

**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

ANCHUN JEAN SU (DC Bar No. CA285167)
HOWARD M. CRYSTAL (DC Bar No. 446189)
CENTER FOR BIOLOGICAL DIVERSITY
1411 K Street N.W., Suite 1300
Washington, D.C. 20005
Telephone: (202) 849-8399
Email: jsu@biologicaldiversity.org
hcrystal@biologicaldiversity.org

*Attorneys for Plaintiffs Center for Biological
Diversity, Friends of the Earth, and Labor Network
for Sustainability*

/s/ Ralph John DiPietro

RALPH DIPIETRO (DC Bar No. 430127)
DN LAW GROUP, LLC
3807 Jeffry Street
Silver Spring, MD 20906
Telephone: (301) 377-9047
Email: dipietro@american.edu

WILLIAM J. SNAPE, III (DC Bar No. 455266)
AMERICAN UNIVERSITY, WASHINGTON
COLLEGE OF LAW
4300 Nebraska Avenue N.W.
Washington, D.C. 20016
Telephone: (202) 536-9351
Email: wsnape@wcl.american.edu

*Attorneys for Plaintiffs Amalgamated Transit
Union, AFL-CIO-CLC; American Federation of
Labor and Congress of Industrial Organizations;
American Federation of Teachers, AFL-CIO;
Association of Flight Attendants-CWA;
Communications Workers of America, AFL-CIO;
Service Employees International Union; Transport
Workers Union of America, AFL-CIO; United Food
and Commercial Workers International Union,
AFL-CIO; and United Steel, Paper and Forestry,*

*Rubber, Manufacturing, Energy, Allied Industrial
and Service Workers International Union, AFL-
CIO-CLC*