19 deaths and infection. Hundreds of thousands of essential workers have died due to COVID-19 or have tested positive for the coronavirus. Studies show that healthcare workers alone make up 10-20 percent of all coronavirus infections. Essential workers are also disproportionately Black, Latinx, Asian and from other communities of color that have disproportionately suffered higher rates of fatalities and infections than their white counterparts.

5. In March 2020, the President declared the COVID-19 pandemic a national emergency and identified the PPE shortage as a matter threatening the national defense. In subsequent executive orders, the President delegated his broad authority under the DPA to Health and Human Services Secretary Azar and Homeland Security Secretary Wolf to address the PPE shortfall for the national defense. However, despite their lawful power to act boldly and urgently on this unprecedented crisis, Secretaries Azar and Wolf have woefully failed to utilize these powers to address the country’s perilous PPE deficit.

6. Accordingly, on August 11, 2020, Plaintiffs—as part of a petitioner group consisting of over 30 leading labor unions and environmental groups representing over 20 million workers and members—submitted the Emergency PPE Petition pursuant to the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (“APA”), demanding the Departments invoke their delegated authorities under the DPA to manufacture and allocate PPE for the protection of essential workers. Plaintiffs requested that the Departments respond within fifteen days.

7. As of this filing’s date, nearly two months later, the Departments continue to ignore the Petition. In the meantime, over the past two months alone the number of coronavirus

infections has increased by 2.5 million cases and deaths by 60,000 lives. Currently, the White House and Capitol Hill are also experiencing a COVID-19 outbreak, with over 150 essential and other workers testing or presumed positive for the lethal coronavirus. In light of this compressed time scale and outsized health risks to essential workers deprived of adequate PPE, the Departments' failure to respond to the Emergency PPE Petition constitutes unreasonable delay in violation of the APA. Accordingly, Plaintiffs seek declaratory and injunctive relief requiring the Departments to promptly respond to and act on the Emergency PPE Petition.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question). This action arises under the APA, 5 U.S.C. § 551 *et seq.*

9. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(b) and (e), because the violations are occurring in this district, and a substantial part of the events or omissions giving rise to the claims have occurred in this district due to decisions made by the Departments, and/or failure(s) to act by the Departments.

PARTIES

A. Plaintiffs

10. Plaintiff AMALGAMATED TRANSIT UNION, AFL-CIO-CLC ("ATU") is the largest transit worker labor union in North America and represents more than 200,000 transit and allied workers in the United States and Canada. ATU's members work as metropolitan, interstate, and school bus drivers; paratransit, light rail, subway, streetcar, and ferry boat operators; mechanics and other maintenance workers; station agents, clerks, baggage handlers, municipal employees and others. Since the COVID-19 pandemic struck North America, the vast majority of ATU members reported to work often with little or no respiratory protection such as N95s and other PPE to protect themselves against the coronavirus. As a result, a reported 89

ATU members have died from COVID-19, and 1,764 ATU members have confirmed coronavirus infection. As the pandemic continues to ravage North America, more people are riding public transit, and ATU members thus face increased COVID exposure in the coming months. The proper use of the DPA will help significantly in the production and allocation of PPE required to keep essential workers and their families safe. ATU and its members are injured by the Departments' failure to respond to the Emergency PPE Petition because the Departments' failure to act is delaying the provision of PPE vital to the protection of ATU and its members.

11. Plaintiff AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS ("AFL-CIO") is an unincorporated labor organization consisting of 56 national and international labor unions representing 13 million working men and woman in every sector of the economy, including millions of essential workers in hospital and nursing homes, grocery stores and meat packing plants, buses and subways, post offices and correctional facilities, and many other workplaces that have remained open during the pandemic. The AFL-CIO's general purposes include advocating for and taking appropriate legal action to protect and advance the interests of working men and women throughout the United States, including, insofar as is relevant here, their interests in a safe and healthy workplace. The AFL-CIO's affiliates' members have suffered devastating losses in mortality and morbidity due to COVID-19 and inadequate provision of respiratory protection and other PPE to mitigate such losses. In addition to the AFL-CIO affiliate Plaintiffs and respective labor sectors described herein, a recent report by National Nurses United identified 1,718 deaths among healthcare workers from COVID-19 as of mid-September. Regarding emergency responders, who are on the frontline of COVID-19 response, the International Association of Firefighters reported that 5,234 of their members have been infected, 122 have been hospitalized, 17 have died, and 10,745 members have been quarantined due to exposure without adequate PPE. Recent data provided by

the United States Post Office revealed that 84 postal workers—many of whom are union members—have died from COVID-19, 1,854 were currently off work due to coronavirus infections, and 6,923 were off work due to quarantine orders. The AFL-CIO affiliates’ members have reported to work often with inadequate PPE to protect themselves against the coronavirus. The full and proper use of the DPA will help significantly in the production and allocation of PPE required to keep essential workers and their families safe. The AFL-CIO and its affiliate members are injured by the Departments’ failure to respond to the Emergency PPE Petition because the Departments’ failure to act is delaying the provision of PPE vital to the protection of the AFL-CIO and its affiliates’ members.

12. Plaintiff AMERICAN FEDERATION OF TEACHERS, AFL-CIO (“AFT”) is a labor union that represents 1.7 million members in more than 3,000 local affiliates nationwide. AFT’s membership broadly spans five divisions: pre-K through 12th-grade teachers; paraprofessionals and other school-related personnel; higher education faculty and professional staff; federal, state and local government employees; and nurses and other healthcare professionals. In addition, the AFT represents approximately 80,000 early childhood educators and nearly 250,000 retiree members. AFT’s members face grave shortages in PPE. Specifically, AFT’s healthcare workers continue to reuse PPE intended for single use. For example, N95 respirators are designed to be discarded after a single encounter, but AFT members have been forced to reuse and rotate respirators that have undergone a decontamination system, oftentimes storing them in a paper bags between re-usages. The consequences of reusing these respirators are adverse; AFT members have reported headaches, tingling on their lips, and other negative physical symptoms. AFT members also have experienced shortfalls in PPE like gloves and gowns. Moreover, some employers have barred AFT members from bringing their own separately-purchased respirators and eye protective gear into the workplace, forcing AFT

members to reuse PPE that increases their coronavirus risk. To date, at least 144 AFT members have died from COVID-19, and infection rates are unknown. The proper use of the DPA will help significantly in the production and allocation of PPE required to keep essential workers and their families safe. AFT and its members are injured by the Departments' failure to respond to the Emergency PPE Petition because the Departments' failure to act is delaying the provision of PPE vital to the protection of AFT and its members.

13. Plaintiff ASSOCIATION OF FLIGHT ATTENDANTS-CWA ("AFA-CWA") is a labor union of more than 50,000 flight attendants, constituting the world's largest flight attendant union. Flight attendants are frontline essential workers, and without rigorous precautions, aircraft cabins are prime locations for community spread of the coronavirus. The well-documented shortage of PPE, especially N95 respirators, has put flight crews and other essential aviation workers in danger of contracting and spreading the virus. AFA-CWA members have experienced coronavirus fatalities and infections and a paucity in PPE supply to protect against the coronavirus. The proper use of the DPA will help significantly in the production and allocation of PPE required to keep essential workers and their families safe. AFA-CWA and its members are injured by the Departments' failure to respond to the Emergency PPE Petition because the Departments' failure to act is delaying the provision of PPE vital to the protection of AFA-CWA and its members.

14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-profit corporation with offices throughout the country and 1.7 million members and online activists. The Center believes that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked. Combining conservation biology with litigation, policy advocacy, and strategic vision, the Center is working to secure a future for animals and plants hovering on the brink of extinction, for the wilderness they need to survive,

and by extension, for the physical health and spiritual welfare of generations to come. Over the past 40 years, the worst human pandemics and epidemics—HIV, SARS, avian flu, swine flu, Ebola virus and Zika virus—all stemmed from trading in and consuming animals and destroying their habitat. The coronavirus is no exception, as it likely originated from a live wildlife market in China—potentially passed from a bat, to another animal, to a human. The Center has long worked for measures to curtail the risk of such pandemics in protection of people and the planet. As the coronavirus pandemic ravages our country, one of the most important steps the Center can take to advance this mission of protecting human health and welfare is to advocate for the immediate provision of PPE to all essential workers. The exploitation of essential workers is the same type of abuse that government and corporations inflict on the environment. The proper use of the DPA will help significantly in the production and allocation of PPE required to keep essential workers and their families safe. The Center and its members are injured by the Departments’ failure to respond to the Emergency PPE Petition because the Departments’ failure to act is delaying the provision of PPE vital to the protection of workers in contravention of the Center’s and its members’ interests.

15. Plaintiff COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO (“CWA”) is a labor organization that represents around 700,000 workers in private and public sector employment in the United States, Canada and Puerto Rico. CWA’s mission is to advance and advocate for workers’ rights and protections, as well as improved wages, benefits, training, and other terms and conditions of employment. A significant number of CWA members work in the telecommunications and information technology sector, assisting families, businesses, and other institutions around the country with obtaining and maintaining communication resources and broadband internet access, which are imperative during the COVID-19 pandemic for household survival. These CWA members have been detrimentally affected by a serious dearth of PPE.

Specifically, continued N95 shortages have caused most telecommunications employers to switch to KN95 masks from China, which are proven to be unreliable in terms of filtration and harder or impossible to properly fit on members' faces. These issues with KN95 masks are particularly problematic for CWA's member technicians who are at higher risk of COVID exposure because they must enter homes and businesses, including higher risk locations such as elder care and nursing homes. The existing paucity in the supply of N95 respirators and other filtering face-piece respirators also continues to make it impossible to secure real respiratory protection for members in other CWA sectors, including manufacturing, retail, public sector, education, airlines, healthcare, and corrections and juvenile detention. For example, healthcare employers in New York and New Jersey continue to force CWA healthcare employees to extend use and reuse single-use, disposable N95 masks when seeing patients in efforts to conserve existing supplies in the event of another surge in cases. Importantly, there has been a particular shortage of small-size N95 masks, which disproportionately affects women who comprise the majority of CWA's member health care providers. In the absence of adequate PPE, there have been over 813 reports of CWA members who have contracted the coronavirus and 68 reports of CWA members who have died from COVID-19. These are likely gross under-estimates. The proper use of the DPA will help significantly in the production and allocation of PPE required to keep essential workers and their families safe. CWA and its members are injured by the Departments' failure to respond to the Emergency PPE Petition because the Departments' failure to act is delaying the provision of PPE vital to the protection of CWA and its members.

16. Plaintiff FRIENDS OF THE EARTH ("FOE") is an environmental organization that fights to protect the environment and create a healthy and just world. FOE has more than 2 million members and activists across all 50 states working to make this vision a reality. FOE and its members are committed to ensuring that pandemic resources are used to protect the health and

safety of frontline communities and essential workers, who are at higher risk of contracting and becoming seriously ill or dying from COVID-19. The PPE shortage contributes to this increased risk. The proper use of the DPA will help significantly in the production and allocation of PPE required to keep essential workers and their families safe. FOE and its members are injured by the Departments' failure to respond to the Emergency PPE Petition because the Departments' failure to act is delaying the provision of PPE vital to the protection of essential workers and in contravention of the interests of FOE and its members.

17. Plaintiff LABOR NETWORK FOR SUSTAINABILITY ("LNS") is a non-profit advocacy organization whose mission is to promote economic and environmental sustainability by creating alignment among labor unions and climate, and climate justice organizations. LNS seeks to eliminate the false conflict between quality jobs and environmental protection so that all can make a living on a living planet. LNS's individual and organizational membership includes local and national unions, rank-and-file members of unions, and environmental and environmental justice organizations across the United States and Canada. Many of LNS's members are front line workers in the health care, transportation, hospitality, food service, manufacturing and public sectors. The well-documented scarcity of PPE jeopardizes the health and safety of these workers whose jobs are essential to preserving the health and safety of our communities. Activating the DPA to compel the manufacture of personal protective equipment and its orderly and efficient distribution will provide these workers with a safer and more secure work environment. LNS and its members are injured by the Departments' failure to respond to the Emergency PPE Petition because the Departments' failure to act is delaying the provision of PPE vital to the protection of LNS and its members.

18. Plaintiff SERVICE EMPLOYEES INTERNATIONAL UNION ("SEIU") is a labor union of more than two million people in the United States (including in Puerto Rico)

and Canada, and is the largest union of healthcare workers in the United States. More than half of SEIU's two million members work in the healthcare industry, including as doctors, nurses, nursing assistants, technicians, therapists, home care providers, administrative staff, janitorial workers, and food service staff. SEIU is also one of the largest unions of public service employees, with more than one million local and state government workers, public school employees, bus drivers, and child care providers. SEIU also represents workers in the property service industries. Approximately 250,000 SEIU property service workers nationwide clean, maintain, and provide security for commercial office buildings, co-ops, and apartment buildings, as well as public facilities like theaters, stadiums, and airports. Many SEIU members are essential workers and have continued working throughout the pandemic without adequate PPE. As a result, SEIU members have experienced coronavirus fatalities and infections and a paucity in PPE supply to protect against the coronavirus. DPA's activation to compel manufacture of PPE would provide these members with a safer and more secure work environment. SEIU and its members are injured by the Departments' failure to respond to the Emergency PPE Petition because the Departments' failure to act is delaying the provision of PPE vital to the protection of SEIU and its members.

19. Plaintiff TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO ("TWU") represents more than 151,000 workers across the airline, railroad, transit, universities, utilities and services sectors. TWU members work as train operators, flight attendants, bus operators & mechanics, subway conductors, aircraft mechanics, school bus workers, aircraft ground crews, carmen, rail mechanics, Amtrak onboard service workers, bikeshare workers, and others. During the pandemic, 95 percent of TWU members have been classified as essential employees across the country and have continued to work to ensure other essential workers and riders are able to get to work and back home to their families. These circumstances have put TWU workers at an

increased risk of exposure for the coronavirus—amounting to nearly 9 percent of all TWU members who have suffered COVID-19 impacts. Specifically, TWU members have reported 149 fatalities and nearly 3,760 COVID-19 cases. And almost 10,000 members have been or are currently in quarantine since the pandemic began. Despite the elevated exposure, TWU workers have not been given the PPE necessary to prevent transmission of the coronavirus. At present, TWU workers continue to express the urgent need for higher quality masks from their employers. Indeed, TWU workers have reported cases of employers requesting transit workers to use self-provided scarves and bandanas and to re-use old masks. The proper use of the DPA will help significantly in the production and allocation of PPE required to keep essential workers and their families safe. TWU and its members are injured by the Departments’ failure to respond to the Emergency PPE Petition because the Departments’ failure to act is delaying the provision of PPE vital to the protection of TWU and its members.

20. Plaintiff UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO (“UFCW”) represents 1.3 million working people and their families in frontline industries, including healthcare, grocery stores, meatpacking, food processing, retail shops, and other industries. The UFCW’s members serve communities in all 50 states, Canada and Puerto Rico. Since the beginning of the pandemic, the UFCW has led the fight for better PPE, universal COVID-19 testing, better social distancing, and the real and enforceable health and safety standards needed to keep facilities safe. COVID-19 has taken a devastating toll on UFCW workers. The coronavirus has led to over 220 meatpacking and grocery worker deaths and over 32,000 meatpacking and grocery workers infected or exposed. The reality is that many UFCW workers still lack the critical PPE necessary to do their job and reduce the risk of exposure. It is essential that the administration standardize and make mandatory the use of PPE, and prioritize all meatpacking and food workers for PPE to ensure the

health and safety of these workers and to protect our food supply. The proper use of the DPA will help significantly in the production and allocation of PPE required to keep essential workers and their families safe. UFCW workers are injured by the Departments' failure to respond to the Emergency PPE Petition because the Departments' failure to act is delaying the provision of PPE vital to the protection of the UFCW and its workers.

21. Plaintiff UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC ("USW") is a labor organization that represents approximately 850,000 workers in the United States and Canada. USW members are employed in metals, mining, pulp and paper, rubber, chemicals, glass, auto supply, and the energy producing industries, as well as in health care, public sector, higher education, tech, and service industries. USW members working in the industrial and manufacturing sectors continued working throughout the period where other sectors of the economy were subject to complete or partial closures because their employers were deemed to provide "essential" services or products, and, in many instances, these industrial and manufacturing workers labor in settings where social distancing is impossible or even unsafe in light of the nature of the operations and production processes. Meanwhile, USW members working in the health care and public sectors worked on the frontlines, providing medical care to the ill and critical public services to county and municipal residents. Across all sectors, USW members reported and continue to report a lack of N95 masks and other masks, gloves, gowns, goggles and safety eyewear, sanitizers, and other PPE in their workplace, with many reporting a need to reuse PPE when best practices would suggest the contrary. USW members have experienced COVID-19 fatalities and virus infections. The proper use of the DPA will help significantly in the production and allocation of PPE required to keep essential workers and their families safe. USW members have observed that the

purchase of N95 masks and other PPE by members of the public has limited the ability of their employers to purchase PPE for use in the workplace, and the Departments' failure to respond to the Emergency PPE Petition injures these members.

B. Defendants

22. Defendant ALEX AZAR is the Secretary of the U.S. Department of Health and Human Services ("HHS") and is the highest-ranking official in HHS. The President delegated specific DPA powers to Secretary Azar to address the PPE shortage emergency. Secretary Azar is sued in his official capacity.

23. Defendant U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES is an agency within the executive branch of the U.S. government.

24. Defendant CHAD WOLF is the Secretary of the U.S. Department of Homeland Security ("DHS") and is the highest-ranking official in DHS. The President delegated specific DPA powers to Secretary Wolf to address the PPE shortage emergency. Secretary Wolf is sued in his official capacity.

25. Defendant U.S. DEPARTMENT OF HOMELAND SECURITY is an agency within the executive branch of the U.S. government.

RELEVANT LEGAL FRAMEWORK

26. Plaintiffs have a fundamental right, preserved under the First Amendment, "to petition the Government for a redress of grievances." U.S. Const. amend. I.

27. The APA requires agencies to give "interested person[s] the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). A "rule" is "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4).

28. The APA further requires that “[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.” *Id.* § 555(b).

29. The APA grants a right of judicial review to “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.” *Id.* § 702. “Agency action” is defined to include the “failure to act.” *Id.* § 551(13).

30. The APA further provides that courts “shall compel agency action unlawfully withheld or unreasonably delayed,” *id.* § 706(1), and “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A).

31. The Departments each have authority, as delegated to them under the DPA via relevant executive orders, to publish the rules and take the other actions requested in Plaintiffs’ Emergency PPE Petition.

FACTUAL AND LEGAL BACKGROUND

A. The COVID-19 Emergency And The PPE Crisis For Essential Workers

32. America’s essential workforce has been at the frontlines of fighting the coronavirus and providing the basic goods and services for the country’s survival over the course of the COVID-19 pandemic.

33. More specifically, the following critical infrastructure sectors—the majority of whom are members of Plaintiff unions—have been deemed “essential” by DHS and have therefore continued to produce and deliver essential services and goods: (i) nurses, doctors, caregivers, clinical researchers, and other healthcare and medical facility workers; (ii) grocers, food bank workers, pharmacists, restaurant and other workers supporting essential commercial

retailers; (iii) farmers and agricultural workers, food manufacturing and processing workers; (iv) teachers, education staff, and institutional supporting workers; (v) bus, metro, and mass transit drivers and workers, commercial transportation driver and workers, mechanics and maintenance workers, and other transportation and logistics workers; (vi) airplane attendants and pilots, mechanics and maintenance workers, and all other aviation workers; (vii) postal service, mail and package delivery workers and drivers, as well as those working in warehouses to prepare mail and packages; (viii) janitors, garbage and waste disposal, and other sanitation workers; (ix) water, electricity, broadband, communications, information technology, wastewater and other essential utility and public works workers; (x) first responder, law enforcement, and other public safety officers; and (xi) construction, energy, and manufacturing workers, including those producing and distributing PPE, and other workers supporting the country's industrial base and essential commercial operations. In addition, domestic workers, including professional caregivers, nannies and cleaners, are also essential workers, even though they have been excluded from governmental categorization.

34. Because of their continued work and workplace settings over the course of the COVID-19 pandemic, essential workers experience greater exposure to the coronavirus than their non-essential worker counterparts. It is now well established that one of the primary modes of coronavirus transmission is airborne through small aerosol particles. Accordingly, exposure in indoor and enclosed environments where people are in close contact for extended periods of time greatly increases the risk of coronavirus infection. Unfortunately, these are the precise conditions that exist for many essential workers, including in healthcare facilities, meat and poultry processing, manufacturing, communications, transit and transportation operations, and schools.

35. PPE includes reusable respirators, particularly elastomeric half-mask and full-facepiece respirators and powered air-purifying respirators, and N95 respirators—both of which

are certified by the National Institute for Occupational Safety and Health and require compliance with Occupational Safety and Health Administration standards—as well as surgical masks, face shields, protective garments, gloves, and ventilators. Such PPE is vital to protecting workers against exposure to small aerosol coronavirus particles. Thus, the provision of adequate PPE to essential workers greatly mitigates their risk of contracting the coronavirus, and by extension, protects the safety and wellbeing of their families, communities, and the entire country they serve.

36. However, the current supply of PPE is woefully insufficient to meet the needs of America's essential workers. Since the pandemic began and continuing today, the United States faces an acute deficit of PPE and critical materials for essential workers. While the federal government has failed to provide and solicit centralized, nationwide, and comprehensive data on the scale and severity of the dearth of PPE across all essential worker sectors, a series of available data points—from federal, state, and local government agencies, as well as media reports, labor unions, and public interest organizations—reveal a profound shortfall in PPE that is necessary to safeguard the millions of workers at serious risk of infection.

37. First, early on in the pandemic, supplies of PPE in the Strategic National Stockpile were fully depleted, and state and local resources were widely exhausted. As a result, competition for scarce supplies was and continues to be fierce among state governments, independent corporations and organizations, and the federal government itself, which, on information and belief, has seized shipments of PPE committed to local governments and other buyers.

38. Second, the Centers for Disease Control and Prevention have found that PPE shortages continue to pose a tremendous challenge to the U.S. healthcare system because of the COVID-19 pandemic. Separately, in a survey of over 300 hospitals across 46 states, HHS

reported that hospitals faced significant challenges with the dearth of PPE, testing, staffing, supplies and durable equipment. And in a non-profit organization's survey of nearly 1,000 healthcare institutions, the majority of those organizations reported having less than two weeks of PPE supply remaining.

39. Finally, first-hand accounts from essential workers and unions further confirm the attenuated PPE shortfall. A recent survey conducted by Politico showed that even four months into the outbreak, healthcare workers had been forced to reuse and rotate single-use masks and even create their own equipment because they lack sufficient PPE supplies. The accounts of Plaintiff union members, as described above, reaffirm these trends across virtually every sector in the economy. Employers continue to force workers to reuse and rotate single-use PPE and supply their own bandanas or scarves that provide limited to no protection from the coronavirus.

40. As a result of these devastating shortages, the COVID-19 pandemic has disproportionately infected and killed essential workers who lacked adequate PPE protection. Hundreds of thousands of essential workers have died due to COVID-19 or have tested positive for the coronavirus, though even these figures are likely gross under-estimates due to the paucity of data from employer corporations and government tracking, their failure to provide testing, and the inordinately high rate of inaccurate test results. Recent academic studies show that healthcare workers *alone* make up 10-20 percent of all coronavirus infections, and confirmed COVID-19 cases among every 100,000 healthcare workers is more than ten-fold that of the general population. Indeed, a recent report from National Nurses United identified at least 1,718 deaths among healthcare workers from COVID-19 as of mid-September 2020.

41. While healthcare workers have faced the brunt of coronavirus exposure, workers across all essential sectors—represented by Plaintiffs and discussed above—face high rates of mortality and morbidity due to their greater coronavirus exposure and lack of adequate PPE. For

example, coronavirus outbreaks in the food industry have been particularly widespread and calamitous since the pandemic began. According to the Food and Environment Reporting Network, as of September 30, 2020, at least 860 meatpacking and food processing plants and 136 farms and production facilities have had confirmed cases of COVID-19. As a result, nearly 63,000 food workers have tested positive for the coronavirus, and nearly 270 workers have died. In parallel, in the few weeks since schools have re-opened in the country, numerous outbreaks, infections and deaths have been reported among school employees. Plaintiff American Federation of Teachers alone has reported nearly 150 deaths among its members already.

42. Additionally, essential workers, including migrant workers, are disproportionately Black, Latinx, Asian, Indigenous and other people of color and are at disproportionately higher risk of death and infection from the coronavirus than their white counterparts. Black Americans are more likely to be part of the essential workforce than any other racial or ethnic group. Moreover, Black and Latinx COVID patients experience an outsized impact of the disease. Studies show that Black and Latinx patients are nearly twice as likely to die of COVID-19 as their white counterparts.

43. Further, current conditions exacerbate the PPE paucity due to increased PPE demand, resulting from both growing infection rates and the climate emergency. As a result of premature opening of state economies, more than half of states are experiencing a rise in coronavirus infection rates. Health experts expect that the onset of fall and winter will also lead to higher coronavirus infections due to flu season and more time spent indoors. Further, due to climate change, the massive wildfires in California, Oregon, and other western states are exposing workers to dual hazards of COVID-19 and particulates from wildfires. Agriculture workers, construction workers, telecommunication workers, and other workers

who work outdoors are particularly at risk from these exposures and require greater PPE provisions than previously warranted.

B. The Defense Production Act And The President’s Executive Orders Delegating DPA Authorities To The Departments Regarding PPE Production

44. The Defense Production Act of 1950, 50 U.S.C. § 4567 *et seq.* (“DPA”), grants the President broad power to mobilize domestic industry to provide essential materials and goods necessary to promote the “national defense” to combat domestic and public health emergencies. *Id.* § 4511(a).

45. The Act includes three major authorities. First, Title I (Priorities and Allocations) allows the President to identify critical materials necessary for the national defense. It then permits the President to require corporations to, among other things, prioritize and accept federal government contracts to produce those critical materials, allocate their general distribution, and protect against their unlawful hoarding. *Id.* § 4511.

46. Second, while Title I seeks to ensure that the federal government has priority access to such critical materials, Title III (Expansion of Productive Capacity and Supply) allows the President to provide financial incentives—including loan guarantees, loans, direct purchases and purchase commitments—to bolster domestic industrial capacities to produce those critical materials for the national defense. *Id.* § 4517.

47. Third, Title VII (General Provisions) empowers the President to coordinate a nationwide domestic industry response to a national crisis by transforming a competitive market into a cooperative one. Specifically, Title VII grants the President authorities to, among other things, establish voluntary agreements and plans of action with private industry for the national defense, as well as “obtain . . . information” as may be appropriate to ensure the Act’s enforcement. *Id.* § 4555.

48. On March 13, 2020, the President declared a national emergency concerning the outbreak of COVID-19 pursuant to the National Emergencies Act, 50 U.S.C. § 1601 *et seq.* 85 Fed. Reg. 15,337 (March 18, 2020). In the emergency proclamation, the President articulated that the “spread of COVID-19 within our Nation’s communities threatens to strain our Nation’s healthcare systems,” and that in addition to preparation by hospitals and medical facilities to meet a capacity surge to address infections, “additional measures” would be “needed to successfully contain and combat the virus in the United States.” *Id.*

49. Subsequently, the President issued a series of executive orders which delegated broad authority under the DPA to the Departments regarding the production of PPE and other resources to meet national defense needs.

50. On March 18, 2020, the President issued Executive Order 13909, identifying “health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators” as critical materials pursuant to Title I of the DPA. 85 Fed. Reg. 16,227 (March 23, 2020). The President then delegated to HHS Secretary Azar both DPA Title I and Title VII authorities to prioritize the production of and allocate such resources, as well as gather information on those resources’ inventory and distribution to “respond to the spread of COVID-19 within the United States.” *Id.*

51. On March 23, 2020, the President issued Executive Order 13910, delegating DPA Title I and Title VII authorities to HHS Secretary Azar to designate critical materials to combat the COVID-19 pandemic, prevent hoarding of such materials, and gather information about those materials’ inventory and distribution. 85 Fed. Reg. 16,227 (March 23, 2020).

52. On March 27, 2020, the President issued Executive Order 13911, delegating DPA Title III and Title VII authorities to both HHS Secretary Azar and DHS Secretary Wolf to expand the domestic production capacity of PPE and other critical materials using loans and loan

guarantees and coordinating industry production through voluntary agreement. 85 Fed. Reg. 18,403 (April 1, 2020). The President also delegated DPA Title I authorities to DHS Secretary Wolf to prioritize, allocate, designate, and prevent hoarding of essential materials, as had been delegated to HHS Secretary Azar in the prior executive orders. *Id.* at 18,403-04. In that Order, the President explicitly stated that “it is the policy of the United States to expand domestic production of health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators.” *Id.* at 18,403.

C. The Departments’ Failure To Fully Utilize Delegated DPA Authorities To Address The PPE Shortage

53. In the seven months since the President delegated DPA authorities to the Departments, Secretaries Azar and Wolf have failed to fully utilize DPA’s broad authorities to address acute problems in the supply chain of PPE.

54. The Departments have refused to coordinate a nationwide comprehensive response to the PPE paucity in terms of allocation and manufacturing. First, in terms of assessing PPE needs, the Departments have failed to take a nationwide inventory. As such, the federal government has no comprehensive picture of which materials should be considered PPE to defend the national security in the evolving crisis and to what depth PPE shortfalls are for essential workers. Second, in terms of PPE allocation, the Departments have failed to coordinate a response to prioritize and organize the delivery of PPE to essential workers. Instead, they have encouraged states, companies and federal agencies to compete for supplies independently. Third, in terms of industry coordination, the Departments have failed to establish and execute a plan of coordinated action with industry to manufacture PPE. Instead, they have pursued a piecemeal approach of compelling particular private companies to produce specific PPE products, often for inadequate amounts and with little to no expertise in such PPE manufacturing processes. Fourth,

in terms of compelling action from industry players with financial incentives, they have cherry-picked particular companies and, at the same time, failed to reward financial support and government contracts to other companies seeking to manufacture PPE. As a result of this failure to use broad DPA powers of coordination, essential worker industries are reliant on overseas manufacturers which have increased prices for PPE by numerous factors.

D. Plaintiffs' Emergency PPE Petition

55. In light of Defendants' failure to harness the powers given to them under the DPA and Executive Orders and the ongoing severe shortage of PPE for essential workers, on August 11, 2020, Plaintiffs submitted their petition for emergency rulemaking.

56. The Emergency PPE Petition demands that Secretaries Azar and Wolf utilize their lawfully delegated DPA powers to their fullest extent by taking the following actions to address the grave PPE shortfall facing essential workers:

- i. Issue a final rule for an emergency nationwide inventory on PPE and other essential materials, assessing supply, demand, and allocation of PPE to essential workers, to be published and updated weekly to reflect public input;
- ii. Issue a final rule designating additional critical materials as PPE vital to protecting essential workers and regularly updating such designations through stakeholder processes with essential worker unions, state governments, and other relevant actors;
- iii. Coordinate private industry through voluntary agreements and plans of action to spur production and proper distribution of PPE and other critical materials and, per statutory requirements, issue rules and procedures by which such voluntary agreements and plans of action are developed and carried out; and

- iv. Effectuate these plans of action by (a) prioritizing and directing contracts with existing producers to the federal government for supply, and ensuring allocation to essential workers; and (b) issuing loans, loan guarantees and providing other financial incentives to spur the entire domestic industrial base to manufacture the needed PPE and critical materials.

57. The Emergency PPE Petition asks that Secretaries Azar and Wolf commence the requested actions within fifteen days of receipt of the Petition.

58. The Petition also discusses how the series of proposed rules in the Petition would address the Departments' failure to fully utilize the DPA.

E. The Departments' Failure To Respond To The Emergency PPE Petition

59. The Departments received Plaintiffs' Emergency PPE Petition more than two months ago.

60. To date, the Departments have not responded to the Petition.

CLAIM FOR RELIEF

61. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

62. HHS and DHS each are an "agency" for purposes of the APA. *See* 5 U.S.C. §§ 551(1), 701(b)(1).

63. The Departments' failure to respond to and take action on the Emergency PPE Petition constitutes unlawfully withheld and unreasonably delayed agency action in violation of the APA. 5 U.S.C. § 706(1).

64. The Departments' failure to respond to the Petition or act on the urgent requests within the Petition for more than two months is particularly unlawful and unreasonable considering the rapid rate of growth of coronavirus infections and deaths, the inadequate supply

of PPE to essential workers that exacerbates the rates of coronavirus infections and deaths in the country, and the greater public health and welfare at stake should the grave shortage in PPE continue.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that the Departments have violated the APA by failing to provide a timely response to the Emergency PPE Petition or act on its requests;
2. Declare that the Departments continue to be in violation of the APA by failing to respond to the Emergency PPE Petition or act on its requests;
3. Order the Departments to respond to the Emergency PPE Petition and act on its requests within five days;
4. Retain jurisdiction to ensure compliance with the Court's Orders;
5. Award Plaintiffs their reasonable costs of litigation, including reasonable attorneys' fees, expert fees, and costs; and
6. Grant such other and further relief as the Court may deem just and proper.

DATED: October 8, 2020

Respectfully submitted,

/s/ Anchun Jean Su

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EXHIBIT A
EMERGENCY PPE PETITION
[*See attached.*]

BEFORE SECRETARY AZAR OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES AND
SECRETARY WOLF OF THE DEPARTMENT OF HOMELAND SECURITY

**PETITION FOR EMERGENCY RULEMAKING AND ACTIONS TO ALLOCATE,
FINANCE, AND COMPEL THE MANUFACTURE OF PERSONAL PROTECTIVE
EQUIPMENT AND OTHER CRITICAL MATERIALS TO SAFEGUARD
FRONTLINE WORKERS IN THE COVID-19 CRISIS PURSUANT TO THE
DEFENSE PRODUCTION ACT**

AUGUST 11, 2020



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Submitted by:

Labor Unions & Organizations. Amalgamated Transit Union, American Federation of Labor and Congress of Industrial Organizations, American Federation of Teachers, American Postal Workers Union, Association of Flight Attendants-CWA, Communications Workers of America, Maine American Federation of Labor and Congress of Industrial Organizations, National Domestic Workers Alliance, National Nurses United, Service Employees International Union, Transport Workers Union of America, United Electrical, Radio and Machine Workers of America

Environmental & Advocacy Organizations. Center for Biological Diversity, Labor Network for Sustainability, 350.org, Alliance of Nurses for Healthy Environments, Center for Popular Democracy, Earth Action, Inc., Earthworks, Fayetteville Police Accountability Community Taskforce, Fire Drill Fridays, Friends of the Earth, GreenFaith, Greenpeace USA, National Children's Campaign, Oil Change International, Sunrise Movement, The Climate Center, Union of Concerned Scientists, US Climate Action Network

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I. EXECUTIVE SUMMARY

The United States is the global epicenter of the coronavirus disease 2019 (“COVID-19”) pandemic, surpassing every other country in the total number of fatalities and infections since April 2020 and comprising nearly one-quarter of all infections across the world. On August 9, 2020, the number of reported COVID-19 cases surpassed 5 million, doubling the number of infections reported at the end of June. This rapid surge in COVID infections and fatalities has largely been driven by the federal government’s failure to contain the virus and the premature reopening of state economies.

Essential workers are at the frontlines of battling COVID-19 and enabling the country’s very survival. Employers continue to put the lives of their frontline workers at unnecessary risk by failing to provide the personal protective equipment (“PPE”) workers need as they deliver these essential services. Nurses, doctors and healthcare workers have relentlessly been put at risk as they care for those suffering from the pandemic. Grocery store workers, farmers, agricultural workers, and meat food processing workers continue to feed the country, in spite of massive outbreaks of COVID infections in factories across the nation. Mass transit, transportation, mail service, and airline workers are moving other frontline workers to their destinations while also delivering food and basic essentials for the nation to survive. After months of challenging distance learning, teachers and educational staff have been called on to resume in-person teaching of millions of children this fall. Caregivers, nursing home assistants, and domestic workers continue to look after vulnerable populations, including the elderly, without the ability to ensure safe social distancing. And utilities, janitorial, sanitation, and maintenance workers continue to provide the water, electricity, broadband, communications, and custodial services necessary for families to access basic human rights throughout this emergency.

In light of their role as the country’s engines of survival, frontline workers deserve to be safeguarded with all required levels of PPE and other critical materials.¹ However, just the opposite has manifested. The Trump Administration has failed to take leadership over the necessary process of producing and delivering PPE and other critical materials to frontline workers and has instead opted for a piecemeal approach rewarding specific corporations and igniting competition for scarce PPE among all levels of government and employer corporations. At base, the Administration, through failure of proper

¹ This petition is lodged in companionship with the “Essential Workers Bill of Rights,” introduced by Senator Elizabeth Warren and House Representative Ro Khanna. The provision of PPE is an essential part of safeguarding frontline workers, but it must also work in tandem with short- and long-term policies and rights assured to essential workers as outlined in the Essential Workers Bill of Rights. See “Essential Worker Bill of Rights Proposal,” THE WASHINGTON POST, April 13, 2020, <https://www.washingtonpost.com/context/essential-workers-bill-of-rights-proposal/ab3e338a-87ea-45b2-97cf-34a9da7e9e18/4>. This petition also complements efforts within Congress to pass legislation to ensure that President Trump fully invokes all powers of the Defense Production Act to mobilize a federal response to the pandemic through an equitable and transparent process. See Medical Supply Transparency and Deliver Act (S. 3627), introduced April 29, 2020 by Senators Baldwin, Murphy, and Schumer, available at: <https://www.baldwin.senate.gov/imo/media/doc/Medical%20Supply%20Transparency%20and%20Delivery%20Act%20Text.pdf>.

action, has created a grave nationwide PPE shortage for essential workers—which continues to deepen with the opening of state economies and infection surges.

The consequence of the Trump Administration’s failure to take leadership on the PPE crisis is fatal. Hundreds of thousands of frontline workers have died due to COVID-19 or have tested positive for the virus. Recent studies show that healthcare workers *alone* make up 10-20% of all COVID-19 infections, and confirmed COVID cases among every 100,000 healthcare workers was more than 10-fold that of the general population. Even these numbers are likely gross under-estimates because of the paucity of data from employer corporations and government tracking, the failure to provide testing, and the inordinately high rate of inaccurate test results. What is more, essential workers are disproportionately Black, Latinx and from other communities of color, reflecting the issues of systemic racism underlying frontline worker fatalities. This is unacceptable. The lives of frontline workers are not expendable.

The government’s failure to manufacture and deliver adequate PPE can and must be legally remedied. On March 13, 2020, President Donald Trump issued Proclamation No. 9994² to declare a national emergency concerning the coronavirus outbreak pursuant to the National Emergencies Act.³ Subsequently, President Trump issued a series of executive orders⁴ mandating the immediate production of PPE and other critical materials to address the COVID-19 emergency pursuant to the Defense Production Act of 1950 (“DPA” or “Act”).⁵ The DPA grants the President broad power to mobilize domestic industry to provide essential materials and goods necessary to promote the “national defense” in public health emergencies.⁶ In his executive orders, the President explicitly delegated the DPA’s primary

² Proclamation No. 9994, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), 85 Fed. Reg. 15337-15338 (March 18, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05794.pdf> (“Emergency Proclamation”).

³ 50 U.S.C. 1601 *et seq.*

⁴ Executive Order 13909 of March 18, 2020, Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19, 85 Fed. Reg. 16227-16228 (March 23, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-03-23/pdf/2020-06161.pdf> (“E.O. 13909”); Executive Order 13910 of March 23, 2020, Preventing Hoarding of Health and Medical Resources To Respond to the Spread of COVID-19, 85 Fed. Reg. 17001-17002, 17001 (March 26, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-03-26/pdf/2020-06478.pdf> (“E.O. 13910”); Executive Order 13911 of March 27, 2020, Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources to Respond to the Spread of COVID-19, 85 Fed. Reg. 18403-18405 (April 1, 2020), 18403, <https://www.govinfo.gov/content/pkg/FR-2020-04-01/pdf/2020-06969.pdf> (“E.O. 13911”).

Additionally, President Trump on May 14, 2020, issued Executive Order 13922, which delegated the authority of Title III of the DPA to the U.S. International Development Finance Corporation (“DFC”) to, among other things, extend loans and loan guarantees to companies engaged in the domestic production of strategic resources to respond to COVID-19. *See* Executive Order 13922, Delegating Authority Under the Defense Production Act to the Chief Executive Officer of the United States International Development Finance Corporation To Respond to the COVID-19 Outbreak, 85 Fed. Reg. 30583-30584 (May 19, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10953.pdf> (“E.O. 13922”). This petition does not seek to compel action from the DFC’s chief executive officer because petitioners believe that such authorities are not appropriate for the DFC but rather best utilized by other agencies, including HHS and DHS, which possess appropriate domestic supply chain and medical expertise that can better align the capacity of the U.S. industrial base with domestic PPE needs. *See, e.g.,* Letter from U.S. Senators Schatz, Durbin, Tester, Baldwin, and Van Hollen to President Trump re: Immediate use of DPA to manufacture PPE, dated May 15, 2020, <https://www.schatz.senate.gov/imo/media/doc/SEN%20Letter%20to%20POTUS%20re%20DPA%2005%2014%2020.pdf>.

⁵ 50 U.S.C. § 4567 *et seq.*

⁶ 50 U.S.C. § 4511(a); 50 U.S.C. § 4552. As defined in section 702 of the DPA, the term “national defense” means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. § 5195 *et seq.*] and critical infrastructure protection and restoration.

authorities to Health and Human Services Secretary Alex Azar and Homeland Security Secretary Chad Wolf to address PPE shortages and the coronavirus emergency. To date, Secretaries Azar and Wolf have failed to fully use the delegated powers of the DPA to meet this mandate.

Petitioners hereby request that Secretaries Azar and Wolf lawfully utilize the delegated DPA powers to their fullest extent and undertake the following actions to address the grave PPE shortage facing frontline workers: (1) Issue a final rule requiring an emergency nationwide inventory on PPE and other essential materials, assessing supply, demand, and allocation of PPE to frontline workers, be conducted, published, and updated weekly to reflect public input; (2) Issue a final rule designating additional critical materials that are vital to protecting frontline workers and regularly update such designations list through stakeholder processes with frontline worker unions, state governments, and other relevant actors; (3) Coordinate private industry through voluntary agreements and plans of action to spur production and proper distribution of PPE and other critical materials and, per statutory requirements, issue rules and procedures by which such voluntary agreements and plans of action are developed and carried out; and (4) Effectuate the plans of action by (i) prioritizing and directing contracts with existing producers to the federal government for supply, and ensuring allocation to frontline workers; and (ii) issuing loans, loan guarantees and providing other financial incentives to spur the entire domestic industrial base to manufacture the needed PPE and critical materials.

This Petition for rulemaking and actions is filed pursuant to the First Amendment's petition clause⁷ and Section 553(e) of the Administrative Procedure Act.⁸

The Petition is submitted by the following unions and advocacy groups: Amalgamated Transit Union, American Federation of Labor and Congress of Industrial Organizations, American Federation of Teachers, American Postal Workers Union, Association of Flight Attendants-CWA, Communications Workers of America, Maine American Federation of Labor and Congress of Industrial Organizations, National Domestic Workers Alliance, National Nurses United, Service Employees International Union, Transport Workers Union of America, United Electrical, Radio and Machine Workers of America, Center for Biological Diversity, Labor Network for Sustainability, 350.org, Alliance of Nurses for Healthy Environments, Center for Popular Democracy, Earth Action, Inc., Earthworks, Fayetteville Police Accountability Community Taskforce, Fire Drill Fridays, Friends of the Earth, GreenFaith, Greenpeace USA, National Children's Campaign, Oil Change International, Sunrise Movement, The Climate Center, Union of Concerned Scientists, and US Climate Action Network.

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⁷ U.S. Const., amend. I.

⁸ 5 U.S.C. § 553(e).

II. FACTUAL AND LEGAL BACKGROUND

A. ESSENTIAL SERVICES WORKERS ARE AT THE FRONTLINE OF THE COVID-19 OUTBREAK; THEIR SURVIVAL AND THE COUNTRY'S WELLBEING DEPENDS ON PROVIDING FRONTLINE WORKERS WITH SUFFICIENT PERSONAL PROTECTIVE EQUIPMENT AND OTHER CRITICAL MATERIALS, WHICH ARE IN SEVERE SHORTAGE

The United States is the global epicenter of the COVID-19 pandemic. America holds the world's highest number of recorded coronavirus deaths and infections, with over 159,000 lives already lost and over 5 million cases of infection.⁹ The country's COVID-19 cases amount to one-fourth of the entire planet's total number of coronavirus infections and over one-fifth of all coronavirus deaths.¹⁰ Critically, the number of reported COVID-19 cases doubled in number since the end of June, while the 5 million mark comes just over two weeks after the country's total number of infection cases exceeded 4 million.¹¹ This rampant surge is largely driven by the premature reopening of state economies and government failure to enforce strict social distancing rules.¹²

America's essential workforce is at the frontline of fighting the coronavirus and providing the basic services for the country's survival. According to the Department of Homeland Security, this essential workforce spans several critical infrastructure sectors.¹³ Chief among them are: (1) nurses, doctors, caregivers, clinical researchers, hospital, lab, hospice, and other medical facility personnel, and other healthcare workers; (2) grocers, food bank workers, pharmacists, restaurant and other workers supporting essential commercial retailers; (3) farmers and agricultural workers, food manufacturing and processing workers; (4) teachers, education staff, and institutional supporting workers; (5) bus, metro, and mass transit drivers and workers, commercial transportation driver and workers, mechanics and maintenance workers, and other transportation and logistics workers; (6) airplane attendants and pilots, mechanics and maintenance workers, and all other aviation workers; (7) postal service, mail and package delivery workers and drivers, as well as those working in warehouse to prepare mail and packages; (8) janitors, garbage and waste disposal, and other sanitation workers; (9) water, electricity, broadband, communications, information technology, wastewater and other essential utility and public works workers; (10) first responder, law enforcement, and other public safety officers; and (11) construction,

⁹ Joe Fox, Brittany Renee Mayes, Kevin Schaul and Leslie Shapiro, "Live tracker: At least 159,000 people have died from the coronavirus in the U.S.," THE WASHINGTON POST, <https://www.washingtonpost.com/graphics/2020/national/coronavirus-us-cases-deaths/> (last updated August 9, 2020).

¹⁰ Washington Post staff, "Live tracker: Mapping the worldwide spread of the coronavirus", THE WASHINGTON POST https://www.washingtonpost.com/graphics/2020/world/mapping-spread-new-coronavirus/?itid=sf_coronavirus (last updated July 9, 2020).

¹¹ Derek Hawkins, Marisa Iati, and Jacqueline Dupress, "Coronavirus update: U.S. infections surpass 5 million," THE WASHINGTON POST, August 9, 2020, <https://www.washingtonpost.com/nation/2020/08/09/coronavirus-covid-updates/>.

¹² Lazaro Gamio, "How Coronavirus cases have risen since states reopened," THE NEW YORK TIMES, July 9, 2020, <https://www.nytimes.com/interactive/2020/07/09/us/coronavirus-cases-reopening-trends.html>; Melissa Hawkins, "The US isn't in a second wave of coronavirus – the first wave never ended," THE CONVERSATION, June 30, 2020, <https://theconversation.com/the-us-isnt-in-a-second-wave-of-coronavirus-the-first-wave-never-ended-141032>.

¹³ U.S. Department of Homeland Security, *Identifying Critical Infrastructure*, <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19> (last updated April 28, 2020).

energy, and manufacturer workers, including those producing and distributing PPE, and other workers supporting the country's industrial base and essential commercial operations.¹⁴ Critically, even within these governmental categories, legal worker protections, if any, are weakened or non-existent for non-unionized, subcontracted, independently contracted, and migrant or undocumented workers.

In addition, there is another essential category of workers that is excluded from governmental categorization: the 2.5 million domestic workers, including professional caregivers, nannies and cleaners, who traditionally have been excluded from legal protections provided to almost all other workers in the United States.¹⁵

1. Ensuring the health and safety of frontline workers by providing sufficient PPE and other critical materials is vital to protecting their lives and the country's survival as a whole

Providing sufficient PPE and other critical materials to frontline workers is a matter of life and death for them, their families and communities, and for the safety and wellbeing of the entire country. While many people were subject to shelter-in-place orders, frontline workers have carried a heroic burden of continuing essential services, operations and delivering the country's basic necessities. In light of state economies opening, frontline workers now face new exposure to the surging rate of infections. When employers fail to provide frontline workers with adequate PPE and other protections, these workers face increased risk of illness and death from the virus, as well as increased risk of unintentionally spreading the virus to their families and communities. In failing to provide adequate PPE, employers have put frontline workers in a position of terrible and unnecessary risk. From a national perspective, failing to protect our frontline workers is not just a moral failing of almost unimaginable proportions, but will also worsen the COVID-19 pandemic, unravel the country's healthcare and essential services system, and place our economy at greater risk.

Scientific studies verify this reality. Surveys have found that frontline workers are at the highest risk of contracting the coronavirus, with healthcare workers and cashiers topping the list.¹⁶ Specifically, a recent study from *The Lancet Public Health* found the number of confirmed COVID cases among every 100,000 healthcare workers was more than 10-fold that of the general population.¹⁷ Other studies suggest

¹⁴ See generally Sophia Waterfield, "A List of Essential Workers that we should thank and support during the coronavirus pandemic," NEWSWEEK, May 2, 2020, <https://www.newsweek.com/list-essential-workers-that-we-should-thank-support-during-coronavirus-pandemic-1495750>.

¹⁵ See Ai-jen Poo, "Protect Caregivers from Coronavirus," THE NEW YORK TIMES, March 9, 2020, <https://www.nytimes.com/2020/03/09/opinion/protect-caregivers-from-coronavirus.html>; NATIONAL DOMESTIC WORKERS ALLIANCE, *Coronavirus' Economic Impact on Domestic Workers*, April 2020, https://domesticworkers.org/sites/default/files/Coronavirus_Report_4_8_20.pdf.

¹⁶ See, e.g., Beatrice Jin and Andrew McGill, "Who is most at risk in the coronavirus crisis: 24 million of the lowest-income workers," POLITICO, March 22, 2020, <https://www.politico.com/interactives/2020/coronavirus-impact-on-low-income-jobs-by-occupation-chart/>; ACLU MASSACHUSETTS, *Data show COVID-19 is hitting essential workers and people of color hardest*, April 8, 2020, <https://www.aclum.org/en/publications/data-show-covid-19-hitting-essential-workers-and-people-color-hardest>.

¹⁷ Long Nguyen, "Risk of COVID-19 among front-line health-care workers and the general community: a prospective cohort study," THE LANCET PUBLIC HEALTH, July 31, 2020, [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30164-](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30164-)

that health care workers alone make up 10-20% of all COVID-19 infections.¹⁸ Moreover, healthcare workers who reported reusing PPE were almost 1.5 times more likely to report a positive COVID-19 test than those with adequate equipment.¹⁹ In light of America's grave shortage of PPE, placing workers in a position to reuse equipment that was designed for limited usage further exacerbates the spread of the disease.

The provision of effective and sufficient PPE to frontline workers is vital to controlling the infection nationwide. The first critical measure to protect frontline workers is to provide them with the necessary PPE, including N95 masks, surgical masks, gloves, eye protection, face shields, gowns, testing kits, and other critical materials. Further, *all* essential workers must be recipients of all necessary PPE and other critical materials. While hospitals have been the focus of receiving PPE, employers in other essential sectors, including grocery chains and airlines, have failed to adequately protect their workers by refusing to supply employees with PPE, outright banning their employees from wearing PPE, and failing to enforce critical health and safety measures foundational to safeguarding worker lives, including requiring interacting customers to wear masks.²⁰ Separate legal and administrative efforts have been lodged and are underway to compel the Occupational Safety and Health Administration ("OSHA") to act on their legal obligation to ensure the health and safety of all working people, including a lawsuit brought by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and administrative petition by National Nurses United ("NNU").²¹

2. Frontline workers contracting and dying from COVID are disproportionately Black, Latinx, and from other communities of color

Critically, the demographics of worker safety during the COVID-19 pandemic are also tied directly to the existing systemic race and class issues facing workers across the country. Workers who are Black, Latinx, Asian, Indigenous, and other people of color, including migrant workers, are at disproportionately higher risk of death and infection from the coronavirus than their white counterparts.²²

X/fulltext; Kevin Kunzmann, "Healthcare Worker COVID-19 Risk Linked to Ethnicity, PPE, and Case Exposure," CONTAGION LIVE, July 31, 2020, <https://www.contagionlive.com/news/healthcare-worker-covid-19-risk-ethnicity-ppe-case-exposure>.

¹⁸ Center for Disease Control, "COVID-19 Response Team Characteristics of health care personnel with COVID-19: United States, February 12–April 9, 2020", MMWR MORB. MORTAL WKLY REP. 2020; 69: 477-481, April 17, 2020, <https://pubmed.ncbi.nlm.nih.gov/32298247/>.

¹⁹ Nguyen, *supra* n. 17.

²⁰ Brianna Gurciullo and Sam Mintz, "Under pressure, airlines begin mandating passenger face masks", POLITICO, April 30, 2020, <https://www.politico.com/news/2020/04/30/airlines-masks-coronavirus-227454>.

²¹ See, e.g., "AFL-CIO sues OSHA for Emergency Temporary Standards to Protect Workers," AFL-CIO, May 18, 2020, <https://aflcio.org/press/releases/afl-cio-sues-osh-a-emergency-temporary-standard-protect-workers>; NATIONAL NURSES UNITED, *Petition to OSHA for an Emergency Temporary Standard on Emerging Infectious Diseases in Response to COVID-19*, March 4, 2020, <https://act.nationalnursesunited.org/page/-/files/graphics/NNUPetitionOSHA03042020.pdf>; AFL-CIO, *Tell Congress: Pass H.R. 6559 and Protect Front-Line Workers*, 2020, <https://actionnetwork.org/forms/osh-a-ets?source=website>; Eli Rosenberg, "Meatpacking workers file lawsuit against OSHA, accusing agency of failing to keep them safe," THE WASHINGTON POST, July 24, 2020, <https://www.washingtonpost.com/business/2020/07/23/lawsuit-osh-a-safety-coronavirus/>.

²² John Eligon, "Black Americans Face Alarming Rates of Coronavirus Infection in Some States", THE NEW YORK TIMES, April 7, 2020, <https://www.nytimes.com/2020/04/07/us/coronavirus-race.html>.

Black Americans are more likely to be part of the essential workforce than other racial or ethnic groups.²³ According to research from the U.S. Bureau of Labor Statistics, Black workers were more likely to be employed in essential services than white workers, with 38% of Black workers employed in these industries compared with 27% of white workers.²⁴ Further, 43% of Black and Latinx workers are employed in service or production jobs that for the most part cannot be done remotely; only about one in four white workers held such jobs.²⁵ This disparity is even clearer in the healthcare industry. Black workers are about 50% more likely to work in the healthcare and social assistance industry and 40% more likely to work in hospitals, compared with white workers.²⁶

Moreover, Black and Latinx COVID patients experience an outsized impact of the disease. Studies show that Black and Latinx patients are nearly twice as likely to die of COVID-19 as their white counterparts.²⁷ Some of these factors include existing poorer health also due to systemic racism, as well as housing situations, whereby Latinx people are twice as likely to reside in a crowded dwelling—less than 500 square feet per person—as white people.²⁸ And a July CDC study showed that Black and Latinx COVID-19 patients are dying younger than white patients.²⁹ Therefore, when addressing the issue of essential worker protections, the government must take steps to redress the structural racism and inequality across the country and provide the necessary protection to all workers, regardless of race or class.

3. Frontline workers face a severe shortage of PPE and other critical materials, exacerbated by premature state openings and resulting infection surges

The United States faces an unprecedented shortage of PPE and critical materials for frontline workers. The COVID-19 pandemic has led to both a surge in domestic and global demand for PPE and other critical materials and disrupted supply chains, resulting in a grave scarcity of these resources across the country.³⁰ The U.S. shortage has multiple causes, including problems with the global supply chain and

²³ Devan Hawkins, “The coronavirus burden is falling heavily on black Americans. Why?,” THE GUARDIAN, April 16, 2020, <https://www.theguardian.com/commentisfree/2020/apr/16/black-workers-coronavirus-covid-19>.

²⁴ U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, <https://www.bls.gov/cps/cpsaat8.htm>.

²⁵ Richard Oppel, Robert Gebeloff, K.J. Rebecca Lai, Will Wright, and Mitch Smith, “The fullest look yet at the racial inequity of coronavirus,” THE NEW YORK TIMES, July 5, 2020, <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

²⁶ U.S. Bureau of Labor Statistics, *supra* n. 24.

²⁷ Richard Oppel, Robert Gebeloff, K.J. Rebecca Lai, Will Wright, and Mitch Smith, “The fullest look yet at the racial inequity of coronavirus,” THE NEW YORK TIMES, July 5, 2020, <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

²⁸ *Id.*

²⁹ Karen Kaplan, “CDC data reveal another racial disparity for COVID-19 victims – age at death,” LOS ANGELES TIMES, July 10, 2020, <https://www.latimes.com/science/story/2020-07-10/cdc-data-reveal-racial-disparity-for-covid-19-victims-age-at-death>.

³⁰ World Health Organization, *Shortage of personal protective equipment endangering health workers worldwide*, March 3, 2020, <https://www.who.int/news-room/detail/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide>; “The new coronavirus could have a lasting impact on global supply chains,” THE ECONOMIST, Feb. 15, 2020,

the federal government's failure to effectively ignite and coordinate domestic production.³¹ *See supra*, Section IV.B.

Stores of PPE in the Strategic National Stockpile have been fully depleted, and state and local resources have been widely exhausted.³² As a result, competition for scarce supplies is fierce among state governments, independent corporations and organizations, and the federal government itself, which has reportedly seized shipments of PPE committed to local governments and other buyers.³³ According to the National Governors Association, "while federal officials contend that state needs for PPE and ventilators can be addressed through the private market, the global shortage and lack of coordination has pitted states against one another and other purchasers—including the federal government—in a bid to secure resources."³⁴

Further, according to the Centers for Disease Control and Prevention ("CDC"), PPE shortages pose a tremendous challenge to the U.S. healthcare system because of the COVID-19 pandemic.³⁵ In a survey of over 300 hospitals across 46 states, the Department of Health and Human Services ("HHS") reported that hospitals faced significant challenges with the dearth of PPE, testing, staffing, supplies and durable equipment.³⁶ And in a survey of nearly 1,000 healthcare institutions, the majority of those organizations—including not only major hospitals and hospital networks, but also home health aide agencies, hospices, ambulance squads, and correctional facilities—reported having less than 2 weeks of PPE supply remaining.³⁷ In June 2020, for example, due to the sharp rise in PPE demand in states

<https://www.economist.com/international/2020/02/15/the-new-coronavirus-could-have-a-lasting-impact-on-global-supply-chains>; Zoe Schlanger, "Begging for Thermometers, Body Bags, and Gowns: U.S. Health Care Workers Are Dangerously Ill-Equipped to Fight COVID-19," TIME MAGAZINE, April 20, 2020, <https://time.com/5823983/coronavirus-ppe-shortage/>.

³¹ As an example, prior to the coronavirus outbreak, China produced approximately half of the world's face masks. The outbreak in China resulted in the halt to mask production and exports. As the infection spreads globally and transmission in China slows, the global manufacturer is shipping masks to other countries as part of goodwill packages, but the United States has not been a major recipient. *See* Megan L. Ranney, M.D., M.P.H., Valerie Griffeth, M.D., Ph.D., and Ashish K. Jha, M.D., M.P.H., *Critical Supply Shortages — The Need for Ventilators and Personal Protective Equipment during the Covid-19 Pandemic*, THE NEW ENGLAND JOURNAL OF MEDICINE, April 30, 2020, <https://www.nejm.org/doi/full/10.1056/NEJMp2006141>.

³² U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Strategic National Stockpile Response to COVID-19 Frequently Asked Questions*, <https://www.phe.gov/emergency/events/COVID19/SNS/Pages/FAQ.aspx>.

³³ Anna Phillips, "Grocery stores seeking masks for 'essential' workers confront shortages, federal interference," THE LOS ANGELES TIMES, April 26, 2020, <https://www.latimes.com/politics/story/2020-04-26/grocery-stores-masks-essential-workers-shortages-federal-interference>.

³⁴ NATIONAL GOVERNORS ASSOCIATION, "Memorandum re: Governor Actions to Address PPE and Ventilator Shortages," April 13, 2020, 1, <https://www.nga.org/wp-content/uploads/2020/04/NGA-Medical-Equipment-Memo.pdf>.

³⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Strategies to optimize the supply of PPE and equipment*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhcp%2Fhealthcare-supply-ppe.html (last updated April 22, 2020).

³⁶ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Hospital Experiences Responding to the COVID-16 Pandemic: Results of a National Pulse Survey March 23-27, 2020*, <https://oig.hhs.gov/oei/reports/oei-06-20-00300.pdf>.

³⁷ GETUSPPE.ORG, *Our Data*, <https://getusppe.org/data> (last updated April 19, 2020) (detailing efforts of, the largest coalition of PPE donor database projects and founded by physicians and medical researchers on the frontlines of the COVID-19 pandemic).

experiencing a surge of infections, the amount of PPE requested from medical providers in Iowa jumped 440 percent from the previous month, and more than 200 percent in Texas and Louisiana.³⁸

Moreover, first-hand accounts from frontline workers confirm the grave PPE shortage. A recent survey reveals that healthcare workers have been forced to reuse one-time masks and create their own equipment even four months into the outbreak because they lack sufficient PPE supplies.³⁹ The American Health Care Association, a national group of long-term care providers, said three-quarters of its members are running out of PPE, and about 60 percent are reusing or improvising PPE.⁴⁰ These conditions exacerbate the public health pandemic, as healthcare workers without sufficient equipment face a heightened risk of infection and in turn a heightened chance of spreading the infection to other patients, family members, or community members.

In parallel, non-healthcare essential workers also face the same lack of access to PPE and other critical supplies, including gloves, hand sanitizer, face masks, and basic cleaning supplies required to keep them safe. The Federal Emergency Management Agency (“FEMA”), a sub-agency of the Department of Homeland Security, has recognized the shortage of PPE facing all essential non-healthcare workers and has issued guidelines to businesses advising them on supply chain issues.⁴¹ Specific sectors have similarly reported the lack of any PPE and testing for their workers; for example, member water utilities of the American Water Works Association found that 59% of water utilities are either currently having issues accessing PPE or anticipate issues within the next month, up from 33 percent in a March 10-16 survey of the same group.⁴²

While all these data points paint the portrait of a vast PPE shortage, its precise scale is not well-understood. The federal government has failed to provide nationwide, comprehensive data on the scale and severity of the shortage of PPE and other essential products across all essential worker sectors—leaving a patchwork of data gaps and making it impossible to thoroughly survey the product demand and shortfalls and match that with an assessment of product supply. Premature state openings have already resulted in a horrifying spike in infections and will only exacerbate the need for PPE for all frontline workers.

³⁸ *Id.*

³⁹ Tucker Doherty and Brianna Ehley, “Trump called PPE shortages ‘fake news.’ Health care workers say they’re still a real problem,” *POLITICO*, April 26, 2020, <https://www.politico.com/news/2020/04/26/trump-ppe-fake-news-207523>.

⁴⁰ *Id.*

⁴¹ FEDERAL EMERGENCY MANAGEMENT AGENCY, *Coronavirus (COVID-19) Pandemic: Addressing PPE Needs in Non-Healthcare Setting*, April 20, 2020, <https://www.fema.gov/news-release/2020/04/22/coronavirus-covid-19-pandemic-addressing-ppe-needs-non-healthcare-setting>. Reported PPE shortages may be due to significantly increased consumer demand related to the pandemic itself, and supply chain disruptions resulting from containment measures in China and elsewhere. *See also* Zoe Schlanger, “Begging for Thermometers, Body Bags, and Gowns: U.S. Health Care Workers Are Dangerously Ill-Equipped to Fight COVID-19,” *TIME MAGAZINE*, April 20, 2020, <https://time.com/5823983/coronavirus-ppe-shortage/>.

⁴² *See, e.g.*, Lisa Martine Jenkins, “Considered Essential, Utilities Sound Alarm on Worker Safety, Lack of COVID-19 Testing,” *MORNING CONSULT*, April 13, 2020, <https://morningconsult.com/2020/04/13/utilities-coronavirus-pandemic-ppe-testing/>.

4. COVID-19 is infecting and killing frontline workers who lack protection from PPE

The consequences of the PPE shortage are fatal and unjust for frontline workers.⁴³ Without more robust supplies of PPE, the fast-moving virus continues to pose a deadly threat to America's essential workforce, which is reflected in the number of fatalities and infections below. The statistics below primarily derive from information gathered by petitioner unions and other unions regarding infections and deaths. Even so, these figures are likely gross under-estimates of the scale and severity of infections and deaths across frontline workers, especially those who are not unionized and who are subcontractors, independent contractors, undocumented and migrant workers, and other workers who are typically unprotected by federal labor laws.⁴⁴ The federal government and the vast majority of employers have neither publicly released data on coronavirus impacts on their workers, nor have they provided testing for their workers—while at the same time continuing to operate and place their workers at risk.

Nurses, Doctors, and Healthcare Workers. According to National Nurses United, the largest union of registered nurses in the country, as of July 24, 2020, at least 164,969 health care workers in the United States have been infected, and at least 1,244 health care workers have died, including 166 registered nurses. Moreover, a recent survey conducted by NNU of over 21,200 nurses revealed that only 24% of nurses thought their employers were providing a safe workplace due to, among other reasons, the forced reuse of PPE, the failure to test patients and nurses, and the dearth of dedicated COVID-19 units.⁴⁵ What is more, a soaring 87% of hospital nurses reported that they had reused at least one type of single-use PPE—a dangerous practice that can increase exposures to nurses, other staff, and patients.⁴⁶ Further, months into this pandemic, only 23% of nurses reported being tested, while 85% of hospital nurses reported that their facilities had restarted elective procedures.⁴⁷ The failure of testing jeopardizes nurses' health and safety and their ability to protect their patients and families. Separately, the CDC reports that, as of the August 10, 2020 and out of available data only for 22.1% of healthcare personnel, there have been at least 128,933 cases of COVID infection and 608 deaths of healthcare workers.⁴⁸

⁴³ Marc Kagan, "Essential' Workers are Dying," SLATE, April 2, 2020, <https://slate.com/news-and-politics/2020/04/essential-workers-deaths-underclass.html>.

⁴⁴ For example, contractor construction workers are not unionized but are experiencing illness. *See, e.g.*, Alfredo Corchado and Todd Gilman, "Crews still heard at work on Trump's wall, despite stay-home orders and pandemic," THE DALLAS MORNING NEWS, April 2, 2020, <https://www.dallasnews.com/news/politics/2020/04/02/crews-still-hard-at-work-on-trumps-border-wall-despite-stay-home-orders-and-coronavirus-pandemic/> (According to one worker involved with the construction of the U.S.-Mexico border wall, "I guess I should be grateful to have a job. But truth is, I'm nervous. Maybe it's time we put the money into things like medical supplies, like face masks, ventilators. But we've been told to show up every day, nonstop, because we have to get this wall built by the end of the year.").

⁴⁵ NATIONAL NURSES UNITED, "National nurse survey reveals devastating impact of reopening too soon," July 28, 2020, <https://www.nationalnursesunited.org/press/national-nurse-survey-reveals-devastating-impact-reopening-too-soon>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ CENTER FOR DISEASE CONTROL, *COVID-19 Cases in the U.S.*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fsummary.html (last visited August 10, 2020).

Education, Healthcare and Public Workers. The American Federation of Teachers (AFT) has found that 108 of its active members have died due to COVID-19. AFT members include educators, support personnel, public employees, as well as 170,000 healthcare professionals in hospitals and clinics across the nation. For education personnel, this number may rise significantly in the wake of school openings across the country.

Additionally, support staff at educational institutions are also at grave risk. Fatality cases for custodial and housekeeping staff on university campuses have already been reported and are likely to increase with the opening of university campuses and schools.⁴⁹

Grocery Store Workers, Farmers, Field Workers, and Food Processing Workers. As of late June 2020, at least 82 supermarket employees have died and 11,507 have been infected in the first 100 days of the COVID pandemic, according to the United Food and Commercial Workers International.⁵⁰ Over twenty meatpacking and food processing workers have died as a result of COVID-19, while nearly 10,000 have tested positive or shown signs of possible coronavirus-related complications, according to United Food and Commercial Workers International Union and the CDC.⁵¹ Recent moves by America's largest grocery chains—including Amazon-owned Whole Foods, Kroger, and Albertsons—to cut hazard pay wage extended at the beginning of the COVID outbreak illustrates the failure of employers to fairly compensate food workers for the serious health hazards they face.⁵²

Transit and Airline Workers. According to the Amalgamated Transit Union, the largest labor union representing more than 200,000 transit and allied workers in the U.S. and Canada, their members have bravely been reporting for work often with little or no protection to provide critical transportation for essential workers to the frontlines to fight this crisis. According to the Transport Workers Union, which represents more than 151,000 workers across the airline, railroad, transit, universities, utilities and services sectors, 95% of TWU members have been classified as essential employees across the country. Nationwide, 155 TWU members have died and 10% have tested positive or been quarantined due to

⁴⁹ Danielle Douglas-Gabriel, "The kids will forget': Custodians, housekeepers, and other support staff brace for college reopenings," THE WASHINGTON POST, August 4, 2020, <https://www.washingtonpost.com/education/2020/08/04/kids-will-forget-custodians-housekeepers-other-support-staff-brace-college-reopenings/>.

⁵⁰ Russell Redman, "UFCW: Over 11,500 grocery workers affected in first 100 days of pandemic", SUPERMARKET NEWS, June 26 2020, <https://www.supermarketnews.com/issues-trends/ufcw-over-11500-grocery-workers-affected-first-100-days-pandemic>; Dalvin Brown, "COVID-19 claims lives of 30 grocery store workers, thousands more may have it, union says," USA TODAY, April 14, 2020, <https://www.usatoday.com/story/money/2020/04/14/coronavirus-claims-lives-30-grocery-store-workers-union-says/2987754001/>; Abha Bhattarai, "It feels like a war zone': As more of them die, grocery workers increasingly fear showing up at work," THE WASHINGTON POST, April 12, 2020, <https://www.washingtonpost.com/business/2020/04/12/grocery-worker-fear-death-coronavirus/>.

⁵¹ Kate Gibson, "13 U.S. meat industry workers have died of COVID-19, union says", CBS NEWS, April 24, 2020, <https://www.cbsnews.com/news/coronavirus-meat-industry-workers-died-covid-19/>; UNIVERSITY OF MINNESOTA, CIDRAP, More than 4,000 U.S. meatpacking workers have COVID-19, May 1, 2020, <https://www.cidrap.umn.edu/news-perspective/2020/05/more-4000-us-meatpacking-workers-have-covid-19>.

⁵² Kamala Harris and Marc Perrone, "Why grocery store workers deserve hazard pay," CNN, August 7, 2020, <https://edition.cnn.com/2020/08/06/opinions/why-grocery-store-workers-deserve-hazard-pay-harris-perrone/index.html>.

COVID-19. Two flight attendants are known to have died from the virus,⁵³ while over one-hundred flight attendants from American Airlines alone have tested positive for the coronavirus, according to the Association of Professional Flight Attendants.⁵⁴ And in the New York City area alone, nearly 2,500 Metropolitan Transportation Authority transit employees have tested positive, and more than 4,000 are in quarantine.⁵⁵

Mail and Delivery Workers. Two UPS employees have been reported dead, but union representatives for UPS and FedEx report that employer corporations have failed to be transparent about the scope and scale of coronavirus infections across the 600,000 employees.⁵⁶

Energy Sector and Utility Workers. Individual sources have confirmed impacts of coronavirus on energy and utility employees, though data is scant. The U.S. Coast Guard reported that 26 offshore oil platform workers in the Gulf of Mexico had been confirmed with the virus.⁵⁷ Consolidated Edison, an electricity utility, has confirmed three deaths and over 170 employees infected.⁵⁸

Domestic Workers. According to a recent report released by the National Domestic Workers Alliance and the Institute for Policy Studies, a survey of over 800 domestic Black immigrant workers in New York, Miami-Dade and Massachusetts found that 73% of respondents had not received any PPE from their employers.⁵⁹ That percentage was far higher for undocumented workers, 84% of whom received no PPE as compared to their documented counterparts at 68%. What is more, one in four of Black immigrant domestic workers surveyed had experienced or lived with someone who had experienced COVID-19 symptoms. Separately, an April 2020 survey of over 16,000 domestic workers—conducted by La Alianza, a national media venture for Spanish-speaking domestic workers—found that most domestic workers surveyed lacked basic access to face masks.⁶⁰ While 87% of respondents affirmed they needed a mask to be protected from coronavirus, only 18% had regular access to masks.

⁵³ Lori Aratani, “As covid-19 cases mount, flight attendants grow increasingly fearful of flying,” THE WASHINGTON POST, April 8, 2020, https://www.washingtonpost.com/local/trafficandcommuting/as-covid-19-cases-mount-flight-attendants-grow-increasingly-fearful-of-flying/2020/04/08/e686eb64-703b-11ea-b148-e4ce3fbd85b5_story.html.

⁵⁴ Kyle Arnold, “100 American Airlines flight attendants have been diagnosed with COVID-19, union says,” DALLAS NEWS, April 7, 2020, <https://www.dallasnews.com/business/airlines/2020/04/07/100-american-airlines-flight-attendants-have-been-diagnosed-with-covid-19-union-says/>.

⁵⁵ *Id.*

⁵⁶ Lisa Riordan Seville and Adiel Kaplan, “As deaths mount, delivery workers say they’re kept in the dark over who’s sick,” NBC NEWS, April 14, 2020, <https://www.nbcnews.com/health/health-news/deaths-mount-delivery-workers-say-they-re-kept-dark-over-n1181436>.

⁵⁷ “Coronavirus confirmed on offshore oil platforms in gulf”, NBC NEWS, April 16, 2020, <https://www.nbcdfw.com/news/coronavirus/coronavirus-confirmed-on-offshore-oil-platforms-in-gulf/2352524/>.

⁵⁸ Iulia Gheorghiu, “Con Edison reaches 170 confirmed COVID-19 cases, 3 deaths, as risks rise for utility workers,” UTILITY DIVE, April 3, 2020, <https://www.utilitydive.com/news/con-edison-reaches-142-confirmed-covid-19-cases-2-deaths-as-risks-rise-fo/575417/>.

⁵⁹ INSTITUTE FOR POLICY STUDIES AND NATIONAL DOMESTIC WORKERS ALLIANCE, “Notes from the Storm: Black Immigrant Domestic Workers in the Time of COVID-19,” June 2020, <https://ips-dc.org/wp-content/uploads/2020/06/Institute-for-Policy-Studies-We-Dream-in-Black-Survey-Data-Brief-6-16-20.pdf>.

⁶⁰ NATIONAL DOMESTIC WORKERS ALLIANCE, *supra* n. 15.

B. CONGRESS EMPOWERED THE PRESIDENT TO ADDRESS PPE AND OTHER ESSENTIAL PRODUCT SHORTAGES THROUGH DOMESTIC PRODUCTION DIRECTIVES UNDER THE DEFENSE PRODUCTION ACT

The Defense Production Act of 1950⁶¹ (“DPA” or “Act”) grants the President broad power to mobilize domestic industry to provide essential materials and goods necessary to promote the “national defense” to combat domestic and public health emergencies.⁶² In his COVID-19 emergency declaration and subsequent executive orders (see *infra* section II.C), President Trump deemed the production of medical resources, including PPE, as essential for combatting the coronavirus emergency pursuant to the Act.⁶³ To effectuate the DPA authorities, the statute permits the President to “prescribe such regulations and issue such orders” as determined appropriate.⁶⁴ Separately, while the DPA authorities are generally afforded to the President, in 2012, former President Obama delegated many of the DPA’s presidential authorities to executive agencies.⁶⁵

The Act has been routinely used by the Trump Administration and other Administrations. Since the law’s passage in 1950, it has been invoked by every Administration to prioritize federal contracts or to shore up vulnerabilities in domestic production to protect the national defense.⁶⁶ In its three years in office, the Trump Administration has relied on the statute hundreds of thousands of times to prioritize Department of Defense procurements as well as mobilize the industrial base for the President’s Space Force project.⁶⁷

⁶¹ 50 U.S.C. § 4567 *et seq.*

⁶² 50 U.S.C. § 4511(a); 50 U.S.C. § 4552. As defined in section 702 of the DPA, the term “national defense” means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. § 5195 *et seq.*] and critical infrastructure protection and restoration.

⁶³ See, e.g., E.O. 13909 at 16227 (“Accordingly, I find that health and medical resources needed to respond to the spread of COVID–19, including personal protective equipment and ventilators, meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)).”).

⁶⁴ 50 U.S.C. § 4554.

⁶⁵ Executive Order 13603 of March 16, 2012: National Defense Resources Preparedness, 77 Fed. Reg. 16651–16660 (March 22, 2012), <https://www.govinfo.gov/content/pkg/DCPD-201200186/pdf/DCPD-201200186.pdf> (“E.O. 13603”). Under Executive Order 13603, the President delegates priorities and allocations authority to the heads of six federal departments: the U.S. Department of Agriculture (USDA); the U.S. Department of Energy (DOE); the U.S. Department of Health and Human Services (HHS); the U.S. Department of Transportation (DOT); the U.S. Department of Defense (DoD); and the U.S. Department of Commerce (DOC). The agency heads have jurisdiction over the resources within their respective areas of responsibility and expertise. E.O. 13603 provides that the priorities and allocations authority may only be used to support programs that are determined to be “necessary or appropriate to promote the national defense,” and assigns responsibilities for making this determination. Under this structure, DHS makes determinations with respect to all other national defense programs, such as emergency preparedness and response, domestic counter-terrorism, critical infrastructure protection and restoration, and continuity of government.

⁶⁶ See CONGRESSIONAL RESEARCH SERVICE, *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress*, March 2, 2020, <https://crsreports.congress.gov/product/pdf/R/R43767>.

⁶⁷ U.S. DEPARTMENT OF HOMELAND SECURITY, “The Defense Production Act Committee Report to Congress, Calendar Year 2018 Report to Congress”, June 24, 2019, <https://www.fema.gov/media-library-data/1582898704576->

Congress crafted the DPA to empower the Executive Branch to coordinate and compel an at-scale response to matters threatening the national defense.⁶⁸ The Act includes three major authorities. First, Title I (Priorities and Allocations) allows the President to identify critical materials necessary for the national defense (§ 101(b)), and require corporations to: (1) prioritize and accept federal government contracts for materials before any other competing interest (§ 101(a)); (2) allocate the general distribution of materials as necessary to promote the national defense (§ 101(a)); and (3) protect against hoarding of such materials (§ 102).⁶⁹

Second, while Title I seeks to ensure that the government has priority access to materials being produced by domestic industries, Title III (Expansion of Productive Capacity and Supply) authorities help create a sufficient domestic supply of those critical materials.⁷⁰ Specifically, Title III authorities permit the President to craft a menu of financial incentives—including loan guarantees (§ 301), loans (§ 302), direct purchases and purchase commitments (§ 303)—to secure domestic industrial capabilities and supply of critical materials for the national defense.⁷¹

Third, Title VII (General Provisions) empowers the President to transform relevant portions of the competitive market into a cooperative one in ways that might otherwise violate antitrust law; such cooperation is crucial for stimulating production in the face of complicated supply bottlenecks of critical materials.⁷² Specifically, Title VII grants the President authorities to coordinate a nationwide domestic industry response to a national crisis, including the authority to establish voluntary agreements and plans of action with private industry for the national defense (§ 708). Section 705(a) of Title VII also gives the President authority to “obtain . . . information . . . as may be necessary or appropriate” to the Act’s enforcement, including the authority to “perform industry studies assessing the capabilities of the United States industrial base to support the national defense.”⁷³

[dc44bbe61cce3cf763cc8a6b92617188/2018_DPAC_Report_to_Congress.pdf](#); see also Zolan Kanno-Youngs and Ana Swanson, “Wartime Production Law Has Been Used Routinely, but Not With Coronavirus,” THE NEW YORK TIMES, March 31, 2020, <https://www.nytimes.com/2020/03/31/us/politics/coronavirus-defense-production-act.html>; Reuters, Donald Trump launches space force for world’s new war-fighting domain, THE GUARDIAN, <https://www.theguardian.com/us-news/video/2019/dec/21/donald-trump-launches-space-force-for-worlds-new-war-fighting-domain-video>.

⁶⁸ See generally CONGRESSIONAL RESEARCH SERVICE, *supra* n. 66.

⁶⁹ 50 U.S.C. §4511.

⁷⁰ 50 U.S.C. §4531.

⁷¹ 50 U.S.C. § 4517. Importantly, the budget authority for guarantees and direct loans must be specifically included in appropriations passed by Congress and enacted by the President before such loan mechanisms can be issued. See 50 U.S.C. §4531(a)(3) and 50 U.S.C. §4532(c).

⁷² 50 U.S.C. § 4588.

⁷³ 50 U.S.C. § 4555.

C. PRESIDENT TRUMP DELEGATED HIS MAJOR DEFENSE PRODUCTION ACT AUTHORITIES TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES AND DEPARTMENT OF HOMELAND SECURITY TO ADDRESS PPE AND OTHER ESSENTIAL PRODUCT SHORTAGES IN THE COVID-19 CRISIS

On March 13, 2020, President Trump issued Proclamation No. 9994⁷⁴ to declare a national emergency concerning the outbreak of COVID-19 pursuant to the National Emergencies Act.⁷⁵ President Trump's declaration followed two days after the World Health Organization declared the coronavirus a global pandemic,⁷⁶ and nearly six weeks after the Secretary of Health and Human Services ("HHS") determined that COVID-19 constituted a public national emergency pursuant to the Public Health Service Act⁷⁷ on January 31, 2020. President Trump's Proclamation specifies:

The spread of COVID-19 within our Nation's communities threatens to strain our Nation's healthcare systems. It is incumbent on hospitals and medical facilities throughout the country to assess their preparedness posture and be prepared to surge capacity and capability. . . . *Additional measures, however, are needed to successfully contain and combat the virus in the United States.*⁷⁸

In recognizing the necessity for additional measures to fight the virus, President Trump subsequently issued a series of executive orders which, among other things, delegated broad authority under the DPA to particular agencies regarding PPE and other resources.

1. Executive Order 13909 (March 18, 2020): President Trump's delegation of DPA Title I, Section 101, and all Title VII authorities to HHS Secretary Azar to prioritize and allocate PPE and additional health and medical resources, as well as gather information on resources' inventory and distribution

On March 18, 2020, President Trump issued Executive Order 13909, in which he found that "health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators, meet the criteria specified in section 101(b) of the [DPA]."⁷⁹ Further, the Order set forth the policy that such materials must be "properly distributed to the Nation's healthcare system and others that need them most at this time" in order to "ensure that our Nation's healthcare systems are able to surge capacity and capability to respond to the spread of COVID-19."⁸⁰

⁷⁴ Emergency Proclamation.

⁷⁵ 50 U.S.C. 1601 *et seq.*

⁷⁶ WORLD HEALTH ORGANIZATION, *WHO Director-General's opening remarks at the media briefing of COVID-19*, March 11, 2020, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁷⁷ 42 U.S.C. § 247d.

⁷⁸ Emergency Proclamation at 15337.

⁷⁹ E.O. 13909.

⁸⁰ *Id.* at 16227.

In effectuating that policy, President Trump delegated to the HHS Secretary both full Title I and Title VII authorities with respect to PPE and other critical materials:

“the authority of the President *conferred by section 101 of the Act* to require performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense, and *to implement the Act in [Title VII]*, is delegated to the Secretary of Health and Human Services *with respect to all health and medical resources needed to respond to the spread of COVID–19 within the United States.*”⁸¹

Critically, President Trump specified that HHS Secretary Azar may use his Title I, Section 101 authority to “determine . . . the proper nationwide priorities and allocation of all health and medical resources, *including the distribution of such materials*” to respond to the COVID-19 crisis.⁸² Additionally, the Order delegates Secretary Azar all Title VII authorities to implement the Act,⁸³ including Section 705(a), which allows the President “to gather information, such as information about how supplies of such resources are distributed throughout the Nation.”⁸⁴

2. Executive Order 13910 (March 23, 2020): President Trump’s delegation of DPA Title I, Section 102, and Title VII, Section 705 authorities to HHS Secretary Azar to designate critical materials, prevent hoarding of such materials, and gather information about the materials’ inventory and distribution

On March 23, 2020, President Trump issued Executive Order 13910, in which he declared that “it is the policy of the United States that health and medical resources needed to respond to the spread of COVID–19, such as personal protective equipment and sanitizing and disinfecting products, are not hoarded.”⁸⁵ To effectuate this policy, President Trump delegated to HHS Secretary Azar the authorities under Title I, Section 102 of the DPA, to “prevent hoarding of health and medical resources necessary to respond to the spread of COVID–19,” including the authority to (i) “prescribe conditions with respect to the accumulation of such resources;” and (ii) “to designate any material as a scarce material, or as a material the supply of which would be threatened by persons accumulating the material either in excess of reasonable demands of business, personal, or home consumption, or for resale at prices in excess of prevailing market prices.”⁸⁶ Additionally, the Order delegates Secretary Azar various authorities under

⁸¹ *Ibid.*

⁸² *Ibid.* (emphasis added).

⁸³ *Ibid.*

⁸⁴ 50 U.S.C. §4554.

⁸⁵ E.O. 13910.

⁸⁶ *Id.* at 17001.

Title VII,⁸⁷ including Section 705(a) of the DPA “to gather information, such as information about how supplies of such resources are distributed throughout the Nation.”⁸⁸

Acting on President Trump’s directive, HHS Secretary Azar on March 25, 2020 issued a notice identifying 15 categories of scarce or threatened materials, which were deemed subject to the hoarding prevention measures detailed in Executive Order 13910 and the DPA.⁸⁹ These are:

- 1) N-95 Filtering Facepiece Respirators;
- 2) Other Filtering Facepiece Respirators;
- 3) Elastomeric, air-purifying respirators and appropriate particulate filters/cartridges;
- 4) Powered Air Purifying Respirators;
- 5) Portable Ventilators;
- 6) Drug product with active ingredient chloroquine phosphate or hydroxychloroquine HCl;
- 7) Sterilization services and sterilizers;
- 8) Disinfecting devices intended to kill pathogens and other kinds of microorganisms by chemical means or physical means;
- 9) Medical gowns or apparel, *e.g.*, surgical gowns or isolation gowns;
- 10) Personal protective equipment (PPE) coveralls, *e.g.*, Tyvek Suits;
- 11) PPE face masks;
- 12) PPE surgical masks;
- 13) PPE face shields;
- 14) PPE gloves or surgical gloves; and
- 15) Ventilators.

3. Executive Order 13911 (March 27, 2020): President Trump’s delegation of DPA Titles III and VII, Section 708 authorities to HHS Secretary Azar and DHS Secretary Wolf to expand the domestic production capacity of PPE using loans and loan guarantees and coordinating industry production through voluntary agreement, as well as Title I, Sections 101 and 102 authorities to DHS Secretary Wolf to prioritize, allocate, designate, and prevent hoarding of essential materials

On March 27, 2020, President Trump issued Executive Order 13911, in which he stated that “it is the policy of the United States *to expand domestic production of health and medical resources* needed to respond to the spread of COVID–19, including personal protective equipment and ventilators.”⁹⁰ To effectuate that policy, the Order delegated to both HHS Secretary Azar and DHS Secretary Wolf the authority under sections 301, 302 and 303 of DPA Title III to issue financial incentives—including “guarantee[ing] loans by private institutions, mak[ing] loans, mak[ing] provision for purchases and commitments to purchase, and tak[ing] additional actions”—in order to expand the domestic industrial capacity to produce PPE and other critical materials.⁹¹ Additionally, the Order delegated to both

⁸⁷ The Order delegated “the authority of the President to implement the Act contained in subchapter III of chapter 55 of title 50, United States Code (50 U.S.C.).” *Id.* at 17001-17002.

⁸⁸ *Ibid.*

⁸⁹ Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID–19 Hoarding Prevention Measures, 85 Fed. Reg. 17592-17593 (March 25, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-03-30/pdf/2020-06641.pdf>.

⁹⁰ E.O. 13911.

⁹¹ *Id.* at 18403, 18404.

Secretaries Azar and Wolf the full authority under sub-sections 708(c)(1) and (d) of Title VII to “provide for the making of voluntary agreements and plans of action by the private sector” in order to “enable greater cooperation among private businesses in expanding production of and distributing such resources.”⁹² Finally, the Order delegates supplemental authorities to further meet the policy of expanding domestic industry to meet PPE needs, including: (1) section 107, enabling both HHS Secretary Azar and DHS Secretary Wolf to use both Title III authority and “any other provision of law” to provide “appropriate incentives to . . . expand the productive capacities of domestic sources” to meet supply needs; and (2) sections 101 and 102 authorities, empowering DHS Secretary Wolf with the authority to prioritize, allocate, designate and prevent hoarding of PPE and other critical materials, mirroring the authorities delegated to Secretary Azar in Executive Orders 13909 and 13910.^{93,94}

III. PETITIONERS DEMAND THAT DHS AND HHS TAKE IMMEDIATE ACTIONS TO PROVIDE FRONTLINE WORKERS WITH THE PPE NECESSARY TO SAFEGUARD THEIR HEALTH AND SAFETY

Petitioners, on an emergency basis, demand DHS Secretary Azar and HHS Secretary Wolf use the full power of delegated DPA authorities—specifically, DPA Titles I, III, and VII authorities delegated to them by President Trump in Executive Orders 13909, 13910, and 13911—to immediately take the following actions that address the nationwide shortage of PPE and other critical materials necessary to safeguard frontline workers.

1. **Action 1: HHS shall issue an emergency rule implementing a system to conduct and publish a systematic, nationwide inventory report assessing the shortage of PPE and other essential materials needed to protect frontline workers, and to update it weekly in line with the COVID-19 emergency circumstances.**

The regulation should include the following:

- A. HHS shall prepare a nationwide inventory of PPE and other critical materials detailing: (i) the current supply of such materials; (ii) the current demand for such materials by state, frontline worker sector, or other relevant category to frontline worker protection; and (iii) the allocation of those materials by state, frontline worker sector, employer and health care facility, and any other relevant category to frontline worker protection.

⁹² *Id.* at 18404.

⁹³ *Id.* at 18404, 18405.

⁹⁴ On August 6, 2020, President Trump issued an executive order which on its face mandates federal agencies to purchase all essential medicines from domestic sources and encourages domestic production of such medicines. WHITE HOUSE, *Executive Order on Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs Are Made in the United States*, August 6, 2020, <https://www.whitehouse.gov/presidential-actions/executive-order-ensuring-essential-medicines-medical-countermeasures-critical-inputs-made-united-states/>. This executive order is compatible with the compelled actions in this Petition. *See also* Tami Luhby, “Trump pushes efforts to lower drug prices as coronavirus rages,” CNN, July 24, 2020, <https://www.cnn.com/2020/07/24/politics/trump-drug-prices/index.html> (describing additional four executive orders aimed at lowering drug prices).

- B. HHS shall define the essential worker sectors to include, but not be limited to, the sixteen essential infrastructure sectors per the Department of Homeland Security⁹⁵—including those within the sectors who are subcontractors, independent contractors, undocumented and migrant workers—as well as other essential workers who are not encompassed in DHS’s categories, including domestic workers and caregivers, typically unprotected by federal labor laws. No worker shall be excluded due to their immigration status.
- C. In preparing this initial inventory report, HHS shall set up a portal for comment submissions from relevant agencies, state governors and the National Governors Association, unions of frontline worker sectors, and other private and public entities involved in essential worker sectors and manufacture of PPE and other critical materials. The information sought regards PPE inventory, shortages, and populations of need, including states, particular frontline worker sectors, and/or communities of workers. HHS shall open the portal for comment submission no later than one week after this Federal Register notice.
- D. HHS shall publish online an electronically searchable and sortable version of this inventory report within thirty days of this Federal Register notice.
- E. Once the initial inventory is published, HHS shall update the inventory once a week for the duration of the COVID-19 emergency and a 6-month grace period beyond the state of emergency is lifted. The public comment process is rolling, and HHS shall review public comments and update the national PPE inventory list as appropriate every two weeks.

2. **Action 2: HHS shall issue an emergency rule designating additional critical materials that are vital to protecting the health and safety of frontline workers and regularly update that designations list through stakeholder processes with frontline worker unions, state governors, and frontline sectoral enterprises.** The regulation should include the following:

- A. Health or medical resources, or any of their essential components, determined by the HHS Secretary to be needed to respond to the spread of COVID–19 and which are, or are likely to be, in short supply (scarce materials) or the supply of which would be threatened by hoarding (threatened materials). Designated scarce materials or threatened materials are subject to periodic review by the Secretary. The following 15 materials are already designated and subject to hoarding prevention measures in

⁹⁵ U.S. Department of Homeland Security, *Identifying Critical Infrastructure*, <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19> (last updated April 28, 2020).

DPA Section 102 and are hereby also designated as critical items under DPA Section 101(b), subject to allocation and prioritization measures.

- i. N-95 Filtering Facepiece Respirators;
- ii. Other Filtering Facepiece Respirators;
- iii. Elastomeric, air-purifying respirators and appropriate particulate filters/cartridges;
- iv. Powered Air Purifying Respirators;
- v. Portable Ventilators;
- vi. Drug product with active ingredient chloroquine phosphate or hydroxychloroquine HCl;
- vii. Sterilization services for any device as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act and sterilizers as defined in 21 CFR 880.6860, 880.6870, and 880.6880;
- viii. Disinfecting devices intended to kill pathogens and other kinds of microorganisms by chemical means or physical means;
- ix. Medical gowns or apparel, *e.g.*, surgical gowns or isolation gowns;
- x. Personal protective equipment (PPE) coveralls, *e.g.*, Tyvek Suits;
- xi. PPE face masks;
- xii. PPE surgical masks;
- xiii. PPE face shields;
- xiv. PPE gloves or surgical gloves; and
- xv. Ventilators.

B. The following list of materials is hereby designated as essential materials under DPA Section 101(b) that are subject to the allocation and prioritization measures under Section 101(a) and hoarding prevention measures under Section 102.

- i. COVID-19 testing kits;
- ii. Viral swabs;
- iii. Thermometers;
- iv. Hand sanitizer;
- v. Alcohol-based hand rubs containing at least 60% alcohol;
- vi. Disinfectants;
- vii. Disinfecting wipes and towels;
- viii. No-touch trash cans;
- ix. Hand soap;
- x. Human remains pouches;
- xi. Booties or shoe covers;
- xii. Remdesivir (made by Gilead);
- xiii. Respirator fit testing kits and supplies; and

xiv. Needles and syringes.

- C. HHS seeks public comment regarding additional materials that should be designated as essential for frontline workers. The public comment period is rolling and shall last for the duration of the COVID-19 emergency and a 6-month grace period beyond the state of emergency is lifted. HHS shall review public comments and expand the designation list as appropriate on a weekly basis.

3. Action 3: On an emergency basis, DHS and HHS shall coordinate private industry through voluntary agreements and plans of action to spur production and proper distribution of PPE and other critical materials and, per statutory requirements, issue rules and procedures by which such voluntary agreements and plans of action are developed and carried out. Pursuant to delegated Title VII authorities, DHS and HHS shall take the following actions:

- i. Further pursuant to Section 708(d), establish an advisory committee formed of representatives from relevant industries, including existing and proposed manufacturers of PPE and other critical materials and logistics and delivery distribution, their labor unions and worker representatives, states, and any other relevant actors to inform efforts for a coordinated production and allocation of PPE and other critical materials to frontline workers.
- ii. Further pursuant to Section 708(c), consult the advisory committee and frontline workers as recipients of the PPE and critical materials to create voluntary agreements and plans of action to address the manufacturing and allocation of PPE and other critical materials.
- iii. As required under Section 708(e), issue an emergency proposed rulemaking in accordance with section 553 of the Administrative Procedure Act incorporating standards and procedures by which the voluntary agreements and plans of action are to be developed and carried out.

4. Action 4: On an emergency basis, DHS and HHS shall immediately utilize the full power of the delegated DPA authorities to meet PPE shortages for frontline workers, including: (1) Title I authorities to prioritize and direct contracts with existing producers to the federal government for supply, and ensure allocation to frontline workers; and (2) Title III authorities to issue loans, loan guarantees and provide other financial incentives to spur the entire domestic industrial base to manufacture PPE and critical materials. These actions shall be executed immediately. When the voluntary agreement and plans of action (per Action 3) are finalized, the following actions shall further be taken to ensure the execution of those plans of action.

A. Pursuant to delegated Title I authorities, both DHS and HHS Secretaries shall:

- i. Order existing producers of needed PPE and other critical materials to increase their production capacity and accept federal government contracts for these materials. This could include the use of the Defense Production Act Fund to increase the capacity of these production facilities, which could include expanding production hours, expanding production facilities, or hiring additional workers.
- ii. Order other appropriate manufacturing facilities that do not currently produce this equipment to begin manufacturing PPE and other critical materials instead of their normal products. This could include using the Defense Production Act fund to procure and install the necessary equipment needed for this manufacturing.
- iii. Establish and implement a plan to distribute the PPE and other critical materials to frontline workers. The distribution plan shall be informed by and consistent with the inventory report in order to properly prioritize and distribute materials to worker communities in accordance with degree of shortage and demand, severity of COVID-19 outbreak, and any other factors raised by frontline worker unions, states, and public health officials.

B. Pursuant to Title III authorities, both DHS and HHS Secretaries shall:

- i. Immediately generate manufacturing purchase orders upon invoking the full extent of Title III, to ensure the most expedient production of PPE and other critical materials.
- ii. Provide loans, loan guarantees, and other appropriate financial instruments to support companies to manufacture the PPE and other critical materials. This may include financial support to procure and install the necessary equipment needed for this manufacturing and increase the capacity of production facilities, which could include expanding production hours, expanding production facilities, or hiring additional workers.

In light of the unprecedented emergency situation, Petitioners request that Secretaries Azar and Wolf commence these requested actions within fifteen days, including the issuance of the aforementioned rules as applicable.

IV. TAKING THESE ACTIONS IS CRITICAL FOR DHS AND HHS TO CARRY OUT THE PRESIDENT’S EXECUTIVE ORDERS TO GENERATE PPE TO ADDRESS THE COVID-19 HEALTH CRISIS

A. HHS AND DHS HAVE THE LEGAL AUTHORITY TO TAKE THE REQUESTED ACTIONS

Petitioners have the right to demand these actions. The Administrative Procedure Act requires HHS and DHS to provide “interested person[s],” like Petitioners, “the right to petition for the issuance . . .

of a rule,”⁹⁶ which is defined as a “whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”⁹⁷ This statutory right is in addition to Petitioners’ fundamental right, preserved under the First Amendment, “to petition the Government for a redress of grievances.”⁹⁸

HHS and DHS possess the legal obligation to take the requested actions. The DPA provides the President with various emergency powers that may be made available if invoked. As detailed above, Executive Orders 13909, 13910, and 13911 each express President Trump’s explicit delegation of his Titles I, III, and VII authorities under the DPA to the DHS and HHS Secretaries to ensure that PPE and other materials are available to address the COVID-19 emergency. President Trump’s delegations are further reinforced by President Obama’s 2012 Executive Order 13603, which explicitly delegated many of the DPA’s presidential authorities to executive agencies.⁹⁹ With regards to each of Petitioners’ requested actions:

1. **Action 1: Authorities permitting HHS Secretary Azar to conduct and publish a nationwide PPE and other essential materials inventory report.** Section 705(a) of Title VII grants the President the authority to “obtain such information from any person as may be necessary or appropriate” to enforce or administer the Act, including “the authority to obtain information in order to perform industry studies assessing the capabilities of the United States industrial base to support the national defense.” President Trump delegated all Title VII authorities to HHS Secretary Azar in Executive Order 13909.¹⁰⁰ Finally, section 802 of Executive Order 13603 delegated this Title VII authority to HHS, as the delegated head of the agency dealing with health emergencies in accordance with the Act.¹⁰¹
2. **Action 2: Authorities permitting HHS Secretary Azar to designate additional critical materials.** Section 101(b) of Title I grants the President the authority to identify “critical and strategic materials” necessary for the national defense. President Trump delegated all Title I authorities to HHS Secretary Azar in Executive Order 13909.¹⁰² Finally, section 201 of Executive Order 13603 delegated this Title I authority to HHS “with respect to health resources.”¹⁰³

⁹⁶ 5 U.S.C. § 553(e)

⁹⁷ 5 U.S.C. § 551(4).

⁹⁸ U.S. Const. amend. I.

⁹⁹ E.O. 13603.

¹⁰⁰ E.O. 13909 at 16227.

¹⁰¹ E.O. 13603 at 16659 (“the authorities vested in the President by title VII of the Act, 50 U.S.C. App. 2151 *et seq.*, are delegated to the head of each agency in carrying out the delegated authorities under the Act and this order”).

¹⁰² E.O. 13909 at 16227.

¹⁰³ E.O. 13603 at 16652.

- 3. Action 3: Authorities permitting Secretaries Azar and Wolf to coordinate voluntary agreements and plans of action with industry and labor.** Section 708 of Title VII grants the President the authority to consult with relevant representatives from industry and labor to make “voluntary agreements and plans of action to help provide for the national defense.” President Trump delegated all Title VII, Section 708 authorities to both HHS Secretary Azar and DHS Secretary Wolf in Executive Order 13911.¹⁰⁴ Finally, Section 401 of Executive Order 13603 delegated these Title VII authorities regarding voluntary agreements and advisory committees to HHS “with respect to health resources” and DHS generally as the coordinating agency for DPA delegations.¹⁰⁵
- 4. Action 4: Authorities permitting Secretaries Azar and Wolf to utilize the full power of Title I and Title III of the DPA to prioritize government contracts for and allocate PPE and critical materials and extend financial instruments in support of the national defense, respectively.** Section 101(a) of Title I grants the President the authority to prioritize and distribute PPE and other critical materials in the national defense. President Trump delegated all Title I authorities to both HHS Secretary Azar and DHS Secretary Wolf in Executive Orders 13909 and 13911, respectively.¹⁰⁶ Finally, Section 201 of Executive Order 13603 delegated this Title III authority to HHS “with respect to health resources” and DHS generally as the coordinating agency for DPA delegations.¹⁰⁷ In parallel, Sections 301, 302, and 304 of DPA Title III grants the President the authority to issue financial incentives in order to expand the domestic industrial capacity to produce PPE and other critical materials.¹⁰⁸ President Trump delegated all Title III authorities to both HHS Secretary Azar and DHS Secretary Wolf in Executive Order 13911.¹⁰⁹ Finally, Section 301 of Executive Order 13603 delegated this Title III authority to HHS “with respect to health resources” and DHS generally as the coordinating agency for DPA delegations.¹¹⁰

¹⁰⁴ E.O. 13911 at 18404.

¹⁰⁵ E.O. 13603 at 16652.

¹⁰⁶ E.O. 13911 at 18404.

¹⁰⁷ E.O. 13603 at 16652.

¹⁰⁸ *Id.* at 18403, 18404.

¹⁰⁹ E.O. 13911 at 18404.

¹¹⁰ E.O. 13603 at 16652.

B. THE ADMINISTRATION’S RESPONSE TO PPE SHORTAGES TO DATE IS GROSSLY INADEQUATE TO PROTECT FRONTLINE WORKERS AND NECESSITATES THE SECRETARIES’ FULL USE OF DPA POWERS TO MEET THE PRESIDENT’S MANDATE TO ADDRESS PPE SHORTAGES FOR THE NATIONAL DEFENSE

Over seven months have passed since COVID-19 hit the United States, but the supply of PPE remains gravely unaddressed by the federal government. As discussed above, frontline workers continue to face severe shortages of PPE and other critical materials. To date, the Administration’s response has been grossly inadequate to meet frontline workers needs and fails to fulfill the President’s own mandate “to expand domestic production of health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators” in order to “surge capacity and capability to respond to the spread of COVID-19.”¹¹¹

The Administration has taken a piecemeal rather than a comprehensive leadership approach to addressing the PPE shortage. First, the Administration has forsaken any role in coordinating a nationwide response to the PPE shortage. Rather, it has encouraged individual states, companies, and its own federal agencies to compete for supplies independently.

Second, the Administration has only compelled particular private companies to produce specific PPE products. The Trump Administration has issued specific memoranda only with respect to the production of ventilators, N-95 masks, and testing swabs, and tasked specific companies, including automakers, 3M and other unnamed private companies to undertake the work.¹¹² In the last few months, DHS has enlisted 19 companies under the DPA produce emergency supplies, but the amounts ordered to date are inadequate, and only about half of the ordered masks will be delivered by end of the year.¹¹³ Further, the handful of American companies still making protective equipment domestically report they

¹¹¹ E.O. 13911 at 18403.

¹¹² President Trump issued four memoranda directing the agency secretaries to use their DPA authorities to ensure production of ventilators, N-95 masks, and swabs. *See* Memorandum on Order Under the Defense Production Act Regarding General Motors Company (March 27, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-general-motors-company/> (President directing HHS Secretary to require General Motors to perform ventilator production contracts); Memorandum on Order Under the Defense Production Act Regarding the Purchase of Ventilators (April 2, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-purchase-ventilators/> (President directing HHS Secretary to facilitate the supply of materials to six ventilator manufacturers); Memorandum on Order Under the Defense Production Act Regarding 3M Company (April 2, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-3m-company/> (President directing DHS Secretary to acquire N-95 masks from 3M). Separately, President Trump announced on April 19, 2020 that his Administration is working on increasing the production of testing swabs. *See* Alice Olstein, “Trump Invokes DPA for testing swabs, weeks after reported shortages,” *POLITICO*, April 19, 2020, <https://www.politico.com/news/2020/04/19/trump-dpa-testing-swabs-reported-shortages-195721>. For a list of awarded companies, *see* Yelena Dzhanova, “Trump compelled these companies to make critical supplies, but most of them were already doing it,” *CNBC*, April 3, 2020, <https://www.cnn.com/2020/04/03/coronavirus-trump-used-defense-production-act-on-these-companies-so-far.html>.

¹¹³ Priscilla Alvarez, Curt Devine, Drew Griffin, and Kristen Holmes, “Trump administration’s delayed use of 1950s law leads to critical supply shortages,” *CNN*, July 14, 2020, <https://www.cnn.com/2020/07/13/politics/delayed-use-defense-production-act-ppe-shortages/index.html>.

are already at maximum capacity.¹¹⁴ The rationale for this piecemeal approach has been to reference private industry's voluntary actions to meet demand¹¹⁵--which in practice has resulted in price gouging, whereby manufacturers have increased prices in bidding wars among the federal government and states.¹¹⁶

Third, domestic companies that seek to manufacture PPE but have not been specifically rewarded with Trump administration contracts face barriers in producing and selling PPE. Trade associations representing manufacturers reported problems in convincing customers to shift to American suppliers, and the lack of long-term government contracts rendered manufacturers apprehensive to invest in equipment to drive economies of scale needed to lower prices.¹¹⁷

Fourth, as a result of uncoordinated domestic efforts, the United States remains highly dependent on overseas manufacturers—a reality that FEMA's Administrator Pete Gaynor has called a “national security issue.”¹¹⁸ According to supply chain specialists and public health experts, these overseas manufacturers have increased prices sevenfold due to soaring global demand, which will only intensify as the pandemic spreads.¹¹⁹ A Trump Administration initiative, called Project Airbridge, flew PPE from international suppliers to the U.S. at taxpayer expense, but even that initiative fulfilled only a paltry amount of supply needs, and final destinations of those supplies were difficult to account for.¹²⁰ That initiative was phased out in June 2020 despite the surge in coronavirus cases.¹²¹

Unfortunately, the Administration's patchwork approach has obstructed efficient PPE production and distribution to frontline workers, contravening the President's articulated goal to address the PPE shortage for the greater national defense. Several problems plague the current approach, and the requested actions seek to resolve these issues.

¹¹⁴ Andrew Jacobs, “Grave shortages of protective gear flare again as Covid cases surge?,” THE NEW YORK TIMES, July 8, 2020, <https://www.nytimes.com/2020/07/08/health/coronavirus-masks-ppe-doc.html>.

¹¹⁵ Don Lee and Jennifer Haberkorn, “Trump's refusal to use wartime powers to direct scarce medical supplies has left states fighting it out,” THE LOS ANGELES TIMES, March 25, 2020, <https://www.latimes.com/politics/story/2020-03-25/trump-faces-heat-for-not-using-wartime-powers-to-procure-medical-supplies>.

¹¹⁶ Jeanne Whalen, “Half a million N95 masks are on their way to New York and Seattle, manufacturer says,” THE WASHINGTON POST, March 22, 2020, <https://www.washingtonpost.com/business/2020/03/22/masks-ppe-3m-coronavirus/>.

¹¹⁷ Jessica Glenza, “America's PPE shortage could last years without strategic plan, experts warn,” Aug. 10, 2020, THE GUARDIAN, <https://www.theguardian.com/world/2020/aug/10/us-ppe-coronavirus-shortage-america>.

¹¹⁸ Noah Higgins-Dunn & Jasmine Kim, “FEMA head says coronavirus hot spots face PPE shortages, U.S. isn't ‘out of the woods,’” July 22, 2020, CNBC, <https://www.cnbc.com/2020/07/22/fema-head-says-coronavirus-hotspots-may-face-ppe-shortages.html>.

¹¹⁹ Jeanne Whalen, “Half a million N95 masks are on their way to New York and Seattle, manufacturer says,” THE WASHINGTON POST, March 22, 2020, <https://www.washingtonpost.com/business/2020/03/22/masks-ppe-3m-coronavirus/>.

¹²⁰ Priscilla Alvarez, “Trump administration ends ‘Project Airbridge’ effort to get supplies to the US,” CNN, June 30, 2020, <https://www.cnn.com/2020/06/30/politics/fema-project-airbridge-phase-out/index.html>.

¹²¹ *Id.*

1. Lack of systematic nationwide data on inventory and allocation of PPE and essential materials

The federal government's failure to nationally coordinate a response, including inventorying current supply and demand for PPE, has left wide gaps in distributing PPE to frontline workers most in need. Due to the lack of coordinated allocation, states, corporations, and the federal government are directly in competition with each other for scarce supplies, leading to severe inefficiencies and chaos, with reports that the federal government has seized PPE shipments already committed to local governments and other buyers.¹²² According to the National Governors Association, "while federal officials contend that state needs for PPE and ventilators can be addressed through the private market, the global shortage and lack of coordination has pitted states against one another and other purchasers—including the federal government—in a bid to secure resources."¹²³ Further, in the absence of federal coordination, states, hospitals, corporations, and workers have mobilized to provide estimates and needs for PPE equipment,¹²⁴ while public organizations and networks have been established in attempts to match worker needs with donations of money and supplies.¹²⁵

In order to resolve the chaotic acquisition process and ensure that materials are properly allocated, Petitioners request Secretary Azar conduct and publish a nationwide inventory report on the supply, demand, and allocation of PPE and essential materials. Because such inventory and allocation information must be derived from both bottom-up and top-down resources, a public process soliciting input from key stakeholders serves to ensure that the data is sourced from all the most relevant groups experiencing the shortages.

2. Failure to update and expand designated materials needed to protect frontline workers

Though HHS designated 15 items that qualify under the DPA as subject to anti-hoarding measures,¹²⁶ the federal government has failed to regularly expand this list to include other essential materials that are necessary to protect frontline workers. It is critical that HHS issue a final rule immediately to automatically designate the above list of materials that Petitioner frontline worker unions

¹²² Anna Phillips, "Grocery stores seeking masks for 'essential' workers confront shortages, federal interference," April 26, 2020, THE LOS ANGELES TIMES, <https://www.latimes.com/politics/story/2020-04-26/grocery-stores-masks-essential-workers-shortages-federal-interference>.

¹²³ NATIONAL GOVERNORS ASSOCIATION, "Memorandum re: Governor Actions to Address PPE and Ventilator Shortages," April 13, 2020, 1, <https://www.nga.org/wp-content/uploads/2020/04/NGA-Medical-Equipment-Memo.pdf>.

¹²⁴ Andrew Jacobs, Matt Richtel and Mike Baker, "'At War With No Ammo': Doctors Say Shortage of Protective Gear Is Dire," THE NEW YORK TIMES, March 19, 2020, <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html>.

¹²⁵ Ranney et al., *supra* n. 31.

¹²⁶ Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures, 85 Fed. Reg. 17592-17593 (March 25, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-03-30/pdf/2020-06641.pdf>.

have specified, but also create an ongoing line of communication and rulemaking between frontline workers and HHS to continue upgrading and expanding that list to address changing needs.

3. No coordinated action plan with industry and labor to address the PPE shortage, and no corresponding suite of prioritized contracts, purchase orders and financial incentives to spur required and cost-effective supply of PPE and other critical materials

Thus far, the Trump Administration has refused to undertake a transparent, systematic and coordinated action plan to work with private industry, labor, and states to meet emergency needs pursuant to Title VII. Nor has the Administration properly utilized Title III financial incentives to spur the coordinated efforts.

Instead, the Administration's haphazard approach has led to deep inefficiencies and failure to spur industry into properly addressing PPE shortages. First, the Administration's targeting of specific companies to produce one-off products has failed to address the breadth of all necessary PPE—ranging in the dozens—to protect frontline workers.¹²⁷ Second, the Administration's private dealings with individual companies instead of a comprehensive consultative process with relevant industry and labor players have resulted in ill-suited vendors and costs of goods that are higher than necessary. For example, a \$55 million contract for N95 masks was awarded to a tactical training firm without any background in manufacturing anything much less medical supplies—raising the per-unit cost to eight times the standard value of masks.¹²⁸ Third, the current Administration's failure to extend purchase orders and loan products to bidding manufacturers has dis-incentivized companies to produce PPE products because they are uncertain of the scope and scale of the order to shore up their investments.¹²⁹ Without concrete purchase orders and financial product incentives, manufacturers seeking to assist the country at a time of crisis lack the means, guidance, and coordination to pitch in or optimize their contributions.¹³⁰ Fourth, the Administration has pitted states and other players against the federal government in bidding for manufacturers on purchase orders; states report that they have been denied major orders because the federal government has outbid them.¹³¹ Fifth, the Administration's sparing use of Title III has targeted particular corporations without any comprehensive mandate to fulfill supply needs.¹³²

¹²⁷ Aishvarya Kavi, "Virus surge brings calls for Trump to invoke Defense Production Act," July 22, 2020, THE NEW YORK TIMES, <https://www.nytimes.com/2020/07/22/us/politics/coronavirus-defense-production-act.html>.

¹²⁸ Isaac Stanley-Becker, Desmond Butler and Nick Miroff, "In coronavirus scramble for N95 masks, Trump Administration pays premium to third-party vendors", April 15, 2020, THE WASHINGTON POST, https://www.washingtonpost.com/national/coronavirus-trump-masks-contracts-prices/2020/04/15/9c186276-7f20-11ea-8de7-9fdff6d5d83e_story.html

¹²⁹ Jane Chong, "How to Actually Use the Defense Production Act," THE ATLANTIC, April 6, 2020, <https://www.theatlantic.com/ideas/archive/2020/04/how-actually-use-dpa-fight-covid-19/609469/>.

¹³⁰ *Ibid.*

¹³¹ Robert Scott, "Defense Production Act urgently needed for critical medical gear," THE HILL, March, 26, 2020, <https://thehill.com/opinion/healthcare/489430-defense-production-act-urgently-needed-for-critical-medical-gear>.

Therefore, Petitioners request Secretaries Azar and Wolf to use the full powers of the DPA's Titles III and VII authorities to address the severe inefficiencies created by the Administration's current approach to PPE manufacturing. Specifically, per the DPA's authorities, Petitioners urge both Secretaries to undertake the central-strategist role that no other entity has the information, resources, or mandate to execute.¹³³ Under Title III as delegated, the Secretaries are authorized to design an array of financial incentives that, with the right appropriations from Congress, would enable private industry to assist in the national defense effort and thereby expand domestic production capacity "to avert an industrial resource or critical technology item shortfall that would severely impair national defense capability."¹³⁴ Under Title VII, the Secretaries are empowered to swiftly mobilize and coordinate agreements among agency heads, private industry, labor, and states in plans of action to meet the emergency situation. While there have been oversight calls from Congress¹³⁵, Petitioners urge that the coordinated action plan with industry, labor, and states are transparent and include key stakeholder processes in order to deliver the most coordinated and efficient plan to address the PPE emergency.

Petitioners' requested actions are warranted in light of the DPA's intent and historical use. The Korean War-time statute was enacted precisely to empower the Executive Branch to comprehensively and quickly coordinate and compel private industry action to meet public needs in times of emergency. As statutorily promulgated, DPA was enacted to ensure that "*every effort* [is] made to foster cooperation between the defense and commercial sectors for research and development and for acquisition of materials, components, and equipment" to forward the national defense."¹³⁶ At base, the DPA empowers the government to spur and synchronize what is otherwise an inadequate, piecemeal effort to equip the country to fight the pandemic. Petitioners urge Secretaries Azar and Wolf to utilize the statute's full powers.

¹³² See, e.g., Letter from U.S. Senators Schatz, Durbin, Tester, Baldwin, and Van Hollen to President Trump re: Immediate use of DPA to manufacture PPE, dated May 15, 2020, https://www.schatz.senate.gov/imo/media/doc/SEN%20Letter%20to%20POTUS%20re%20DPA%2005_14_2020.pdf.

¹³³ See, e.g., Chong, *supra* n. 129.

¹³⁴ 50 U.S.C. § 4531.

¹³⁵ Katie Porter, "Americans are in the dark on one of the Trump Administration's key coronavirus response tools", THE WASHINGTON POST, April 28, 2020, <https://www.washingtonpost.com/opinions/2020/04/28/we-dont-need-guessing-games-we-need-trump-be-transparent-about-ordering-tests/>.

¹³⁶ 50 U.S.C. § 4502 (emphasis added).

C. THERE IS GOOD CAUSE FOR THE REQUESTED ACTIONS TO BE TAKEN IMMEDIATELY IN LIGHT OF THE CURRENT AND GROWING NEEDS OF FRONTLINE WORKERS AND IMPENDING OPENINGS OF STATE AND FEDERAL ECONOMIES

Petitioners urge Secretaries Azar and Wolf to undertake the requested actions within fifteen days upon receipt of this Petition. As consistent with Executive Order 13603, each agency to whom a DPA authority is delegated “shall act . . . in a time frame consistent with the urgency of the need at hand.”¹³⁷

The coronavirus pandemic warrants this emergency timescale. As discussed above, frontline workers continue to face PPE shortages, and the number of their infections and fatalities will continue to grow due to the combined impact of inadequate PPE, premature state and school openings, and other factors.¹³⁸ The CDC and epidemiologists cautioned that premature opening of economies will lead to outbreaks in major cities and across the country.¹³⁹ Further, health experts have warned that a second wave of COVID-19 cases is likely to peak later in the year. These realities mean that PPE is still urgently needed to meet the current and foreseeable needs of frontline workers to weather the ongoing and new surge of outbreaks ahead.

V. STATEMENTS OF INTEREST

This Petition is joined by the parties listed below. Petitioners consist of: (1) frontline worker labor unions and organizations whose members are experiencing harm and will be further harmed if PPE and other critical material are not met immediately; and (2) environmental and other public interest advocacy organizations representing millions of people across the country who support essential workers and whose communities will be harmed if the shortages are not addressed and frontline workers are not protected.

Labor Unions and Organizations

Amalgamated Transit Union

The Amalgamated Transit Union (“ATU”)—the largest labor union representing more than 200,000 transit and allied workers in the U.S. and Canada—fights for the interests of its hardworking members and promotes mass transit. Our more than 200,000 members work as metropolitan, interstate, and school bus drivers; paratransit, light rail, subway, streetcar, and ferry boat operators; mechanics and

¹³⁷ E.O. 13603, 16652-53.

¹³⁸ Lazaro Gamio, “How Coronavirus cases have risen since states reopened,” THE NEW YORK TIMES, July 9, 2020, <https://www.nytimes.com/interactive/2020/07/09/us/coronavirus-cases-reopening-trends.html>; Teo Armus, “Reopening of America: More than half of states will lift coronavirus restrictions by the end of the week,” THE WASHINGTON POST, April 30, 2020, <https://www.washingtonpost.com/world/2020/04/30/coronavirus-latest-news/>.

¹³⁹ Nick Turse, “Trump’s obsession with reopening the economy ignores public health experts,” THE INTERCEPT, April 16, 2020, <https://theintercept.com/2020/04/16/coronavirus-trump-economy-second-wave/>.

other maintenance workers; station agents, clerks, baggage handlers, municipal employees and others. Since the COVID-19 pandemic hit North America, ATU members have bravely been reporting for work often with little or no protection to provide critical transportation for essential workers to the frontlines to fight this crisis. The ATU has launched an aggressive Safe Service campaign to demand our elected officials and employers provide proper PPE and advocated for critical policies to keep transit workers safe on the job. The shortage of PPE has had a devastating impact on the ATU, as 80 of our frontline heroes have lost their lives and thousands have been infected with the coronavirus. The ATU supports the activation of the DPA to ensure the production of the needed PPE to provide transportation and other essential workers the necessary protection to stay safe on the job.

American Federation of Labor and Congress of Industrial Organizations

The American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) is an unincorporated association of 55 national and international labor unions representing 13 million working men and woman in every sector of the economy, including essential, front-line workers in hospitals, nursing homes, grocery stores, meat packing plants, correctional facilities, manufacturing, airlines, and public transit. The AFL-CIO has been actively working to protect the health and safety of those workers during the pandemic by, among other actions, petitioning the Occupational Safety and Health Administration to adopt an emergency temporary standard addressing the novel coronavirus and seeking a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit to compel the agency to take that action. When that Court refused, the AFL-CIO worked successfully with the Virginia Safety and Health Codes Board to adopt such a standard, and urging other states to take similar action.

American Federation of Teachers

The American Federation of Teachers (“AFT”) was founded in 1916 and today represents 1.7 million members in more than 3,000 local affiliates nationwide. Five divisions within the AFT represent the broad spectrum of the AFT's membership: pre-K through 12th-grade teachers; paraprofessionals and other school-related personnel; higher education faculty and professional staff; federal, state and local government employees; and nurses and other healthcare professionals. In addition, the AFT represents approximately 80,000 early childhood educators and nearly 250,000 retiree members.

American Postal Workers Union

The American Postal Workers, a labor union consisting of 200,000 members, recognizes the importance of this administrative petition for personal protective equipment for all essential workers.

Postal workers are extremely dedicated to the mission of connecting and serving people, individuals and businesses alike. Our commitment to the public is exemplified by the heroism of front line essential postal workers during this dangerous and challenging pandemic. We serve from one end of the

country to the other, and in every community, ensuring that the mail—including checks, food, medicine, medical equipment, and election ballots—reaches its destination. To keep this nation running, it is important that essential workers, including postal workers, have enhanced access to personal protective equipment.

Association of Flight Attendants-CWA

The Association of Flight Attendants-CWA is a labor union of more than 50,000 Flight Attendants making up the world's largest Flight Attendant union. As a trade union representing exclusively Flight Attendants, we have over 70 years of experience advocating for our members and the passengers we serve. Flight Attendants are frontline essential workers, and without rigorous precautions aircraft cabins are prime locations for community spread of COVID-19. The well-documented shortage of PPE, especially N95 respirators, puts flight crews and other essential aviation workers in danger of contracting and spreading the virus. We urge the administration to activate the DPA to increase the manufacture of PPE in order to provide safer workplace conditions for our members, our passengers and all essential workers.

Communications Workers of America

Communications Workers of America, AFL-CIO ("CWA") is a labor organization that represents around 700,000 workers in private and public sector employment in the United States, Canada and Puerto Rico. CWA advances and advocates for workers' rights and protections, and for improved wages, benefits, training, and other terms and conditions of employment. A significant number of our CWA members work in the telecommunications and information technology sector, assisting families, businesses, and other institutions all around the country with obtaining and maintaining communication resources and broadband internet access, which is imperative during this pandemic. Relatedly, our members in the news media, broadcast and cable television industry are keeping the public well informed through investigating, reporting, editing, producing, and recording stories, often engaging on the front lines to do so. Further, our members also work in the airline industry ensuring the safety of travelers, as well as in law enforcement, including corrections and juvenile detention, ensuring the safety of the populace. Finally, our members also work in the fields of education, healthcare, public service, manufacturing and others.

CWA members in healthcare have been working on the frontline in hospitals, nursing homes, laboratories, and as visiting nurses providing critical services in patient homes since the beginning of the pandemic when the epicenter was in NY and NJ. Due to shortages of N95 respirators which should be disposed of after caring for a single patient following normal standards of care, our members in healthcare have been forced to use re-use N95's for extended periods of time—sometimes for days or weeks. In some locations, healthcare members must use N95's that have been decontaminated by questionable methods never approved before the pandemic, but now authorized under emergency use authorizations. Even in

areas where the COVID-19 patient population has declined, healthcare facilities are still operating under crisis conditions because of the lack of PPE and the fear of continued shortages and potential surges in COVID-19 patients.

Members deemed “essential”, as well as our other members who have not been labeled as such, have all worked tirelessly throughout the pandemic and continue to do so, often without adequate personal protective gear. The shortage of respirators, in particular, is also negatively impacting our members who need protection from exposure to hazards other than SARS-CoV-2 encountered on the job, such as lead and silica.

Clearly, the PPE shortage detrimentally affects our members, who have put themselves at risk in order to help communities across the nation. Utilizing the DPA to compel the manufacture of PPE would allow necessary protective equipment and security measures to reach our members to keep them safe as they perform their important work in this moment of crisis.

Maine American Federation of Labor and Congress of Industrial Organizations

The Maine American Federation of Labor and Congress of Industrial Organizations (“Maine AFL-CIO”) is a statewide federation of approximately 160 labor organizations representing approximately 40,000 workers in a wide variety of industries from nurses to crane operators to mill workers to teachers. We are an affiliate of the national AFL-CIO. Many of the workers who make up our affiliate unions are in “essential” services and industries, working on location on the job despite the risks posed by COVID-19, and many have encountered difficulty obtaining adequate PPE to safely perform their work. PPE is fundamental to workplace safety and, during this pandemic, to community health and safety.

National Domestic Workers Alliance

The National Domestic Workers Alliance (“NDWA”) is a leading voice for our nation’s 2.2 million domestic workers, who work as nannies, housecleaners and caregivers taking care of children, elderly, and people with disabilities in private homes. NDWA reaches and engages over 250,000 domestic workers on a regular basis through our 60 affiliate organizations in 36 cities and 17 states, local chapters in Atlanta, Durham, Seattle, and New York City, and digital platforms. The vast majority of these domestic workers are women and more than half are immigrants. NDWA works to raise and strengthen wage and industry standards to ensure that domestic workers achieve economic security and protection, respect, and dignity in the workplace. NDWA organizes domestic workers, cultivates the leadership of low-income women and women of color, leads campaigns at the federal, state and local levels for policy change, and engages in workforce development and social innovations to deliver greater economic opportunity and security to domestic workers.

Throughout the coronavirus pandemic, many of NDWA's members have continued to provide essential caregiving services. Most have done so without adequate PPE that would increase their ability to work safely. The nationwide PPE shortage has put the health of domestic workers and their families in jeopardy. Fully utilizing the Defense Production Act to significantly increase the supply of PPE is an important solution to allow NDWA's members to work safely and securely.

National Nurses United

National Nurses United ("NNU"), with more than 155,000 members nationwide, is the largest union and professional association of registered nurses in the country. NNU members work as bedside health care professionals in hospitals and clinics across the country and have been on the frontlines of the COVID-19 pandemic response caring for patients. Since mid-January 2020, NNU has been advocating for employers, government, and federal agencies to urgently implement lifesaving workplace protections that nurses and their patients need against exposure to COVID-19 and to ensure that hospitals and other healthcare facilities are not sources for the spread of COVID-19 infections. NNU's advocacy during the pandemic has included a relentless demand for the increased manufacture and distribution of PPE, including powered air-purifying respirators, elastomeric respirators, N95 respirators, and the full range of optimal PPE that workers need for protection against aerosol transmissible diseases such as COVID-19. Despite NNU's advocacy, the shortage and rationing of PPE persists, and nurses continue to care for patients without optimal workplace protections. As a result, as of July 24, 2020, nearly 165,000 health care workers in the United States have been infected, including thousands of nurses, and at least 1,244 health care workers have died, including 166 registered nurses.

Service Employees International Union

The Service Employees International Union ("SEIU") is a labor union of more than two million people in the United States (including in Puerto Rico) and Canada, and is the largest union of healthcare workers in the United States. More than half of SEIU's two million members work in the healthcare industry, including as doctors, nurses, nursing assistants, technicians, therapists, home care providers, administrative staff, janitorial workers, and food service staff. SEIU is also one of the largest unions of public service employees, with more than one million local and state government workers, public school employees, bus drivers, and child care providers. SEIU also represents workers in the property service industries. Approximately 250,000 SEIU property service workers nationwide clean, maintain, and provide security for commercial office buildings, co-ops, and apartment buildings, as well as public facilities like theaters, stadiums, and airports. Many SEIU members are essential workers and have

continued working throughout the pandemic. The well-documented PPE shortage¹⁴⁰ negatively affects these members, and the DPA's activation to compel manufacture of PPE would provide these members with a safer and more secure work environment.

Transport Workers Union of America

The Transport Workers Union ("TWU") represents more than 151,000 workers across the airline, railroad, transit, universities, utilities and services sectors. TWU members work as flight attendants, bus operators & mechanics, subway conductors, aircraft mechanics, school bus workers, aircraft ground crews, carmen, rail mechanics, Amtrak onboard service workers, bikeshare workers, and others. During the pandemic, 95% of TWU members have been classified as essential employees across the country. They have continued to come to work to make sure other essential workers and riders can get to their jobs and back home to their families. This has put TWU workers at an increased risk of exposure for the coronavirus.

Nationwide, 155 TWU members have died and 10% have tested positive or been quarantined due to COVID-19. Despite the elevated threat of exposure, TWU workers have not been given the PPE necessary to prevent transmission of this virus. We truly believe that more needs to be done to protect workers who are putting their lives at risk each day. The DPA will help significantly produce and expedite the need for PPE required to keep essential workers and their families safe.

United Electrical, Radio and Machine Workers of America

The United Electrical, Radio and Machine Workers of America ("UE") represents more than 30,000 workers across the United States. Our members' jobs range from healthcare services, such as nurses, nurse assistants and technicians, to essential manufacturing, such as making soap and industrial batteries for field hospitals. Our members include grocery store workers and rail crew drivers, both essential for making sure the general public still has the food and supplies they need during this pandemic. We also represent public employees in education, social services, transportation and many other vital government services. Across these fields of work, our members have been coming to work during this pandemic while putting their own health and safety in jeopardy because of insufficient access to PPE and adequate cleaning supplies. The activation of the DPA to compel the manufacturing of PPE and cleaning supplies would meaningfully improve the safety of these members' work environments.

¹⁴⁰ Centers for Disease Control and Prevention, Optimizing Shortage of PPE and Other Equipment during Shortages, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html> (last updated July 16, 2020).

Environmental & Advocacy Organizations**350.org**

350.org is a global climate justice organization working to end the era of fossil fuels and usher in a just and equitable community-led renewable energy economy. 350 US represents hundreds of thousands of people across the country committed to a Just Recovery, which means protecting all workers and securing medicare for everyone. Humans on the frontlines of COVID and climate must be prioritized with ready action and real solutions. The DPA is available now to provide adequate PPE and medical equipment to fight COVID-19. We stand with the Center for Biological Diversity in this work and our partners across the climate justice and labor movements to demand that all workers are protected, without qualification.

Alliance of Nurses for Healthy Environments

The Alliance of Nurses for Healthy Environments is the only national nursing organization whose prime focus is on the intersection of health and the environment. The environment includes anywhere we live, work, or play. Nurses are on the frontlines of the global COVID-19 pandemic. With access to the proper PPE, they are being forced to choose between an unsafe work environment and taking care of their patients. We support this petition in order to ensure all nurses and other healthcare professionals have the necessary PPE to protect themselves and their patients.

Center for Biological Diversity

The Center for Biological Diversity (“the Center”) is a non-profit corporation with offices throughout the country and 1.7 million members and online activists. The Center believes that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked. Combining conservation biology with litigation, policy advocacy, and strategic vision, the Center is working to secure a future for animals and plants hovering on the brink of extinction, for the wilderness they need to survive, and by extension, for the physical health and spiritual welfare of generations to come. We work to protect biodiversity and human health and welfare from many threats, including the climate emergency, pesticides and other toxic substances, and pandemics linked to wildlife trade and habitat destruction.

Over the past 40 years, the worst human pandemics and epidemics—HIV, SARS, avian flu, swine flu, Ebola virus and Zika virus—all stemmed from trading in and consuming animals and destroying their habitat. The coronavirus is no exception, as it likely originated from a live wildlife market in China—potentially passed from a bat, to another animal, to a human. The Center has long worked for measures to protect animals and curtail the risk of such pandemics, including significantly curtailing wildlife trade, permanently closing all live wildlife markets, building global capacity to conserve wildlife and protect nature, and shifting to a more respectful relationship with the millions of other species with which we

share our planet. Today, as the coronavirus pandemic ravages our country, one of the most important steps we can take to advance our mission of protecting human health and welfare is to advocate for the immediate provision of PPE to all frontline workers. The exploitation of frontline workers is the same type of abuse that government and corporations inflict on the environment. The Center stands in solidarity with workers to stop this tragic, preventable loss of life and fight these systemic, common injustices.

Center for Popular Democracy

The Center for Popular Democracy is a national organization committed to advancing equity, opportunity, and inclusive democracy in partnership with grassroots organizations, local organizing groups, and progressive unions. Our vast membership is composed of working class, communities of color who face the brunt of this pandemic. Their disproportionate representation among essential workers exposes them to heightened risks of viral transmission, reproducing the racial and class inequities afflicting the health of marginalized communities in America. As we continue to organize and advocate for solutions that will mitigate this pandemic's grievous impact on our communities, we recognize that increased access and use of PPE is critical to safeguarding the health of our members. As state economies begin to reopen, the failure to provide adequate safety equipment to essential workers will result in heightened transmission and deaths, devastating our working class, communities of color even more. This will have radiating effects on local economies and health systems' capacities. It is unconscionable that the federal government has the power to address the shortage of PPE, but to date, has failed to exercise it effectively. We join several other organizations in calling on the federal government to use its authority under the DPA to coordinate, finance, and compel the manufacturing of PPE to save our frontline workers' lives.

Earth Action, Inc.

Earth Action is a 501(c)(4) that addresses policy and legislation change and action, focusing primarily on environmental and social justice issues. Earth Action believes that it is imperative for the current administration, the Department of Health and Human Services, and the Department of Homeland Security step and protect our essential workers by supplying them with the tools and equipment they need to do their jobs effectively while protecting theirs and others health. It has been shown that many of our essential workers are women, immigrants, and people of color. It is time to step up and take care of these marginalized communities while they are taking care of us.

Earthworks

Earthworks is a nonprofit organization dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions. Earthworks stands for clean air, water and land, healthy communities, and corporate accountability. We work for solutions that protect both the Earth's resources and our communities. We stand with all

frontline communities, including those on the forefront of the COVID-19 pandemic, and believe they should have access to all the PPE they need.

Fayetteville Police Accountability Community Taskforce

We agree on this legal petition to provide PPE to all Essential Workers. Fayetteville PACT advocates for the injustice of any human rights. The workplace is supposed to be a space to feel comfortable and be able to perform duties properly. The duties must be done thoroughly to satisfy the consumer. PPE is needed to mitigate the risk of the workers, it also provides comfort space for the workers. We must understand that no corporation or business has the right to determine if someone can live. We stand in solidarity to continue to protect all workers, and their ability to work in healthy conditions.

Fire Drill Fridays

In the Fall of 2019, Greenpeace USA partnered with actor and activist Jane Fonda to create Fire Drill Fridays. The programming has made great progress in raising awareness and engaging the public to address the climate emergency and take action in this time of national and global crisis. As of July 2020, 1 million people were tuning in to Fire Drill Fridays.

While Greenpeace USA has long highlighted the disproportionate manner in which Black and Brown people and low-income communities are impacted by climate change, Fire Drill Fridays has intentionally given these communities a platform to tell their own stories and to shine a light on the injustices these communities face. In line with Fire Drill Fridays' mission of speaking out against injustice, we are urging the Trump administration to deploy the DPA. It is critical to protect the people who are at the frontline of the response to the COVID-19 pandemic. The necessary PPE must be made available to frontline healthcare and essential workers.

Friends of the Earth

Friends of the Earth, founded by David Brower in 1969, fights to protect our environment and create a healthy and just world. We are more than 2 million members and activists across all 50 states working to make this vision a reality. We are part of the Friends of the Earth International federation, the largest grassroots network in the world with sister organizations in 75 countries working for social and environmental justice. Together we speak truth to power and expose those who endanger the health of people and the planet for corporate profit. Friends of the Earth and our members are committed to ensuring that pandemic resources are used to protect the health and safety of frontline communities and essential workers, who are at higher risk of contracting and becoming seriously ill or dying from COVID-19. The shortage of PPE contributes to this increased risk. Activating the DPA to compel the manufacture of PPE would help safeguard these workers and communities.

GreenFaith

Because the Earth and all people are sacred and at risk, GreenFaith is building a worldwide, multi-faith climate and environmental movement. Together our members create communities to transform ourselves, our spiritual institutions, and society to protect the planet and create a compassionate, loving and just world. We envision a world transformed, in which humanity in all its diversity has developed a shared reverence for life on Earth, religious and spiritual communities everywhere generate a moral awakening to the sacredness of Earth and the dignity of all people, and together, we are building resilient, caring communities and economies that meet everyone's needs and protect the planet. The era of conquest, extraction, and exploitation has given way to cooperation and community.

GreenFaith is committed to ensuring that the response and recovery to the COVID pandemic protects those at greatest risk - the elderly, people with preexisting health conditions, and frontline workers. It is morally unthinkable that the US government has not, to date, adequately prioritized this. We strongly support the use of the DPA to remedy this grave and preventable injustice.

Greenpeace USA

Greenpeace is a global, independent campaigning organization that uses peaceful protest and creative communication to expose global environmental problems and promote solutions that are essential to a green and peaceful future. Together with our 2.7 million supporters nationwide, Greenpeace USA challenges the systems of power and privilege that destroy the environment and place disproportionate burdens on vulnerable communities. Through our campaigning, we create solutions that promote environmental sustainability rooted in social justice.

Our mission is to create a more just, green, and peaceful future, which includes protecting public health and workers' safety. The shortage of PPE has left our communities, especially frontline healthcare and essential workers, too vulnerable for too long. The Trump administration must deploy the DPA to remedy this grave and preventable injustice.

Labor Network for Sustainability

The Labor Network for Sustainability is a non-profit advocacy organization whose mission is to promote economic and environmental sustainability by creating alignment among labor unions and climate, and climate justice organizations. We seek to eliminate the false conflict between quality jobs and environmental protection so that we can all make a living on a living planet. Our individual and organizational membership includes local and national unions, rank-and-file members of unions, and environmental and environmental justice organizations across the United States and Canada.

Many of our members are front line workers in the health care, transportation, hospitality, food service, manufacturing and public sectors. The well-documented shortage of personal protective equipment jeopardizes the health and safety of these workers whose jobs are essential to preserving the health and safety of our communities. Activating the DPA to compel the manufacture of personal protective equipment and its orderly and efficient distribution will provide these workers with a safer and more secure work environment.

National Children's Campaign

The National Children's Campaign ("NCC") is a nonprofit organization that aims to ensure that the welfare of America's 74 million children is placed at the forefront of local, state, and national policy. NCC is dedicated to creating a better and safer country for its children and, in a time of unprecedented medical and economic fallout catalyzed by the COVID-19 pandemic, it is essential that our government do everything possible to ensure the safety and security of our youth.

The Trump administration's refusal to provide PPE leaves millions of youth and their families—particularly children with disabilities, unhoused children, children in low-income communities, and children of color—increasingly vulnerable. From students forced back to school to young relatives of essential workers, millions of children are at risk of coming into contact with COVID-19, so it is imperative that the creation and distribution of PPE becomes a national priority. The National Children's Campaign fully supports activating the Defense Production Act to provide the legal foundation for the acceleration of PPE manufacturing so we can create a safer country for America's 74 million children and their families.

Oil Change International

Oil Change International is a research, communications, and advocacy organization with more than 250,000 members in the United States, many of whom are essential workers in need of PPE to do their jobs safely and securely. Oil Change International advocates for the mitigation of harmful sources of pollution, particularly from energy infrastructure, and for the protection of workers in the fossil fuel energy industry in the ongoing transition to clean energy.

The COVID-19 pandemic has exacerbated the health burdens of communities living near energy infrastructure, who are already more likely to be impacted by higher levels of particulate matter than the general public,¹⁴¹ and who are doubly at risk due to the unique impacts of COVID-19 combined with air

¹⁴¹ Oak Ridge National Laboratory, "Environmental Quality and the U.S. Power Sector: Air Quality, Water Quality, Land Use, and Environmental Justice," Jan. 4, 2017, <https://www.energy.gov/sites/prod/files/2017/01/f34/>

pollution.¹⁴² Additionally, the COVID-19 pandemic is currently impacting workers in the energy industry,¹⁴³ a group that Oil Change International works with and advocates for on a regular basis. The well-documented and ongoing PPE shortage in the United States¹⁴⁴ negatively affects Oil Change International's members and the communities and workers we advocate on behalf of, and the Defense Production Act's activation to compel manufacture of PPE would help protect both these populations.

Sunrise Movement

Sunrise is a nationwide movement of hundreds of thousands of young people dedicated to stopping the climate crisis and ensuring dignified work and lives for all. We stand in solidarity with frontline workers and all people whose lives would be protected by the actions outlined in this petition. In times of crisis, it is critical that the federal government effectively use all powers at its disposal, including the DPA, in service of the common good. This is true for COVID-19, and for climate change as well.

The Climate Center

The mission of The Climate Center is to deliver speed and scale greenhouse gas reductions, starting in California. This petition aligns with our values. We stand in solidarity with communities of color and with the protesters in the streets. We join them in demanding an end to institutional racism, police violence, white supremacy, and the environmental injustices that many Black, Brown, Asian and Indigenous communities experience daily. Shared responsibility and equitable, inclusive solutions are fundamental values we at The Climate Center strive to embody in our efforts to realize speed and scale greenhouse gas reductions. Our urgent climate policy goals will only be achieved if we also close the climate gap and ensure that communities of color are no longer disproportionately harmed. There cannot be climate justice without racial justice.

Union of Concerned Scientists

The Union of Concerned Scientists ("UCS") is a national organization with 50 years of experience advocating for a healthier planet and a safer world. We have a proven record of putting science into action: we conduct rigorous technical analyses, develop policies to address some of today's most pressing problems, and advocate for change by educating decisionmakers and mobilizing our half-million supporters—everyday people as well as some of the nation's top scientists, working with us to advance

Environment%20Baseline%20Vol.%202--Environmental%20Quality%20and%20the%20U.S.%20Power%20Sector--Air%20Quality%2C%20Water%20Quality%2C%20Land%20Use%2C%20and%20Environmental%20Justice.pdf.

¹⁴² Silvia Comunian et al., Air Pollution and COVID-19: The Role of Particulate Matter in the Spread and Increase of COVID-19's Morbidity and Mortality, Int. J. Environ. Res. Public Health, 2020 Jun; 17(12): 4487, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7345938/>.

¹⁴³ Michelle Homer, "Five Shell workers with coronavirus airlifted to hospitals from offshore platform in Gulf," KHOU 11, May 27, 2020, <https://www.khou.com/article/news/health/coronavirus/five-shell-workers-from-offshore-platform-in-gulf-airlifted-to-hospital-with-coronavirus/285-f1c77046-41f9-4fcb-947a-2d8d9f2d3265>.

¹⁴⁴ Centers for Disease Control and Prevention, Optimizing Shortage of PPE and Other Equipment during Shortages, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html> (last updated July 16, 2020).

science-based solutions. Our UCS Science Network comprises more than 25,000 scientists and technical experts including doctors, nurses, public health experts, and public servants whose own health and safety are threatened by the lack of available personal protective equipment to protect them from COVID-19. We also work closely with labor organizations and public institutions whose members are impacted by the PPE shortage.

We join in solidarity with those working on the front lines of the COVID-19 crisis who sounded the alarm months ago about the inadequate supply of PPE. Our core values include heeding the words not only from scientific experts, but also from those harmed by political inaction and policy failures. Our mission and our values remain clear and unwavering: UCS champions evidence-based solutions to the pressing problems we face. Enforcing the DPA would solve the crisis-level shortage in necessary protective equipment that can save lives and help overwhelmed public services operate during this pandemic. The lives of these frontline workers, and the people that they serve, depend on closing this supply gap.

US Climate Action Network

US Climate Action Network, with 184 members spanning environmental groups, civil rights organizations, frontline non-profits passionate about racial justice, churches and interfaith groups, along with union and union members, is the largest network dedicated to tackling the climate crisis in the United States. It is without question that we support needed PPE supplies reaching frontline workers, the people who among many things keep patients safe, keep areas clean and covid-19 free, and ensure Americans are safely transported to work, pharmacies, grocery stores and disabled loved ones. The federal government should do everything in its power to make sure these workers are protected in the middle of a pandemic, particularly in ways that center racial justice.

Respectfully submitted,

/s/Jean Su

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