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## Trade War, PPE, and Race

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# Trade War, PPE, and Race

Ernesto Hernández-López\*

## ABSTRACT

*Tariffs on Personal Protective Equipment (PPE), such as face masks and gloves, weaken the American response to COVID. The United States has exacerbated PPE shortages with Section 301 tariffs on these goods, part of a trade war with China. This has a disparate impact felt by minority communities because of a series of health inequity harms. COVID's racial disparity appears in virus exposure, virus susceptibility, and COVID treatments. This Article makes legal, policy, and race-and-health arguments. Congress has delegated to the United States Trade Representative expansive authority to increase tariffs. This has made PPE supplies casualties of the trade war. In political terms, the Trump administration prioritized increasing tariffs over public health readiness. Regarding race, PPE shortages exemplify the socioeconomic effects of trade policies and add to COVID's racial disparities.*

**Keywords:** PPE, COVID, racial disparity, tariffs, trade, coronavirus, Section 301

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## INTRODUCTION

*“[T]rade wars are good, and easy to win”*  
—President Donald Trump, March 2, 2018<sup>1</sup>

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<sup>1</sup> Thomas Franck, *Trump Doubles Down: 'Trade Wars Are Good, and Easy to Win,'* CNBC (Mar. 2, 2018, 10:32 AM), <https://www.cnbc.com/2018/03/02/trump-trade-wars-are-good-and-easy-to-win.html>.

*The federal government is “not a shipping clerk”*

—President Donald Trump commenting on face masks, PPE, and ventilators, March 19, 2020<sup>2</sup>

In 2020, Personal Protective Equipment (PPE) became a daily concern for millions of Americans, opening a window into the complex issues of global trade and virus protection. Worn to prevent the spread of COVID-19 (COVID) by the coronavirus,<sup>3</sup> PPE includes face masks, gloves, and more.<sup>4</sup> In January, the first COVID cases in the United States appeared.<sup>5</sup> In March, the World Health Organization declared the virus outbreak a global pandemic, while the United States declared it a national emergency.<sup>6</sup> These declarations ignited panicked searches for PPE, followed by realizations that American inventories were far from sufficient. These shortages reflect a global trade issue since most PPE is imported from overseas producers. This Article examines these developments in public health and these critically needed supplies. It also illustrates how American trade policies exacerbated PPE shortages and identifies the racial disparities experienced by those who need PPE.

Because of a two-year trade war with China, PPE purchases were more expensive, if not impossible during the first few months of 2020.<sup>7</sup> Starting in 2018, President Donald Trump imposed new tariffs for imports from China, including tariffs on PPE. Tariffs are taxes paid by importers when products enter the United States.<sup>8</sup> As part of the trade war,

<sup>2</sup> Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 7 (Mar. 19, 2020), <https://www.govinfo.gov/content/pkg/DCPD-202000174/pdf/DCPD-202000174.pdf>.

<sup>3</sup> See *Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It*, WORLD HEALTH ORG., [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) (last visited July 27, 2020).

<sup>4</sup> See AGATA DABROWSKA & VICTORIA R. GREEN, CONG. RSCH. SERV., IF11488, PERSONAL PROTECTIVE EQUIPMENT (PPE) AND COVID-19: FDA REGULATION AND RELATED ACTIVITIES 1 (2020).

<sup>5</sup> See CDC COVID-19 Response Team, Michelle A. Jorden, Sarah L. Rudman, Elsa Villarino, Stacey Hoferka, Megan T. Patel, Kelley Bemis, Cristal R. Simmons, Megan Jespersen, Jenna Iberg Johnson, Elizabeth Mytty,

Katherine D. Arends, Justin J. Henderson, Robert W. Mathes, Charlene X. Weng, Jeffrey Duchin, MD10; Jennifer Lenahan, Natasha Close, Trevor Bedford, Michael Boeckh, Helen Y. Chu, Janet A. Englund, Michael Famulare, Deborah A. Nickerson, Mark J. Rieder, Jay Shendure & Lea M. Starita, *Evidence for Limited Early Spread of COVID-19 Within the United States, January–February 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 680 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6922e1-H.pdf>.

<sup>6</sup> The WHO declaration was on March 11. See Jamie Ducharme, *World Health Organization Declares COVID-19 a 'Pandemic.' Here's What That Means*, TIME (Mar. 11, 2020, 12:39 PM), <https://time.com/5791661/who-coronavirus-pandemic-declaration/>. On March 13 President Donald Trump declared a national emergency. See Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020).

<sup>7</sup> A trade war occurs when a state uses economic harm to persuade a foreign state to agree to change its trade policies, see *c.f.* Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT’L SEC. 90, 94 (1997). The trade war with China includes a series of tariff actions. The first tariffs, for solar panels and washing machines, were imposed on January 22, 2018. For a timeline, see Chad P. Bown & Melina Kolb, *Trump’s Trade War Timeline: An Up-to-Date Guide*, PETERSON INST. INT’L ECON., <https://www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf> (last updated Sept. 28, 2020).

<sup>8</sup> This essay also uses the terms levies, taxes, and duties to also refer to tariffs. For description of how tariffs are administered and who pays them, see *Who Pays Trump’s Tariffs, China or U.S. Customer and Companies*, REUTERS (May 21, 2019, 10:45 AM), <https://www.reuters.com/article/us-usa-trade-china-tariffs-explainer/who-pays-trumps-tariffs-china-or-u-s-customers-and-companies-idUSKCN1SR1UI>. For

the United States deployed additional tariffs, levies of either 7.5% or 25% on goods from China,<sup>9</sup> an important source of PPE imports. With these new tariffs, importers could pay up to 25% more just to have their PPE purchases enter the country.<sup>10</sup> These tariffs are in addition to usual custom duties. The added expenses are passed on to distributors, retailers, and consumers.<sup>11</sup> The administration did not approve requests in 2018 and 2019 to eliminate these tariffs for PPE.<sup>12</sup> When the pandemic hit in 2020, PPE shortages added to the stress already caused by quarantines, social distancing, and general panic.<sup>13</sup> PPE is used by a variety of actors, including for personal use and for large medical centers. PPE buyers faced many challenges. To limit exposure to the virus, Americans re-organized their home, work, and family lives. Because of this, they desperately looked for PPE. These scarcities weakened a national COVID response.<sup>14</sup> These experiences show how a trade war impacts domestic consumers. Said simply, a trade war made PPE scarce and more expensive, just as the pandemic converted PPE into a life-or-death necessity for millions of Americans.

This outbreak and the need for PPE critically impacts minority communities. African Americans and Latinos are three times more likely to be infected and are nearly twice as likely to die from COVID.<sup>15</sup> The virus spreads more dangerously in these communities, with greater rates of contractions, hospitalizations, and deaths.<sup>16</sup> Because of this, health officials worry about the coronavirus in these populations and other minority groups.<sup>17</sup> Furthermore, these communities make up the major part of the essential work force, such as grocery store, public transit, and home health workers, who have to work during

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the basics of United States tariff policy, its history, and Congressional and Presidential roles, see CHRISTOPHER A. CASEY, CONG. RSCH. SERV., IF11030, U.S. TARIFF POLICY: OVERVIEW (2018).

<sup>9</sup> The 25% duty was imposed on July 6, 2018. See Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301, 83 Fed. Reg. 28,710 (June 20, 2018). For key dates announcing tariffs, relevant notice and comment proceedings, and tariff deployment, see Bown & Kolb, *supra* note 7; BROCK R. WILLIAMS & KEIGH E. HAMMOND, CONG. RSCH. SERV., IN10943, ESCALATING U.S. TARIFFS: TIMELINE 4 (2020).

<sup>10</sup> See Chad P. Bown, *Trump's Trade Policy is Hampering the US Fight Against COVID-19*, PETERSON INST. INT'L ECON.: TRADE & INV. POL'Y WATCH (Mar. 13, 2020, 4:00 PM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-trade-policy-hampering-us-fight-against-covid-19>.

<sup>11</sup> See Jeanna Smialek & Ana Swanson, *American Consumers, Not China, Are Paying for Trump's Tariffs*, N.Y. TIMES (Jan. 6, 2020), <https://www.nytimes.com/2020/01/06/business/economy/trade-war-tariffs.html>.

<sup>12</sup> See Bown, *supra* note 10.

<sup>13</sup> For a description of PPE shortages and supply chain problems, see Zoë Schlanger, *Begging for Thermometers, Body Bags, and Gowns: U.S. Health Care Workers Are Dangerously Ill-Equipped to Fight COVID-19*, TIME (Apr. 20, 2020, 8:00 AM), <https://time.com/5823983/coronavirus-ppe-shortage/>.

<sup>14</sup> See *id.*; Bown, *supra* note 10.

<sup>15</sup> See Richard Opiel Jr. Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequality of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

<sup>16</sup> See Kat Stafford, Meghan Hoyer & Aaron Morrison, *Racial Toll of Virus Grows Even Starker as More Data Emerges*, ASSOCIATED PRESS (Apr. 18, 2020), <https://apnews.com/8a3430dd37e7c44290c7621f5af96d6b>. For a summary of racial disparities regarding virus cases, testing, mortality and data collection, see Zoë Carpenter, *What We Know About the Covid-19 Race Gap*, THE NATION (May 4, 2020), <https://www.thenation.com/article/society/covid-19-racial-disparities/>.

<sup>17</sup> This Article uses the terms Latino and African American since most of the cited studies refer to these terms. It uses different terms when directly quoting specific sources.

lockdowns.<sup>18</sup> These essential workers have a critical need for PPE, typically face masks and gloves.<sup>19</sup> For many essential jobs, the work force is overwhelmingly female and non-white.<sup>20</sup> Editorials in the medical journal *Lancet* described the need for PPE.<sup>21</sup> They emphasized this need for health care workers who are a “country’s most valuable resource” and explained that essential workers (largely African American or Latino) “face the greatest risk to their lives.”<sup>22</sup> Even though COVID is called the great equalizer, the reality is that it spreads blindly into living, work, and health settings that are far from equal.

This Article explains how trade policies, specifically tariffs on PPE imports, aggravate American experiences with COVID.<sup>23</sup> The results are a disparate impact on minority communities because of a complex mix of virus and health inequality harms. This Article makes three arguments from legal, policy, and race-and-health perspectives. First, the Trump administration was able to continue the trade war because the executive branch has ample authority to implement additional tariffs. PPE and many more products are subject to tariffs enacted pursuant to Section 301 of the International Trade Act of 1974.<sup>24</sup> The executive branch has wide discretion to impose these levies when it determines that foreign practices are “unreasonable or discriminatory,” and “burden or restrict” American commerce.<sup>25</sup> Accordingly, it applied Section 301 tariffs after determining that China appropriates intellectual property (IP) from American businesses and engages in cyber theft.<sup>26</sup> This Article refers to this American trade measure as the “China Case.” The majority of the Article’s legal arguments focus on Section 301, its procedures, and the administration’s power to impose tariffs in Section 301 cases.

Second, the Trump administration prioritized tariffs over ensuring that Americans could respond to the COVID pandemic. As a key part of the trade war, these tariffs try to

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<sup>18</sup> See HYE JIN RHO, HALEY BROWN & SHAWN FREMSTAD, CTR. ECON. & POL’Y RSCH., A BASIC DEMOGRAPHIC PROFILE OF WORKERS IN FRONTLINE INDUSTRIES (2020), <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf>.

<sup>19</sup> See *id.* at 5-6.

<sup>20</sup> See JOCELYN FRYE, CTR. AM. PROGRESS, ON THE FRONTLINES AT WORK AND AT HOME (2020), <https://cdn.americanprogress.org/content/uploads/2020/04/22133103/WOCcorona-report-1.pdf/>.

<sup>21</sup> *COVID-19: protecting health-care workers*, 395 LANCET 922 (2020), [https://doi.org/10.1016/S0140-6736\(20\)30644-9](https://doi.org/10.1016/S0140-6736(20)30644-9); *The plight of essential workers during the COVID-19 pandemic*, 395 LANCET 1587 (2020), [https://doi.org/10.1016/S0140-6736\(20\)31200-9](https://doi.org/10.1016/S0140-6736(20)31200-9).

<sup>22</sup> *COVID-19: protecting health-care work*, *supra* note 21; *The plight of essential workers during the COVID-19 pandemic*, *supra* note 21.

<sup>23</sup> This Article focuses on the COVID response from January to May of 2020. Public health policies continue to try to control the pandemic, with more recent outbreaks since June. Similarly, the United States-China trade war and the Section 301 case continues.

<sup>24</sup> See Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (codified as amended at 19 U.S.C. § 2411).

<sup>25</sup> 19 U.S.C. § 2411(b) (1974). For a description of Section 301 and the case against China, see ANDRES B. SCHWARZENBERG, CONG. RES. SERV., IF11346, SECTION 301 OF THE TRADE ACT OF 1974 (2020).

<sup>26</sup> See OFF. OF THE U.S. TRADE REP., FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF> (summarizing the findings by the United States Trade Representative’s Section 301 report of March 22, 2018, which serves as the basis for the tariffs described). For documents from the investigation, hearings and tariffs, see *Section 301 – China*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-china> (last visited July 27, 2020).

force changes in China's IP and cyber theft practices.<sup>27</sup> When PPE was subjected to additional duties the administration prioritized tariffs to compel changes in China over public health readiness.<sup>28</sup> A viral epidemic like COVID was a predictable threat, worrying presidencies for decades.<sup>29</sup> As a matter of policy in 2018 and 2019, the Trump administration chose not to remove many PPE items from Section 301 tariffs.<sup>30</sup> Eventually, this exacerbated PPE shortages with price spikes and uncertainty in 2020, creating a PPE crisis. This policy persisted. In June 2020, months after the initial outbreak, United States Trade Representative Robert Lighthizer told Congress that the administration preferred tariffs for PPE even though PPE is needed to fight the pandemic.<sup>31</sup> Section 301 protects these political choices made by the executive branch.

Third, PPE shortages show that tariffs can exacerbate the existing health inequities that harm communities of color. The disastrous experiences of 2020 help chart how African Americans, Latinos, women, and other disenfranchised groups disproportionately suffer from the harms posed by new tariffs and virus outbreaks. Governmental research and scholarly data studies show racial inequities in COVID contraction, hospitalization, and death rates.<sup>32</sup> These findings are continually updated as the pandemic progresses, but they confirm mounting evidence of racial disparities in the COVID response.<sup>33</sup> Trump trade policies aggravated the pandemic for workers and non-workers who need PPE.<sup>34</sup> Critical race health scholarship helps frame inquiries into how health policies appear race neutral but actually result in predictable negative consequences for Black, Indigenous, People of Color, and women.<sup>35</sup> Racial disparity impacts the COVID response on three fronts: coronavirus exposure, virus susceptibility, and medical treatments.<sup>36</sup> The PPE crisis

<sup>27</sup> See Bown & Kolb, *supra* note 7.

<sup>28</sup> See *c.f.* Deborah Abrams Kaplan, *How Tariffs Ravaged the COVID-19 Medical Supply Chain*, SUPPLY CHAIN DIVE (May 27, 2020), <https://www.supplychaindive.com/news/coronavirus-tariffs-trade-medical-supply-chain/578615/>.

<sup>29</sup> For history of pandemic threats and American worries, see HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA 1-2 (2005), <https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf>. Since January 18, 2020 President Trump has been briefed on COVID. See Ursula Perano, *10 Times Trump and His Administration Were Warned About Coronavirus*, AXIOS (Apr. 12, 2020), <https://www.axios.com/trump-coronavirus-warnings-46ea8006-2e19-4810-82c1-0f10f4f9aa97.html>.

<sup>30</sup> See Bown, *supra* note 10.

<sup>31</sup> See Ana Swanson, *Trump Trade Official Defends China Deal and Criticizes the W.T.O.*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/business/economy/us-trade-china-tariffs.html>.

<sup>32</sup> See *infra* notes 246, 252-253 and accompanying text.

<sup>33</sup> This Article identifies the relationships between tariffs and PPE shortages, legal authority and tariffs, and racial consequences in the COVID response. It refers to quantitative studies on COVID's racial disparities, demographic and occupational studies of essential and frontline workers, and scientific research on PPE's effectiveness against the virus. This opens up the question of how PPE shortages add to health disparities. The essay does not make empirical claims about the effects of PPE prices, PPE supply, and PPE use by minority groups.

<sup>34</sup> See *infra* Part IV.

<sup>35</sup> See Osagie Obasogie, Irene Headen & Mahasin S. Mujahid, *Race, Law, and Health Disparities: Toward a Critical Race Intervention*, 13 ANN. REV. L. & SOC. SCI. 313 (2017); Chandra L. Ford & Collins O. Airhihenbuwa, *Critical Race Theory, Race Equity, and Public Health: Toward Antiracism Praxis*, 100 AM. J. PUB. HEALTH s30 (2010); Camara Phyllis Jones, *Invited Commentary: "Race," Racism, and the Practice of Epidemiology*, 154 AM. J. EPIDEMIOLOGY 299 (2001).

<sup>36</sup> See Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism and the COVID-19 Pandemic*, 7 J. L. & BIOSCIENCES 1, 2 (2020).

exemplifies the economic burdens of trade policies, while simultaneously adding to racial disparities in health.

This Article proceeds in four parts. Part I offers a picture of the PPE crisis in the United States and how the federal government responded, focusing on January to May of 2020. Part II describes Section 301 tariffs and the United States-China trade war. Part III explains how legal doctrine contributed to PPE shortages; and how constitutional and administrative law afford the executive branch, primarily the Office of the United States Trade Representative (USTR), expansive authority to prioritize tariffs and deploy Section 301. This Part also identifies ways to reform Section 301. Part IV explores the racial consequences of limited PPE; less protective equipment adds to racial disparities, defined as health inequalities closely associated with race.<sup>37</sup>

### I. COVID HITS. PPE SHORTAGES APPEAR AND LINGER.

Since the pandemic began, questions about national PPE supplies have become increasingly commonplace. PPE is worn to block infections from blood, bodily fluids, or respiratory particles in the air and includes protective gowns, gloves, masks, goggles, and respirator masks.<sup>38</sup> Most PPE is intended as single use, to be worn once and then discarded to minimize contamination. This equipment is common in health care settings, in surgery rooms, or for patient examinations. With a pandemic, the need for PPE extends far beyond hospitals. PPE is expected or required when people cannot keep a safe distance, for example in a grocery store or government office. PPE items vary in terms of level of protection and accordingly are subject to different Food and Drug Administration (FDA) or National Institute for Occupational Safety and Health (NIOSH) regulations.<sup>39</sup>

Importantly, the American COVID response also depends on other imports like pharmaceuticals and medical equipment,<sup>40</sup> including ventilators, medical device parts, thermometers, and test swabs. These pharmaceutical and medical products have also been in short supply and are similarly subject to Section 301 levies. China is a significant source for these goods and PPE.<sup>41</sup> For the sake of simplicity, this Article focuses on PPE, but comparable analysis could track how the trade war impacts these vital products.

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<sup>37</sup> For descriptions of these terms, see Obasogie, Headen & Mujahid, *supra* note 35, at 31; Sara N. Bleich, Marian P. Jarlenski, Caryn N. Bell & Thomas A. LaVeist, *Health Inequalities: Trends, Progress, and Policy*, 33 ANN. REV. PUB. HEALTH 7 (2012).

<sup>38</sup> See DABROWSKA & GREEN, *supra* note 4, at 1. PPE has been proven to stop the spread of COVID. See Derek K. Chu, Elie A. Akl, Stephanie Duda, Karla Solo, Sally Yaacoub & Holger J Schünemann, *Physical Distancing, Face Masks, and Eye Protection to Prevent Person-to-Person Transmission of SARS-CoV-2 and COVID-19: A Systematic Review and Meta-Analysis*, 395 LANCET 1973 (2020), [https://doi.org/10.1016/S0140-6736\(20\)31142-9](https://doi.org/10.1016/S0140-6736(20)31142-9).

<sup>39</sup> As an example, surgical masks and N95 masks provide different levels of protection and receive different regulatory approvals. See DABROWSKA & GREEN, *supra* note 4, at 1 (describing “device” under Federal Food, Drug, and Cosmetic Act). There are three device classes, some require premarket submission. See 21 C.F.R. § 807.87 (2019).

<sup>40</sup> See NINA M. HART, CONG. RES. SERV., LSB10424, COVID-19: AN OVERVIEW OF TRADE-RELATED MEASURES TO ADDRESS ACCESS TO MEDICAL GOODS (2020).

<sup>41</sup> See KAREN M. SUTTER, ANDRES B. SCHWARZENBERG & MICHAEL D. SUTHERLAND, CONG. RES. SERV., R46304, COVID-19: CHINA MEDICAL SUPPLY CHAINS AND BROADER TRADE ISSUES (2020).

Importantly, PPE and medical equipment scarcities result in increased virus exposure and aggravate medical treatments for COVID.<sup>42</sup>

For months, Americans looked for PPE, while shortages persisted.<sup>43</sup> Shortages were quickly evident. Describing the situation in March 2020, an Inspector General report from the Department of Health and Human Services (HHS) noted that “widespread shortages of PPE put staff and patients at risk,” with the most needed items being masks (N95, surgical, and face shields), followed by gowns and gloves.<sup>44</sup> This created a series of problems.<sup>45</sup> Health care workers had to reuse and conserve PPE, which is unsafe. Some relied on community donations or non-medical grade items, at times using homemade articles. In early April, a nationwide medical survey reported PPE demand spiking between 3 to 17 times the usual rate, with demand at 8.6 times for face shields, 5 times for gowns, and 3.3 times for surgical masks.<sup>46</sup> In a *Washington Post-Ipsos* poll from May, nearly two-thirds of health care workers cited insufficient masks to filter airborne particles.<sup>47</sup> The poll added that seven in ten of these workers worried about exposing their household to the virus, 58% said they had likely been exposed at work, and one-third said someone at work had been infected.<sup>48</sup> Developed in response to this PPE crisis, the web-based platform *GetUsPPE* continues to report on PPE shortages.<sup>49</sup>

Price hikes and delays in finding new stock characterized this PPE crisis. PPE is mostly sold through supply chains, which contributed to delays and shortages. Supply chains are cross-border systems of production and distribution, organized to take advantage

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<sup>42</sup> See Schlanger, *supra* note 13.

<sup>43</sup> See *id.*; Bob Herman, *Health Workers Fear New Shortages of Protective Equipment*, AXIOS (July 13, 2020), <https://www.axios.com/coronavirus-personal-protective-equipment-masks-problems-ebb82bb1-8429-489b-af64-61df2acb6818.html>; Shawn Radcliffe, *Why We May Run into PPE Shortages Again*, HEALTHLINE (July 16, 2020), <https://www.healthline.com/health-news/why-we-may-run-into-ppe-shortages-again>. For a description of how PPE shortage persisted after the first six months of 2020 and are predicted to last into 2021.

<sup>44</sup> CHRISTI A. GRIMM, OFF. OF INSPECTOR GEN., U.S. DEP’T HEALTH & HUM. SERVS., OEI-06-20-00300, HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC: RESULTS OF A NATIONAL PULSE SURVEY MARCH 23-27, 2020, at 3 (2020), <https://www.oig.hhs.gov/oei/reports/oei-06-20-00300.pdf>.

<sup>45</sup> See *id.* at 9-10.

<sup>46</sup> See *Premier Inc., Survey: As COVID-19 Spreads to New Hotspots, Hospitals Should Prepare for up to a 17X Surge in Supply Demand*, PREMIER (Apr. 1, 2020), <https://www.premierinc.com/newsroom/press-releases/premier-inc-survey-as-covid-19-spreads-to-new-hotspots-hospitals-should-prepare-for-up-to-a-17x-surge-in-supply-demand>.

<sup>47</sup> See *Washington Post-Ipsos Coronavirus Employment Survey, April 27-May 4*, WASH. POST (May 20, 2020, 11:31 AM), <https://www.washingtonpost.com/context/washington-post-ipsos-coronavirus-employment-survey-april-27-may-4/4bd8dd8b-1257-4d5f-b3c1-0af6c38f060d/>; Lenny Bernstein & Alauna Safarpour, *Mask Shortage for Most Health-Care Workers Extended Into May, Post-Ipsos Poll Shows*, WASH. POST (May 20, 2020, 11:30 AM), [https://www.washingtonpost.com/health/mask-shortage-for-most-health-care-workers-extended-into-may-post-ipsos-poll-shows/2020/05/20/1ddb588-9a21-11ea-ac72-3841fcc9b35f\\_story.html](https://www.washingtonpost.com/health/mask-shortage-for-most-health-care-workers-extended-into-may-post-ipsos-poll-shows/2020/05/20/1ddb588-9a21-11ea-ac72-3841fcc9b35f_story.html).

<sup>48</sup> See Bernstein & Safarpour, *supra* note 47.

<sup>49</sup> See *Our Data*, GETUSPPE.ORG, <https://getusppe.org/data/> (last visited July 27, 2020); Suhas Gondi, Adam L. Beckman, Nicholas Deveau, Ali S. Raja, Megan L. Ranney, Rachel Popkin & Shuhan He, *Personal Protective Equipment Needs in the USA During the COVID-19 Pandemic*, 395 LANCET e90 (2020), 10.1016/S0140-6736(20)31038-2; Nancy Crotti, *Study: PPE Shortages Persist Nationwide*, MASS DEVICE (May 15, 2020), <https://www.massdevice.com/study-ppe-shortages-persist-nationwide/>.

of overseas regulations and low labor costs.<sup>50</sup> Supply chains result in low priced imported goods by structuring dedicated manufacturing, transport, and purchases. Supply chain problems in the United States caused price increases of 600% for surgical masks and 200% for medical gowns.<sup>51</sup> Quotes from hospital buyers describe \$0.50 masks sold for \$6.00 and boxes of masks usually priced \$2.28 offered for \$70.00.<sup>52</sup> As new vendors entered the void, American buyers started to deal directly with unknown sources, often overseas, and faced the threat of price gauging. Complicating matters, PPE shipments could be delayed by three to six months.<sup>53</sup> Two things contributed to this: transports from China take three weeks to reach the United States, and China itself was recovering from the first COVID outbreak.<sup>54</sup>

These shortages happen because supply chains prioritize low prices while sacrificing the flexibility to use alternative suppliers or to increase production.<sup>55</sup> PPE is typically imported from overseas producers at low prices. This system depends on predictable supplies from China and anticipates American demand. But, when production or transport is disrupted or demand increases, as in a sudden pandemic, the system loses control over prices, supplies, and delivery times. This explains one aspect of the PPE crisis.

Another dimension involves the trade war, which raised PPE prices and decreased supplies. On March 13, 2020 Chad Bown of the Peterson Institute for International Economics explained how tariffs made PPE more expensive.<sup>56</sup> Bown argued that Section 301 levies “suddenly threatened to cripple” the COVID response and disrupted “access to medical products” when “they [were] needed the most.”<sup>57</sup> He identified applicable tariff rates for PPE and medical goods from China. Using specific products’ tariff schedule codes called “classifications,” the study detailed tariff increases and corresponding decreases in American purchases since the trade war began. For example, the USTR imposed tariff charges of 25% on medical headwear, hand sanitizer, thermometers, and others medical imports from China.<sup>58</sup> Charges of 7.5% applied to goggles, protective clothing, net

<sup>50</sup> For a description of supply chains and PPE, see Kaplan *supra* note 28; SUTTER, SCHWARZENBERG & SUTHERLAND, *supra* note 41. For analysis the influence supply chains exert on global trade, see Grietje Baars, Jennifer Bair, Liam Campling, Dennis Davis, Klaas Hendrik Eller, Dez Farkas, Tomaso Ferrando, Jason Jackson, David Hansen-Miller, Elizabeth Havice, Claire Mummé, Jesse Salah Ovidia, David Quentin, Brishen Rogers, Jaakko Salminen & Benjamin Selwyn, *The Role of Law in Global Value Chains: A Research Manifesto*, 4 LONDON REV. INT’L L. 57 (2016); Dan Danielsen, *Trade, Distribution and Development Under Supply Chain Capitalism*, in WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION 121 (Alvaro Santos, Chantal Thomas & David Trubek eds., 2019).

<sup>51</sup> See HART, *supra* note 40, at 2.

<sup>52</sup> See GRIMM, *supra* note 44, at 4; Jack Nicas, *It’s Bedlam in the Mask Market, as Profiteers Out-Hustle Good Samaritans*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/04/03/technology/coronavirus-masks-shortage.html>.

<sup>53</sup> See GRIMM, *supra* note 44, at 3.

<sup>54</sup> See SUTTER, SCHWARZENBERG & SUTHERLAND, *supra* note 41, at 2.

<sup>55</sup> See James Randall Patrinely Jr., Sean T. Berkowitz, Danny Zakria, Douglas J. Totten, Mumin Kurtulus & Brian C. Drolet, *Lessons from Operations Management to Combat the COVID-19 Pandemic*, 44 J. MED. SYS. 129 (2020).

<sup>56</sup> See Bown, *supra* note 10.

<sup>57</sup> See *id.*

<sup>58</sup> For the sake of simplicity, these names paraphrase the actual identification for the goods. They are not the exact tariff schedule names, typically called classifications. The titles for classifications tend to be quite detailed and long. See *id.* Other goods also subject to additional tariffs include: CT, monitoring, ultrasound, x-ray, and oxygen concentrator equipment. See *id.*

headwear, gloves, and more.<sup>59</sup> Bown summarized that the overall impact of these tariffs was a “sharp decline” in imports of critical products from China. Americans had to pay the higher prices because changing suppliers is difficult, and domestic manufacturers had to pay higher prices for parts and components needed for production.<sup>60</sup>

The United States International Trade Commission (USITC) confirmed that the United States was imposing these additional tariffs. In its April 2020 report to Congress, it found 112 different classifications of imported goods related to the COVID response.<sup>61</sup> In June, an updated report found 203 product classifications, widening its scope to include pharmaceuticals, ingredients to make pharmaceuticals, hospital supplies, and items needed to administer a vaccine.<sup>62</sup> Of these, 57% (116 classifications) were subject to Section 301 tariffs, with 89 classifications subject to the 25% tariff rate and 27 classifications subject to the 7.5% rate.<sup>63</sup> Accordingly, the USTR imposed the higher rate for 44% of COVID-related products and the lower rate for 13% of those items. The USITC also found that thirty PPE classifications were COVID-related.<sup>64</sup> More specifically, twenty-one PPE classifications were subject to Section 301 tariffs.<sup>65</sup> These studies, from Bown and the USITC, show how PPE along with other medical supplies became casualties of the trade war.

Put simply, as national supplies fell dramatically, Americans paid more for PPE needed to fight and avoid COVID. Bown called for an immediate and blanket end to Section 301 tariffs imposed on PPE and medical supplies. Other observers agreed.<sup>66</sup>

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<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See* U.S. INT’L TRADE COMM’N, COVID-19 RELATED GOODS: U.S. IMPORTS AND TARIFFS, PUB. NO. 5047, INVESTIGATION NO. 332-576 (2020), <https://www.usitc.gov/publications/332/pub5047.xlsx> (listing the total number in the Executive Summary).

<sup>62</sup> *See* U.S. INT’L TRADE COMM’N, COVID-19 RELATED GOODS: U.S. IMPORTS AND TARIFFS (UPDATED), PUB. NO. 5073, INVESTIGATION NO. 332-576 (2020), [https://www.usitc.gov/sites/default/files/publications/332/covid-19\\_related\\_goods\\_us\\_imports\\_and\\_tariffs\\_commission.xlsx](https://www.usitc.gov/sites/default/files/publications/332/covid-19_related_goods_us_imports_and_tariffs_commission.xlsx) (listing the total number in the Executive Summary). These names paraphrase the actual identification for the goods.

<sup>63</sup> *See id.*

<sup>64</sup> *See id.* at “Table 1: COVID-19 related goods duty rate and imports at the HTS 10-digit level.” This report defined PPE as “protective materials that are worn” and distinct from COVID tests, sterilization products, oxygen equipment, imaging and diagnostic equipment, non-PPE medical supplies, medicines, and other health care products. *See id.* at “Introduction.”

<sup>65</sup> *See id.*

<sup>66</sup> *See* Robert B. Zoellick, Opinion, *Trump’s Tariffs Leave the U.S. Short on Vital Medical Supplies*, WALL ST. J., Mar. 19, 2020, at A19 (former Trade Representative criticizing economic isolationism and tariffs for PPE and medical supplies); Ryan Young, *Report: Tariff Relief Would Help COVID-19 Recovery*, COMPETITIVE ENTER. INST., July 8, 2020, [https://cei.org/news\\_releases/report-tariff-relief-would-help-covid-19-recovery/](https://cei.org/news_releases/report-tariff-relief-would-help-covid-19-recovery/). *See, e.g.,* Kaplan, *supra* note 28 (analyzing PPE tariff developments); Anabel González, *A Memo to Trade Ministers on How Trade Policy Can Help Fight COVID-19*, PETERSON INST. INT’L ECON.: TRADE & INV. POL’Y WATCH (Mar. 23, 2020, 11:45 AM), <https://www.pie.com/blogs/trade-and-investment-policy-watch/memo-trade-ministers-how-trade-policy-can-help-fight-covid> (proposing trade policy changes for the United States and other countries); Chloe Kent, *How is the US China Trade War Hitting the Medical Device Industry*, MED. DEVICE NETWORK (Aug. 8, 2019), <https://www.medicaldevice-network.com/features/us-china-trade-war-medical-devices/> (describing the call for tariff exemptions from before COVID).

Months later, trade war tariffs still apply to PPE imports with added costs passed on to buyers, workers, and the health care system.<sup>67</sup>

The Trump administration had a series of responses to the PPE crisis, but avoided a blanket end to Section 301 charges for PPE. It continued its trade war posture. This policy called for a clear trade-off: tariffs are necessary to force important changes in China's policies, even if American businesses pay for price hikes and our pandemic response suffers.

The Trump administration's responses to the PPE crisis were piecemeal and insufficient. Seven steps illustrate this. First, the Centers for Disease Control and Prevention (CDC) and the FDA approved changes to allow face masks certified under NIOSH regulations for the COVID response.<sup>68</sup> These are similar to N95 face coverings but were approved for use in settings other than health care, such as construction work. Second, the USTR began approving individual importer's requests to avoid paying the Section 301 charges. Called exclusions, they began on March 6, 2020.<sup>69</sup> Described in more detail below, exclusions provide limited relief, since they are temporary. Third, on March 17, 2020 the CDC changed its recommendations for face masks, suggesting that health care workers could wear less protective surgical masks, reuse masks, and even use homemade items, instead of the prior strict recommendation for N95 masks.<sup>70</sup> It issued similar guidelines for eye protection and gowns.<sup>71</sup> Fourth, on March 18, 2020 the President invoked the Defense Production Act (DPA) to spur American industry to produce PPE and medical equipment.<sup>72</sup> The DPA compels private actors to prioritize sales of needed supplies to the government.<sup>73</sup> Actually procuring supplies is not quick—manufacturers have months to prepare manufacturing capacities and then actually make the items. Eventually the

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<sup>67</sup> See Kaplan, *supra* note 28.

<sup>68</sup> Encompassing a series of steps, these actions began with an Emergency Use Authorization on March 2, pursuant to NIOSH regulations (42 C.F.R. Part 84) and the Food Drugs and Cosmetic Act (21 U.S.C. § 360bbb-3). For a summary, see *FDA News Release: Coronavirus (COVID-19) Update: FDA and CDC Take Action to Increase Access to Respirators, Including N95s, for Health Care Personnel*, FDA (Mar. 2, 2020), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-and-cdc-take-action-increase-access-respirators-including-n95s>. For a description of the regulatory steps at the CDC, FDA, and NIOSH, see Letter from RADM Denise M. Hinton, Chief Scientist, Food & Drug Admin., to Robert R. Redfield, MD, Dir. Ctrs. for Disease Control & Prevention (Mar. 28, 2020), <https://www.fda.gov/media/135763/download>.

<sup>69</sup> The USTR approved exclusions on March 10, 16 and 17. See Kaplan, *supra* note 28.

<sup>70</sup> See *Strategies for Optimizing the Supply of Facemasks*, CDC (June 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/face-masks.html>. For how these regulatory changes were applied, see Zoë Carpenter, *Health Care Workers Are Facing Burdens That Put Everyone at Risk*, NATION (Mar. 25, 2020), <https://www.thenation.com/article/society/healthcare-workers-coronavirus-ppe/>.

<sup>71</sup> See *Strategies for Optimizing the Supply of Isolation Gowns*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/isolation-gowns.html> (last updated Mar. 17, 2020); *Strategies for Optimizing the Supply of Eye Protection*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/eye-protection.html> (last updated July 15, 2020).

<sup>72</sup> See Exec. Order No. 13,909, 85 Fed. Reg. 16,227 (Mar. 23, 2020).

<sup>73</sup> See Bryan Bender & Megan Cassella, *Will Trump Be Able to Get Emergency Medical Supplies Fast Enough?*, POLITICO (Mar. 18, 2020, 7:36 PM), <https://www.politico.com/news/2020/03/18/coronavirus-defense-production-act-trump-136316>.

administration used its DPA powers to secure production contracts specifically for PPE.<sup>74</sup> Fifth, the USTR opened a comment process for importers to submit details on why COVID related goods should not be subject to Section 301 tariffs.<sup>75</sup> Sixth, on March 29, 2020 Project Airbridge provided expedited international transport for PPE and other needed imports.<sup>76</sup> Seventh, the Strategic National Stockpile began distributing PPE and other supplies to states. By April 8, 2020 the stockpile was nearly depleted.<sup>77</sup>

Critics describe these actions as too little, too late. Observers, including members of Congress, complained that it took the administration two months to start distributions from the stockpile and that the federal government did not coordinate PPE procurement.<sup>78</sup> As COVID hospitalizations peaked in many places, this inaction left states to compete with each other for crucial supplies. These impressions reflect larger complaints that the administration did not act fast enough to respond to COVID. Starting in January, it did not recognize the real threat to Americans, support testing, include emergency management in its response, or invoke the DPA until these actions were too late.<sup>79</sup>

As the pandemic persisted, Congress acted to secure PPE and investigate these shortages. On March 27, 2020, it passed the Coronavirus Aid, Relief and Economic

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<sup>74</sup> See Tony Bertuca, *DOD Details Latest Defense Production Act Move to Increase N95 Mask Supply*, INSIDE DEF. (Apr. 21, 2020, 2:00 PM), <https://insidedefense.com/insider/dod-details-latest-defense-production-act-move-increase-n95-mask-supply> (describing PPE production contracts with 3M, O&M Halyward, and Honeywell with expected production by June, within six months, and within ten months respectively); *Release, DOD Announces Defense Production Act Title 3 COVID-19 PPE Project*, U.S. DEP'T DEF. (May 28, 2020), <https://www.defense.gov/Newsroom/Releases/Release/Article/2200654/dod-announces-defense-production-act-title-3-covid-19-ppe-project-22-million-in/> (describing a contract with Hollingsworth & Vose expecting production by August); and Chris Newmarker, *U.S. Defense Department Using Defense Production Act to Boost N95 masks Supply*, MASS DEVICE (Apr. 15, 2020), <https://www.massdevice.com/u-s-defense-department-using-defense-production-act-to-boost-n95-masks-supply/> (reporting a contract for mask decontamination services for various locations nationwide).

<sup>75</sup> See *USTR: Response to Coronavirus Crisis*, OFF. OF THE U.S. TRADE REP. (Mar. 20, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/march/ustr-response-coronavirus-crisis>.

<sup>76</sup> For how Project Airbridge started and its challenges, see Memorandum from Carolyn B. Maloney, Chairwoman, H. Comm. on Oversight & Reform, to James E. Clybourn, Chairman, Select Subcomm. on the Coronavirus 4 (July 2, 2020), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Project%20Airbridge%20Memo%2007-02-20.pdf>.

<sup>77</sup> See Press Release, Carolyn B. Maloney, Chairwoman, H. Comm. on Oversight & Reform, New Document Shows Inadequate Distribution of Personal Protective Equipment and Critical Medical Supplies to States (Apr. 8, 2020), <https://oversight.house.gov/news/press-releases/new-document-shows-inadequate-distribution-of-personal-protective-equipment-and>.

<sup>78</sup> See Memorandum from Carolyn Maloney, *supra* note 76; Michael Biesecker, *HHS: Federal Stocks of Protective Equipment Nearly Depleted*, AP (Apr. 9, 2020), <https://apnews.com/a464316e25560d393bd07a021b7e81ba> (placing criticism of the stockpile in the context of response to COVID). For a description of claims of political preferences between states, limited transparency, and federal confiscation of supplies for states, see Adam Clark Estes, *America's Emergency Medical Stockpile Is Almost Empty. Nobody Knows What Happens Next*, VOX (Apr. 7, 2020, 11:20 AM), <https://www.vox.com/recode/2020/4/3/21206170/us-emergency-stockpile-jared-kushner-almost-empty-coronavirus-medical-supplies-ventilators>.

<sup>79</sup> See Michael Biesecker, *US 'Wasted' Months Before Preparing for Coronavirus Pandemic*, AP (Apr. 5, 2020), <https://apnews.com/090600c299a8cf07f5b44d92534856bc>; Marisa Fernandez, *Timeline: How the U.S. Fell Behind on the Coronavirus*, AXIOS (Apr. 10, 2020), <https://www.axios.com/coronavirus-timeline-trump-administration-testing-c0858c03-5679-410b-baa4-dba048956bbf.html>.

Security Act (CARES Act), which includes PPE provisions.<sup>80</sup> Congress also used its oversight powers to attain information about PPE shortages, the administration's response, and tariffs.<sup>81</sup> For example, on March 21, 2020 chairs of six House committees requested a briefing with HHS Secretary Alex Azar. After summarizing "widespread shortages," they asked about plans to "acquire and distribute" PPE, how the HHS would use the DPA, and how it would work with the Federal Emergency Management Agency (FEMA).<sup>82</sup> On April 6, 2020, the chairs of the House Committee on Ways and Means and the Senate Committee on Finance asked the USITC for details on tariff rates for goods related to the COVID response.<sup>83</sup> They described "an urgent public health crisis on the scale that we have not encountered in over a century" that was "severely exacerbated by disruptions and deficiencies in supply" of needed equipment.<sup>84</sup> Next, Senators Thomas R. Carper (D-DE) and Pat Toomey (R-PA) requested that the USTR "immediately and broadly suspend 301 tariffs" on products needed to manufacture critical medical supplies.<sup>85</sup> They explained that there was "an extreme shortage" of "supplies needed to respond" to the pandemic, including PPE.<sup>86</sup> On another front, members of Congress proposed legislation to address COVID's racial disparities and improve PPE supplies in the United States.<sup>87</sup>

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<sup>80</sup> See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No: 116-136, 134 Stat. 281 (codified in scattered sections of U.S.C.) (Section 3102 requires that the strategic national stockpile include PPE; Section 3101 requires the HHS and National Academy of Sciences, Engineering, and Medicine report on the security of the United States medical product supply chain; Section 3103 revises the liability protections for use of NIOSH approved masks; Section 12003 requires the HHS to consider distributing PPE to prison for inmates and staff; Section 20005 and 2009 focus on similar requirements for Veterans Administration facilities.).

<sup>81</sup> For example, House and Senate committees requested that the USITC investigate PPE supplies, see USITC, *USITC To Investigate Industry and Supply Chain Conditions Affecting COVID-19 Industry Sectors and Products*, New Release 20-097, Inv. No. 332, -580, (Aug. 21, 2020), [https://www.usitc.gov/press\\_room/news\\_release/2020/er082111634.htm](https://www.usitc.gov/press_room/news_release/2020/er082111634.htm).

<sup>82</sup> Letter from Chairwoman Carolyn B. Maloney, H. Comm. on Oversight & Reform, Ranking Member Jim Jordan, H. Comm. on Oversight & Reform, and Members of the H. Comm. on Oversight & Reform to Alex M. Azar II, U. S. Sec. of Health and Hum. Servs, and Robert Kadlee, Assistant Sec. for Preparedness and Response, Dep't of Health and Hum. Servs. (Mar. 21, 2020), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-21.CBM%20SFL%20JR%20Rouda%20GEC%20to%20HHS%20re%20PPE%20%281%29.pdf>.

<sup>83</sup> See Letter from Richard E. Neal, Chairman, Comm. on Ways and Means, & Charles E. Grassley, Chairman, Comm. on Fin., to David Johanson, Chairman, U.S. Int'l Trade Comm. (Apr. 6, 2020), [https://usitc.gov/research\\_and\\_analysis/imports\\_covid\\_19\\_request\\_letter.pdf](https://usitc.gov/research_and_analysis/imports_covid_19_request_letter.pdf).

<sup>84</sup> See *id.*

<sup>85</sup> See Letter from Thomas R. Carper, U.S. Senator, & Pat Toomey, U.S. Senator, to Robert E. Lighthizer, U.S. Trade Rep. (Apr. 17, 2020), [https://www.carper.senate.gov/public/\\_cache/files/d/e/de9a8045-c5f9-4903-861a-53b0176de96d/A69A0D7987C83D56CAFBDE3C25DC6711.2020.04.17---letter-to-ustr-re-emergency-tariff-suspensions-for-medical-supply-chain---final.pdf](https://www.carper.senate.gov/public/_cache/files/d/e/de9a8045-c5f9-4903-861a-53b0176de96d/A69A0D7987C83D56CAFBDE3C25DC6711.2020.04.17---letter-to-ustr-re-emergency-tariff-suspensions-for-medical-supply-chain---final.pdf).

<sup>86</sup> See *id.*

<sup>87</sup> The COVID-19 Racial and Ethnic Disparities Task Force Act would require data-driven recommendations to allocate crucial resources, including PPE, in communities with racial disparities. See Press Release, *Durbin: If We Don't Address Racial Health Care Disparities, Shame On Us*, DICK DURBIN U.S. SENATOR ILL. (May 5, 2020), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-if-we-dont-address-racial-health-care-disparities-shame-on-us>. The Equitable Data Collection and Disclosure on COVID-19 Act would require the CDC to post online data regarding "testing, treatment, and fatalities, disaggregated by race, ethnicity, sex, age, socioeconomic status, disability status, county, and other demographic information." *Id.*; see also NCPA Staff, *Senators Toomey and Hassan coordinate to make PPE more accessible*, NORTHCENTRALPA.COM (Aug. 10, 2020), <https://www.northcentralpa.com/life/covid->

Congress also heard from federal agents who reported on these shortages or tried to spur faster responses to COVID. On May 26, 2020, Christi A. Grimm testified before the House Oversight Committee.<sup>88</sup> She served as the principle investigator for the mentioned HHS report.<sup>89</sup> The Trump administration replaced Grimm at the HHS, allegedly because the report's conclusions drew negative attention to the administration's inaction.<sup>90</sup> This came after former director of the United States Biomedical Advanced Research and Development Authority, Rick Bright, explained that the administration failed to take "critical steps" in January and February 2020.<sup>91</sup> He described that he was removed because he disagreed with administration positions.

In sum, PPE was in short supply as a coronavirus pandemic initially hit the United States during the first half of 2020. Imposed since 2018, tariffs not only increased prices for these desperately needed products, but they resulted in decreased PPE imports. Despite knowing about COVID's pandemic risks since January, the federal government did too little far too late to respond to the PPE crisis. It did not eliminate PPE or medical equipment from Section 301 tariffs. Instead, the administration preferred to stay the course with the posture that levies are needed during a trade war.

## II. THE UNITED STATES-CHINA TRADE WAR RESULTS IN SECTION 301 TARIFFS.

The United States imposed additional tariffs on PPE pursuant to Section 301 of the Trade Act of 1974 (Trade Act), intended to combat unfair trade practices by foreign states.<sup>92</sup> Section 301 is one of many measures that are part of a trade war with China. One objective of this trade war is to change Chinese industrial policies, implicating foreign and economic relations between the two countries. Specific to trade, this conflict involves thousands of goods subject to Section 301 levies; separate American tariffs on steel (Section 232) and solar panels and washing machines (Section 201); and tariff retaliations from China.<sup>93</sup> Before the Trump administration initiated the China case in 2017, the last Section 301 investigation was in 2013.<sup>94</sup> To contextualize PPE shortages, this part of the Article describes basic elements of Section 301 and the China Case. This analysis of

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19\_updates/senators-toomey-and-hassan-coordinate-to-make-ppe-more-accessible/article\_c9843b5c-d9d1-11ea-9e1b-03003d3e876a.html (describing S.4497 Stop PPE Taxes Act of 2020 and S.4501 Strategic Global Supply Chains Act of 2020).

<sup>88</sup> See Dan Diamond, *HHS Watchdog Vows Independence Amid Trump Actions*, POLITICO (May 26, 2020, 2:30 PM), <https://www.politico.com/news/2020/05/26/hhs-watchdog-vows-independence-amid-trump-actions-282249>.

<sup>89</sup> See CHRISTI A. GRIMM, OFF. OF INSPECTOR GEN., U.S. DEP'T HEALTH & HUM. SERVS., OEI-06-20-00400, HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC: RESULTS OF A NATIONAL PULSE SURVEY MARCH 23-27, 2020, at 3 (2020), <https://www.oig.hhs.gov/oei/reports/oei-06-20-00300.pdf>.

<sup>90</sup> See Peter Baker, *Trump Moves to Replace Watchdog Who Identified Critical Medical Shortages*, N.Y. TIMES (May 4, 2020), <https://www.nytimes.com/2020/05/01/us/politics/trump-health-department-watchdog.html?referringSource=articleShare>.

<sup>91</sup> See Marisa Fernandez, *Ousted Vaccine Chief: I was Told My Pandemic Warnings Were "Causing a Commotion"*, AXIOS (May 14, 2020), <https://www.axios.com/rick-bright-testimony-coronavirus-response-d1362f5e-9033-481b-afb7-5e1a716f52bc.html>.

<sup>92</sup> See 19 U.S.C. § 2411 (a)-(c).

<sup>93</sup> For a description of these tariff actions, see BROCK R. WILLIAMS & KEIGH E. HAMMOND, CONG. RSCH. SERV., R45949, U.S.-CHINA TARIFF ACTIONS BY THE NUMBERS (2019).

<sup>94</sup> See SCHWARZENBERG, CONG. RSCH. SERV., IF11346, *supra* note 25. There have been 127 Section 301 cases since 1974. *See id.*

Section 301 illustrates how executive action can prioritize tariffs. The PPE crisis is one socioeconomic impact resulting from these executive choices.<sup>95</sup> As described below, the PPE crisis adds to racial disparity in the COVID response.

“Section 301” refers to a set of American trade measures in sections 301 to 310 of the Trade Act.<sup>96</sup> Relevant to the PPE crisis, the Section 301 China Case developed in three stages. In chronological order, the USTR: (1) investigated foreign conduct that hurt American commerce, (2) imposed retaliatory sanctions to remedy this, and (3) decided which particular goods, if any, were excluded from these sanctions. PPE imports became part of the second and third stages.

For the first stage, the USTR investigates possible trade harms. It examines if the foreign nation violates a trade agreement, pursues “unjustifiable” action that “burdens or restricts” American commerce, or engages in “unreasonable or discriminatory” action that “burdens or restricts” American commerce.<sup>97</sup> The USTR conducts the investigation and recommends sanctions or not, in consultation with an intra-agency committee and the private sector.<sup>98</sup> It consults with the foreign country before starting the investigation.<sup>99</sup> Referred to as the “determination,” the USTR makes recommendations based on the investigation.<sup>100</sup> As described below, this investigation started the China Case, which is currently in the retaliation stage.

Initiated on August 24, 2017, the investigation into China regards “Technology Transfer, Intellectual Property and Innovation.”<sup>101</sup> The USTR issued its investigation report on March 22, 2018 with four general findings.<sup>102</sup> First it found that China forces technology transfers with government mechanisms including administrative procedures, joint venture requirements, and others. Additionally, its licensing policies deprive American companies from setting market-based terms in technology transactions. Next, China directs investments in American companies to control strategic assets, such as for the Made in China 2020 initiative. Lastly, China supports the cyber theft of trade secrets and IP. Highlighting economic harms in technology and IP, these findings are the reason for American retaliation in the China Case.

In a second stage called retaliation, Section 301 provides for trade sanctions, including various measures that the USTR can choose from, one of which is tariffs.<sup>103</sup> The

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<sup>95</sup> Domestic law typically addresses the economic dislocations and social consequences of trade policies. Trade policies usually focus on the international arena, such as reaching or complying with trade agreements or treatment for inbound foreign imports, but domestic law responds to its effects, *see c.f.* Timothy Meyer, *Trade, Redistribution and the Imperial Presidency*, 44 YALE J. INT’L L. ONLINE 16 (2018); Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 2 (2019).

<sup>96</sup> *See* 19 U.S.C. § 2411.

<sup>97</sup> “Unreasonable” is defined as “unfair and “inequitable” and “not necessarily in violation of, or inconsistent with” international obligations. 19 U.S.C. § 2411(d)(3)(A). “Unjustifiable” is defined as in violation of, or inconsistent with these obligations. 19 U.S.C. § 2411(d)(4)(A). Discriminatory actions include the denial of national or most-favored- nation treatment. 19 U.S.C. § 2411(d)(5).

<sup>98</sup> *See* 19 U.S.C. § 2155.

<sup>99</sup> *See* 19 U.S.C. § 2413(a)(1).

<sup>100</sup> *See* 19 U.S.C. § 2414.

<sup>101</sup> It was initiated on August 18, 2017. *See* Initiation of Section 301 Investigation, 82 Fed. Reg. 40,213 (Aug. 24, 2017), <https://ustr.gov/sites/default/files/enforcement/301Investigations/FRN%20China301.pdf>.

<sup>102</sup> *See* OFF. OF THE U.S. TRADE REP., FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, *supra* note 26.

<sup>103</sup> Other measures include suspending trade concessions and imposing import restrictions. *See* 19 U.S.C. § 2411(b)-(c).

United States applies these sanctions in order to compel a change in foreign practices with the objective that added economic costs of exporting to the United States will motivate a change. During this stage, the USTR designates a list of goods that will be subject to additional tariffs. The USTR issues a list proposal along with a Notice-and-Comment announcement in the *Federal Register*.<sup>104</sup> It requests comments on the potential economic harm caused by additional tariffs.<sup>105</sup> Based on public hearings and statements received in the hearing or in response to the Notice-and-Comment, the USTR, in consultation with other agencies, determines what goods warrant additional tariffs and their applicable tariff rate.

These executive choices result in predictable negative socioeconomic impacts because additional tariffs increase the price paid for products in the United States. The PPE industry predicted the potential negative consequences. For instance, during this stage in the China Case, distributors of PPE and medical products asked the USTR to remove their products from the tariff list.<sup>106</sup> In a public hearing, they explained that PPE is a “critical component of our nation's response to public health emergencies, such as Ebola.”<sup>107</sup> When the USTR decided to keep these products on the tariff list, it effectively prioritized tariffs.

As the China Case entered the retaliation stage, the United States and China both publicly threatened and proceeded with multiple escalating tariff rounds. On March 22, 2018, President Trump authorized additional tariffs for imports from China.<sup>108</sup> Consistent with the President's prior comments, the USTR predicted that imports from China would have a 25% tariff rate.<sup>109</sup> The USTR deployed retaliatory tariffs in four rounds. The first two rounds applied the 25% rate on July 6 and August 23 of 2018, for an estimated \$34 billion and \$16 billion in imports respectively.<sup>110</sup> On June 15, 2019, a third round imposed this rate to an additional \$200 billion in imports.<sup>111</sup> Later that year, a fourth round was divided into two lists, 4A and 4B. The USTR deployed List 4A on September 1, 2019, with a 15% tariff rate for \$126 billion in imports.<sup>112</sup> Then, announced on January 15, 2020 in a “Phase One Agreement,” the United States and China agreed to stop new rounds of

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<sup>104</sup> See, e.g., Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301, 83 Fed. Reg. 14,906 (Apr. 6, 2018), <https://ustr.gov/sites/default/files/enforcement/301Investigations/FRN301.pdf>.

<sup>105</sup> This includes whether increased duties on a specific product help eliminate unfair economic practices and cause “disproportionate economic harm” to American interests. See Notice of Action, 83 Fed. Reg. 14,906, 14,908.

<sup>106</sup> See *Section 301 Tariffs Public Hearing: Hearing Before the U.S. Trade Rep. 301 Comm.*, at 386 (Aug. 20, 2018), <https://ustr.gov/sites/default/files/enforcement/301Investigations/0820USTR.pdf> (statement from Matt Rowan, President, Health Indus. Distribs. Ass'n) [hereinafter *Rowan Testimony*].

<sup>107</sup> See *id.*

<sup>108</sup> See Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13,099 (Mar. 22, 2018).

<sup>109</sup> These determinations are pursuant to sections 301(b), 301(c), and 304(a), codified at 19 U.S.C. § 2411(b), 2411(c), 2414(a). See Notice of Action, 83 Fed. Reg. 14,906.

<sup>110</sup> See WAYNE M. MORRISON, CONG. RSCH. SERV., IF10708, ENFORCING U.S. TRADE LAWS: SECTION 301 AND CHINA 1 (2019).

<sup>111</sup> The prior September, a 10% tariff rate had been imposed on these goods. See *id.*

<sup>112</sup> See WILLIAMS & HAMMOND, CONG. RSCH. SERV., IN10943, *supra* note 9, at 4.

tariffs.<sup>113</sup> This agreement, implemented on February 14, 2020, suspended List 4B.<sup>114</sup> It kept the List 4A tariff rate at 7.5% and kept the rates for the three prior rounds.<sup>115</sup> By then, China was deep into fighting the COVID epidemic, while virus spread in the United States was just becoming apparent. As of November 2020, this is where retaliation in the China Case remains.

In the third stage of a Section 301 case, goods may be excluded from the additional tariff charges. Specifically, private parties request that the USTR remove a particular goods classification from the tariff list, with the USTR then approving or denying these. For this, private parties submit comments and provide testimony in response to the USTR's Notice-and-Comment requesting information on the product's supply.<sup>116</sup> Initially, in June 2018, long before COVID, the USTR developed an exclusion process.<sup>117</sup> This was the first time that the USTR established a process to request exclusions for 301 tariffs.<sup>118</sup>

In 2019, noting that their products would likely be subject to a 25% duty, producers of PPE and medical supplies again requested that the USTR remove their goods from the tariff list.<sup>119</sup> This time the producers asked to be excluded from the tariff lists.<sup>120</sup> They requested this after the USTR announced the tariff lists and included products from these producers.<sup>121</sup> The producers predicted what eventually occurred in 2020, i.e. the PPE crisis.<sup>122</sup> Medical supplies and PPE makers explained that Section 301 tariffs would immediately increase costs for "hospitals, surgery centers, long-term care facilities, individual consumers, and government programs" with no real alternative source for the products than China.<sup>123</sup> Specific to a pandemic, they detailed compromised supply chains,

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<sup>113</sup> See *Economic and Trade Agreement Between the Government of the United States of America and the Government of The People's Republic of China Text*, OFF. OF THE U.S. TRADE REP. (Jan. 15, 2020), <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text>.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> The USTR requests information regarding the product and its availability from non-Chinese sources, attempts to procure it from the United States and other countries, reviews whether the imposition of Section 301 tariffs causes severe economic harm to American interests, and determines the product's importance to the Made in China 2025 program, see for example, *Procedures To Consider Requests for Exclusion*, 83 Fed. Reg. 32,181 (July 11, 2018). In the past, such exclusions were based on the USTR finding that in extraordinary cases the 301 action would cause an "adverse impact" on United States economy "substantially out of proportion to benefits" of the action, see 19 U.S.C. § 2411(a)(2)(B) (iv), or "would cause serious harm to the national security," see 19 U.S.C. § 2411 (a)(2)(B)(iv-v).

<sup>117</sup> See, e.g., *Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301*, 83 Fed. Reg. 28,710 (June 20, 2018).

<sup>118</sup> See ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., IF11582, SECTION 301: TARIFF EXCLUSIONS ON U.S. IMPORTS FROM CHINA (2020).

<sup>119</sup> See *Section 301 Tariffs Public Hearing: Hearing Before the U.S. Trade Rep. 301 Comm.*, at 191-92 (June 20,

2019) (testimony of Lara Simmons, Medline Indus., Inc.), [https://ustr.gov/sites/default/files/enforcement/301Investigations/Section\\_301\\_Hearing\\_Transcript\\_on\\_Proposed\\_Tariffs\\_Day\\_4.pdf](https://ustr.gov/sites/default/files/enforcement/301Investigations/Section_301_Hearing_Transcript_on_Proposed_Tariffs_Day_4.pdf) [hereinafter *Simmons Testimony*]; see *id.* at 197-98 (testimony of Linda O'Neill, Health Indus. Distribs. Ass'n) [hereinafter *O'Neill Testimony*].

<sup>120</sup> *Simmons Testimony*, *supra* note 119; *O'Neill Testimony*, *supra* note 119.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.* at 196, 201.

<sup>123</sup> See *id.* at 191-92.

which would put public health preparedness at risk.<sup>124</sup> They pointed to recent viral epidemics, such as Ebola and H1NI, as proof of when demand for PPE increases fivefold.<sup>125</sup> In these circumstances, PPE was “critical” to any response.<sup>126</sup> This was the second attempt by PPE producers and distributors to avoid additional tariffs.

Some PPE products did have their exclusion requests approved. For instance, face masks received a partial exclusion from the 7.5% tariff rate, announced on March 17, 2020.<sup>127</sup> The USTR did not announce many PPE exclusions, such as for goggles, medical gloves, textile gloves, or disposable hospital apparel, until after the COVID outbreak in the United States.<sup>128</sup> These approved exclusions applied retroactively based on when the Section 301 tariff rate was imposed and expired on August 7 or September 1, 2020.<sup>129</sup>

However, beginning in 2018, the USTR did not approve many PPE exclusions.<sup>130</sup> The following protective items were subject to the 25% tariff rate without any exclusion: headgear, plastic aprons, protective aprons, garments made of rubber, and textiles reinforced with rubber.<sup>131</sup> These products were similarly subject to the 7.5% tariff rate: surgical gowns, gloves, hair nets, patient gowns, hospital gowns, and scrubs.<sup>132</sup> For these products, PPE importers would have to pay these added taxes when their goods entered the United States.<sup>133</sup> Customs officials would start imposing these charges depending on when they were announced, as part of Section 301 tariff round 1, 2, 3 or 4A.<sup>134</sup> By not approving these exclusions for PPE, the USTR reaffirmed its prioritization of tariffs over public health readiness.

After COVID became an American emergency, the USTR reacted but did not shift its position that PPE goods would be part of a Section 301 retaliation.<sup>135</sup> It began considering items needed for the pandemic response.<sup>136</sup> This came as the USTR announced a supplemental comment request on March 20, 2020.<sup>137</sup> The USTR invited comments

<sup>124</sup> See *id.* at 196, 201.

<sup>125</sup> See *O’Neill Testimony*, *supra* note 119.

<sup>126</sup> See *id.*

<sup>127</sup> This included N95 respirators, surgical masks, disposable masks, shoe covers, and textile face masks with plastic face shields. This exclusion was retroactively applied to include additional duties paid since September 1, 2019. See U.S. INT’L TRADE COMM’N, *supra* note 62, at “Table 3: Products listed in table 1 that are excluded from Section 301 duties” Harmonized Tariff Schedule (HTS) 10-digit code: 6307.90.9889.

<sup>128</sup> See *id.*, at HTS 10-digit code: 9004.90.0000, 3926.20.9050, 4015.19.0510, 4015.19.0550, 6116.10.6500, 6210.10.5000

<sup>129</sup> See *id.*

<sup>130</sup> See Josh Zumbrun & Anthony DeBarros, *U.S. Grants Tariff Exemptions for More Medical-Goods from China*, WALL ST. J. (Mar. 13, 2020, 4:52 PM), <https://www.wsj.com/articles/u-s-grants-tariff-exemptions-for-more-medical-goods-from-china-11584125840>.

<sup>131</sup> See U.S. INT’L TRADE COMM’N, *supra* note 62, at HTS 10-digit codes: 3926.20.9010, 4015.19.1010, 4015.90.0050, 6505.00.9089.

<sup>132</sup> See *id.* at HTS 10-digit codes: 6113.00.1012, 6210.50.5555, 6211.43.1091, 6211.42.1081, 6216.00.5420, 6505.00.0100, 6505.00.9089.

<sup>133</sup> See Bown, *supra* note 10.

<sup>134</sup> See WAYNE M. MORRISON, CONG. RSCH. SERV., IF10708, ENFORCING U.S. TRADE LAWS: SECTION 301 AND CHINA 1 (2019).

<sup>135</sup> See Ana Swanson, *Trump Trade Official Defends China Deal and Criticizes the W.T.O.*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/business/economy/us-trade-china-tariffs.html> (reporting an administration preference for PPE tariffs five months after the virus entered the country).

<sup>136</sup> See *USTR: Response to Coronavirus Crisis*, *supra* note 75.

<sup>137</sup> See *id.*

regarding “tariff actions and relevant responses to the coronavirus.”<sup>138</sup> Earlier that month, it started approving exclusions for PPE and medical products,<sup>139</sup> without announcing them as COVID related.<sup>140</sup>

The USTR’s March 20 request focused on “medical-care products needed to address the COVID-19 outbreak” and possible “modifications to remove duties from additional medical-care products.”<sup>141</sup> It asked for a particular explanation of “how [each particular] product relates to the response.”<sup>142</sup> This explanation could include whether the item is directly used to treat the virus, limit the outbreak, or produce needed “medical-care products.”<sup>143</sup> For three months after this USTR announcement, it was unclear how the USTR would use these pandemic related comments.<sup>144</sup> By July 2020, the USTR received over 600 comments regarding COVID-related products.<sup>145</sup> On its webpage, it stated that it was “not planning to hold hearings” for these products and how Section 301 tariffs impact them.<sup>146</sup> It did request public comments on whether exclusions from these duties should be extended beyond their September 1, 2020 deadline.<sup>147</sup> This means that the USTR considered extending general exclusions from additional tariffs. USTR consideration is not specific to COVID-related products. It is unlikely that that PPE products will receive a blanket exclusion from Section 301 tariffs. Accordingly, PPE products may only receive tariff relief after the USTR reviews and then approves an exclusion request for a particular product classification.

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<sup>138</sup> *See id.*

<sup>139</sup> This included PPE such as examination gloves, single-use surgical drapes, single-used and medical masks, and “certain other protective articles” and various medical equipment, medical parts, and sanitation items. *See* Lars-Erik Hjelm, Suzanne Kane, Emily Fuller Opp & Andrew Schlossberg, *USTR Requests Comments on Section 301 Tariffs on COVID-19 Related Products*, JD SUPRA (Mar. 24, 2020), <https://www.jdsupra.com/legalnews/ustr-requests-comments-on-section-301-44066/>. It also included patient bags, medical waste disposal bags. *See* Zumbun & DeBarros, *supra* note 130.

<sup>140</sup> For an initial description of this, see Bown, *supra* note 10. For these exclusions in March, see Notice of Product Exclusions, 85 Fed. Reg. 13,970 (March 10, 2020) and 85 Fed. Reg. 15,244 (Mar. 17, 2020) (applying exclusions for tariffs since Sept. 1, 2019 with exclusions expiring Sept. 1, 2020); Notice of Product Exclusions, 85 Fed. Reg. 15,015 (Mar. 16, 2020) (applying exclusions for tariffs since September 24, 2018, and with exclusions expiring August 7, 2020).

<sup>141</sup> *See* Request for Comments on Additional Modifications to the 301 Action to Address COVID-19: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property and Innovation, 85 Fed. Reg. 16,987 (2020).

<sup>142</sup> *See id.*

<sup>143</sup> *See id.* The USTR began this separate request, since the public comment period window for exclusions had closed before COVID. *See* Mark K. Neville, Jr., *Trade in the Time of COVID-19: Make America Healthy Again!*, 31 J. INT’L TAX’N 30 (2020).

<sup>144</sup> *See* SCHWARZENBERG, CONG. RES. SERV., IF11582, *supra* note 118, at 2.

<sup>145</sup> *See* Request for Comments on Additional Modifications to the 301 Action to Address COVID-19, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=USTR-2020-0014> (last visited July 31, 2020).

<sup>146</sup> *See* FAQs FOR REQUEST FOR COMMENTS ON ADDITIONAL MODIFICATIONS TO THE 301 ACTION TO ADDRESS COVID-19: CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION, [https://ustr.gov/sites/default/files/enforcement/301Investigations/FAQs\\_on\\_Additional\\_Modifications\\_to\\_Address\\_COVID-19.pdf](https://ustr.gov/sites/default/files/enforcement/301Investigations/FAQs_on_Additional_Modifications_to_Address_COVID-19.pdf) (last updated June 26, 2020).

<sup>147</sup> *See* Request for Comments Concerning the Extension of Particular Exclusions of Particular Exclusions Granted Under the \$300 Billion Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology, Transfer, Intellectual Property, and Innovation, 85 Fed. Reg. 38,482 (2020).

Exclusions provide minimal relief from the tax burdens felt by Americans from Section 301 retaliation. In most cases these imports cost more to enter the United States, and this cost is passed to domestic consumers.<sup>148</sup> An exclusion requires a stakeholder to affirmatively make a request. But most importantly, even after the slow process, the USTR rarely approves such requests. For instance, through January 31, 2020, the USTR received 52,746 exclusion requests and only approved 13% of them, while denying 87% of them.<sup>149</sup> In July, the USTR extended the exclusions for some—not all—goods that had been previously approved.<sup>150</sup> These determinations do not mention any COVID-related products. In September, the USTR extended more exclusions until December 31, 2020, but not for all of the ones initially approved.<sup>151</sup> As 2020 ended, the USTR approved exclusions for some medical-care products to address COVID-19, effective January 1, 2021 to March 31, 2021.<sup>152</sup> These exclusions are primarily for medical equipment and products but include some PPE.<sup>153</sup>

In sum, tariffs on PPE are part of a larger Section 301 case, investigating and then retaliating against technology transfers and IP policies and practices in China.<sup>154</sup> Consequently, the administration has imposed tariff increases, up to 25%, for over a thousand imported goods, including PPE.<sup>155</sup> With Section 301, President Trump was able to follow through with a campaign promise and apply tariffs to force changes in China.<sup>156</sup> More importantly, Section 301 allows the executive branch to control when to deploy additional tariffs, how long they are imposed, and at what tariff rate.

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<sup>148</sup> See Smialek & Swanson, *supra* note 11.

<sup>149</sup> These figures refer to approvals and denials as of October 25, 2020, see CONG. RSCH. SERV., SECTION 301: TARIFF EXCLUSIONS ON U.S. IMPORTS FROM CHINA, IF11582 (2020).

<sup>150</sup> See, e.g., Notice of Product Exclusion Extensions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 85 Fed. Reg. 41,267 (July 9, 2020) (announcing extensions until Dec. 31, 2020); Notice of Product Exclusion, 84 Fed. Reg. 43,291 (July 12, 2020) (announcing exclusions applied retroactively); Request for Comments Concerning the Extension of Particular Exclusions Expiring in October 2020 Granted Under the \$34 Billion Action Pursuant to Section 301, 85 Fed. Reg. 46,777 (Aug. 3, 2020) (requesting comments regarding possible extensions for exclusions expiring on Oct. 2, 2020).

<sup>151</sup> See, e.g., Notice of Product Exclusions Extensions, 85 Fed. Reg. 54616 (Sept. 2, 2020). See also David Lawder, *U.S. Extends some China Tariff exclusions only through year end*, REUTERS (Sept. 15, 2020), <https://uk.reuters.com/article/us-usa-trade-china-tariffs/u-s-extends-some-china-tariff-exclusions-only-through-year-end-idUKKBN25S5CT>.

<sup>152</sup> See Notice of Product Exclusion Extensions and Additional Modifications: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 85 Fed. Reg. 85,831 (Dec. 29, 2020).

<sup>153</sup> This includes aprons, gloves in Annex C and face shields, face masks, gloves, and shoe covers in Annex D. See *id.*

<sup>154</sup> See *supra* Part II.

<sup>155</sup> See Bown, *supra* note 10; U.S. INT'L TRADE COMM'N, *supra* notes 61-62.

<sup>156</sup> For examples of Trump discussing China during the 2016 president campaign, see Veronica Stracqualursi, *10 Times Trump attacked China and its trade relations with the US*, ABC NEWS (Nov. 9, 2017, 6:55AM), <https://abcnews.go.com/Politics/10-times-trump-attacked-china-trade-relations-us/story?id=46572567>; Nick Corasaniti, Alexander Burns & Binyamin Appelbaum, *Donald Trump Vows to Rip Up Trade Deals and Confront China*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/06/29/us/politics/donald-trump-trade-speech.html>.

### III. SECTION 301 INSULATES CHOICES TO FAVOR TARIFFS OVER EMERGENCY PREPAREDNESS.

The Trump administration employed additional taxes on imports from China with statutory powers delegated by Congress in Section 301. Even though the Constitution expressly provides that tariff powers belong to Congress,<sup>157</sup> the executive branch may impose these types of tariffs in response to various situations, with minimal or no checks by Congress or the courts.<sup>158</sup> An administration can apply these duties when it determines that imports threaten national security (Section 232),<sup>159</sup> when import quantities harm domestic industry (Section 201),<sup>160</sup> or when foreign states engage in unfair trade practices (Section 301).<sup>161</sup> This Article refers to these as “executive tariffs,” since the executive branch determines when they are imposed, how this happens, and for how long. Executive tariffs have an established place in American trade policies and the Trump administration increased their use.<sup>162</sup> This runs contrary to free trade liberalizations and Congressional control of tariff policies generally.<sup>163</sup> But importantly, executive tariffs create significant economic burdens in the United States felt by consumers and importers. For instance, as imports faced added custom levies PPE prices increased and supplies decreased. As explained in Part IV, this has racial consequences for virus exposure and COVID treatments. Black, Indigenous, and People of Color disproportionately catch COVID, die from it, and makeup the majority of essential workers. Applied pursuant to Section 301, tariffs decreased PPE supplies and increased their prices most needed by these patients and workers.

This Part describes executive tariffs as one legal aspect of the trade war. It focuses on how the power to impose executive tariffs: (a) effectively insulates executive actions from governmental checks, (b) aggravates the COVID response by reducing available PPE, and (c) can be reformed by requiring more of a role for Congress. With this delegated power, the Trump administration prioritized tariffs on Chinese goods over preparedness for American public health and healthcare systems.

#### A. *Traditionally Presidents Freely Deploy Section 301.*

The expanded use of executive tariffs raises important separation of powers questions regarding how Congress and the executive branch devise and implement trade

<sup>157</sup> U.S. CONST. art. I, § 8, cls. 1, 3 (stating Congress has the power “To lay and collect Taxes, Duties, Imposts, and Excises” and “To regulate Commerce with Foreign Nations”).

<sup>158</sup> For a description of how these delegations started historically, see Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 UCLA L. REV. 285, 287 (1986).

<sup>159</sup> See Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862.

<sup>160</sup> See Trade Act of 1974 § 201, 19 U.S.C. § 2251.

<sup>161</sup> See Trade Act of 1974 § 301, 19 U.S.C. § 2411.

<sup>162</sup> Congress and the President do work together to craft trade policy. “Fast track” authority exemplifies this when Congress approves executive-led trade negotiations for international agreements, such as recently with the United States-Mexico-Canada Agreement. For a description of this, see Trade Act of 1974 § 151, 19 U.S.C. § 2191.

<sup>163</sup> See, e.g., Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 STAN. L. REV. 1097 (2020) (illustrating how these tariffs function as security-based exceptions to international trade commitments and proposing new delegation standards to offset these harms); Timothy Meyer & Ganesh Sitaraman, *Trade and Separation of Powers*, 107 CAL. L. REV. 583 (2019) (arguing for a rebalance of the constitutional power over trade with Congress more active in multiple trade policy areas).

policy. Kathleen Claussen explains that executive tariffs operate as security exceptions delegated by Congress, allowing the Executive a way to employ tariffs to respond to perceived threats.<sup>164</sup> They can undo international trade commitments approved by Congress, potentially veering far from their original statutory purpose.<sup>165</sup> Timothy Meyer and Ganesh Sitaraman point to Congress's complex cession of trade powers to the executive branch.<sup>166</sup> This cession includes Section 301, as well as authority to fast track trade negotiations, initiate and pursue trade wars, withdraw from international trade treaties, and make international trade commitments.<sup>167</sup> As these legal scholars explain, tensions between the two branches over trade policy develop in many areas, not solely with Section 301.

Seen as a constitutional allocation of government powers, Section 301 tariffs function as a presidential action without input from Congress.<sup>168</sup> The USTR must report or consult with Congress in various instances, but not much more.<sup>169</sup> The Trade Act delegates management of Section 301 to the USTR, within the Executive Office of the President.<sup>170</sup> It states that the President may take action when the USTR makes its determination regarding unfair foreign practices.<sup>171</sup> Investigations are under USTR control. Directing the USTR and responsible for the Section 301 process, the Trade Representative is a political appointee, typically working closely with, if not directly following instructions from, the White House.<sup>172</sup> Civil servants conduct USTR tasks during the investigation, retaliation, and exclusion stages.<sup>173</sup> In this regard, any independent input during Section 301's three stages most likely hinges on the participation of government employees who are not appointed by the President.<sup>174</sup> Other agencies consult with the USTR throughout this, but the USTR is the most important agency in these three stages and in reporting to Congress.<sup>175</sup>

Section 301 powers are broadly delegated to the executive branch and more precisely to the USTR. The USTR has the discretion to initiate an investigation and to pursue

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<sup>164</sup> See *id.* at 1103.

<sup>165</sup> See Claussen, *supra* note 163, at 1142.

<sup>166</sup> See Meyer & Sitaraman, *supra* note 163, at 588-89.

<sup>167</sup> See Meyer & Sitaraman, *supra* note 163, at 588-89.

<sup>168</sup> See Claussen, *supra* note 163, at 1103 (describing that the president is allowed "to act without any supervision when he wishes to set higher tariffs"); Meyer & Sitaraman, *supra* note 163, at 648-49 (explaining the president's "significant discretion" for this tariff includes determining the trade remedy, which products, from what country, and for how long).

<sup>169</sup> This includes publication in the *Federal Register* if it does the following: decides whether to initiate an investigation, see 19 U.S.C. § 2412(a)(3)-(4); (b)(1)(A); has reached a determination, see 19 U.S.C. § 2414(c); or modifies an action, see 19 U.S.C. § 2417(b). It also has to report to Congress, semi-annually, regarding Section 301 actions taken with respect to investigations and their commercial effects. 19 U.S.C. § 2419(3)(C)(D). It is required to consult annually with Congress regarding investigations and trade enforcement priorities and actions. 19 U.S.C. § 2420(a)-(b).

<sup>170</sup> See Trade Act of 1974 §301, 19 U.S.C. § 2411.

<sup>171</sup> See 19 U.S.C. § 2411(a) (requiring action regarding practices in violation of a trade agreement); 19 U.S.C. § 2411(b) (providing the USTR discretion to start action in cases of unreasonable or discriminatory trade practices).

<sup>172</sup> See Claussen, *supra* note 163, at 1128-29.

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

<sup>175</sup> See 19 U.S.C. § 2411 (c)(2)(C); 19 U.S.C. § 2412(b)(1)(B); 19 U.S.C. § 2412(b)(2)(D).

retaliation.<sup>176</sup> Under the caption of “Discretionary Action,” the Trade Act specifically states that the USTR takes action subject to the President’s “specific direction.”<sup>177</sup> USTR actions are similarly subject to “all other appropriate and feasible action within the power of the President.”<sup>178</sup> The USTR can act “within the power of the President” regarding trade in goods or services or “any other area pertinent to relations with country.”<sup>179</sup> With this, the USTR may rely on other executive powers, including foreign relations.

This discretion is evident in the China Section 301 Case, specifically during the exclusion stage. There is no clear requirement for exclusions in the Trade Act. This leaves the process “solely at the USTR’s discretion” and unclear as to how it functions internally in the USTR.<sup>180</sup> With exclusions, American consumers, importers, retailers, and manufacturers try desperately to escape executive tariffs. This stage provides the last chance to avoid economic harms until the President ends the Section 301 case or a negotiation with the foreign country is completed.

A series of procedural, reporting, and timing requirements guide how the USTR advances Section 301 cases. The USTR has to report and consult with Congress in various instances.<sup>181</sup> It must announce in the *Federal Register* developments regarding the investigation, its determination, and modification or termination of any action.<sup>182</sup> Various deadlines force the USTR to proceed or report on a case.<sup>183</sup> The USTR must consult with other agencies and the private sector during the investigation and retaliation phases of Section 301 cases.<sup>184</sup> While these requirements do keep policy makers and stakeholders informed and at times able to provide their perspective, it is difficult for other government branches or agencies to stop or significantly change how cases progress.

Most likely, if the USTR follows the process laid out in the Trade Act and is closely driven by Presidential direction, a case will not significantly change course. Kathleen Claussen argues that executive tariffs’ statutory structure predisposes the executive branch to employ them.<sup>185</sup> Put simply, the President and the USTR heavily control the fate of Section 301 tariffs, typically until they reach a resolution with the foreign state. Relevant to PPE during the pandemic, tariff changes will only happen when the administration is satisfied with IP and cyber theft developments in China, ends the investigation, removes PPE from retaliation actions against China, or excludes individual PPE goods from the tariffs.

Substantive checks on executive tariffs have been eliminated. For example, the legislative veto originally constrained Section 301 actions. When enacted in 1974, the

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<sup>176</sup> See 19 U.S.C. § 2412 (c).

<sup>177</sup> See 19 U.S.C. § 2411(b).

<sup>178</sup> See 19 U.S.C. § 2411(b)(2).

<sup>179</sup> See *id.*

<sup>180</sup> See SCHWARZENBERG, *supra* note 118, at 1.

<sup>181</sup> See, e.g., 19 U.S.C. §§ 2412 (b)(2)(C), 2413(b)(2)(B), 2417(b), 2420.

<sup>182</sup> See 19 U.S.C. §§ 2414(a)(3)(B)(iii), 2412(a)(4), 2412(b)(1)(A), 2412(b)(2)(D) (investigation); 19 U.S.C. § 2414(c) (determination); 19 U.S.C. § 2417(b) (modification or termination of any action).

<sup>183</sup> These include twelve months to conduct an investigation, 19 U.S.C. § 2414(a)(2)(B); 30 days to implement retaliations such after a determination has been reached, 19 U.S.C. § 2415(a); four years for retaliation, 19 U.S.C. § 2417(c)(1).

<sup>184</sup> See 19 U.S.C. § 2155.

<sup>185</sup> See Claussen, *supra* note 163, at 1101, 1106.

Trade Act permitted Congress to disapprove and stop specific Section 301 actions.<sup>186</sup> This constituted a legislative veto, an act that overrides a completed executive action.<sup>187</sup> In 1983, however, the Supreme Court found legislative vetoes to be unconstitutional in *I.N.S. v. Chadha*.<sup>188</sup> The Court's ruling abolished the "most important Congressional restraint" for delegations of trade power to the executive, relevant to Section 301 and other executive tariffs.<sup>189</sup> In the Trade Act, Congress contemplated the legislative veto as an important constraint.

Traditionally, courts have not exercised meaningful checks on executive tariff delegations, but recent litigation since the trade war hints at potential changes. Sections 301, 201, and 232 do not expressly provide for judicial review for executive tariffs.<sup>190</sup> Court review has usually been precluded, since the President has not been regarded as an agency, which is needed for review under the Administrative Procedures Act (APA).<sup>191</sup> The USTR is technically within the Executive Office of the President and argued to not be an agency.<sup>192</sup> Similarly, courts have found that executive tariffs meet delegation requirements needed to impose additional duties pursuant to congressional authorization.<sup>193</sup> Recent attempts to challenge the Court's delegation findings have failed. In 2019, the United States Court of International Trade found that Section 232 tariffs for steel were constitutional delegations of Congress's tariff powers.<sup>194</sup>

Legal doctrine may change with the trade war. The Court of International Trade's recent rulings and decisions point to judicial enforcement of the procedural requirements for executive tariffs. In one case involving duties for steel products from Turkey, under Section 232, the trial court found that retaliatory tariff designations must conform with timelines in the statute.<sup>195</sup> It described these requirements as constraints on executive power.<sup>196</sup> In 2020, a later panel of the court upheld this order, stating that for tariffs, presidents must strictly adhere to timeline restrictions.<sup>197</sup> In another case regarding tariffs on solar products pursuant to Section 201, the court focused on USTR determinations during the exclusion process.<sup>198</sup> This process is similar to the third stage of Section 301, but here it is for Section 201 when the USTR responds to import quantities that harm

<sup>186</sup> See Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2043 (regarding trade actions for countries not part of an investigation); Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191, 1207 n.46 (1986).

<sup>187</sup> Koh defines legislative vetoes as "action with legislative effect but not accomplished through legislation and not requiring the President's signature," accomplished with a resolution of one house of congress or both houses that overrides or alters completed executive action. *Id.* at 1196 n.16.

<sup>188</sup> See 462 U.S. 919.

<sup>189</sup> See Claussen, *supra* note 163, at 1161.

<sup>190</sup> See *id.* at 1128-29, 1162; Meyer & Sitaraman, *supra* note 163, at n.133, 649.

<sup>191</sup> See *Dalton v. Specter*, 511 U.S. 462 (1994).

<sup>192</sup> See Meyer & Sitaraman, *supra* note 163, at n.350; see also Claussen, *supra* note 163, at 1128-29, 1158 (describing limited judicial review for executive tariffs).

<sup>193</sup> See *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976).

<sup>194</sup> See *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1344-45 (Ct. Int'l Trade 2019), *aff'd*, 806 F. App'x 982 (Fed. Cir. 2020), *cert. denied*, No. 19-1177, 2020 WL 3405872 (U.S. June 22, 2020). This decision applies precedent from *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548.

<sup>195</sup> See *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267 (Ct. Int'l Trade 2019).

<sup>196</sup> See *id.* at 1275.

<sup>197</sup> See, e.g., *Transpacific Steel LLC v. United States*, No. 19-00009, 2020 WL 3979838 (Ct. Int'l Trade 2020).

<sup>198</sup> See *Invenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255 (Ct. Int'l Trade 2019).

domestic industry. Importantly, the court found that the USTR is an agency for the purposes of the APA, emphasizing how the USTR operates and how it presents itself.<sup>199</sup> It added that USTR exclusion choices did not conform with Notice-and-Comment requirements and were likely arbitrary and capricious.<sup>200</sup> Rulings since then agree.<sup>201</sup>

The Court of International Trade is expected to rule on a similar case, specifically regarding Section 301 tariffs and the APA. In a complaint filed in September of 2020, importers focus on procedural problems with tariff retaliations in the China Case.<sup>202</sup> They argue that later tariff rounds, rounds three and four, are not related to the original purpose of the Section 301 investigation of China's IP and cyber theft practices.<sup>203</sup> They also contend that these tariff rounds are untimely, since they came twelve months after the USTR's report on China's unfair trade practices.<sup>204</sup> Nearly three thousand importers have made similar contentions before the court about the procedural illegalities with Section 301 tariff retaliations.<sup>205</sup>

### B. Section 301 Aggravated the COVID Response.

Section 301 tariffs significantly impact public health readiness, with racial consequences in coronavirus exposure and treatments. As the pandemic persists, Section 301 remains extremely relevant because China still dominates the PPE market, and the trade war shows no sign of ending. Countless Americans need these goods as essential workers, patients, first responders, or everyday shoppers. Early in 2020, Section 301 tariffs made PPE more expensive and consequently diminished supplies. This aggravated the PPE crisis. Shortages resulted in more virus contractions, hospitalizations, and deaths.

PPE is needed to stop COVID's community spread. The UC Berkeley Labor Center found that in California over 20,000 worker infections could have been avoided with proper PPE.<sup>206</sup> Recent studies since the pandemic identify reduced COVID contractions when PPE is used.<sup>207</sup> Thus, the executive choices to tax PPE imports aggravates COVID policies by reducing the availability of PPE.

<sup>199</sup> See *id.* at 1282.

<sup>200</sup> See *id.* at 1288.

<sup>201</sup> See, e.g., *Transpacific Steel LLC*, 2020 WL 3979838.

<sup>202</sup> See Complaint, *HTMX Indus. v. U.S.*, U.S. Court of Int'l Trade, Sept. 10, 2020, Court No. 20-00177, [https://www.lawbc.com/uploads/docs/HMTX\\_v\\_US\\_-\\_China\\_Section\\_301\\_List\\_3\\_and\\_4A\\_complaint.pdf](https://www.lawbc.com/uploads/docs/HMTX_v_US_-_China_Section_301_List_3_and_4A_complaint.pdf).

<sup>203</sup> See *id.* at 2.

<sup>204</sup> See *id.*

<sup>205</sup> See John Brew and Mert Arkan, *HTMX et al. v. United States – An (Ongoing?) Opportunity for Importers to Recover Section 301 Tariffs Paid on Section 301 List 3 (and 4A) Products*, CROWELL MORNING (Oct 8, 2020), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/The-Month-in-International-Trade-September-2020#ITB07> (providing a list of plaintiffs). See also Mollie D. Sitkowski, *Latest Development in Court Case Challenging Validity of Section 301 Tariffs; Opportunity to Add Challenge to List 4A to Complaints*, NAT'L L. REV. (Sept. 24, 2020), <https://www.natlawreview.com/article/latest-development-court-case-challenging-validity-section-301-tariffs-opportunity>.

<sup>206</sup> William Dow, Kevin Lee & Laurel Lucia, *Economic and Health Benefits of a PPE Stockpile*, U. CAL. BERKELEY LABOR CTR. (Aug. 12, 2020), <https://laborcenter.berkeley.edu/economic-and-health-benefits-of-a-ppe-stockpile/>.

<sup>207</sup> One study reports daily COVID growth rates declining by .9% and 2% in American states where face masks were mandated, see Wei Lyu & George L. Wehby, *Community Use of Face Masks and COVID-19: Evidence from a Natural Experiment of State Mandates in the US*, 39 HEALTH AFFS. 1 (2020). Another

Tariffs hurt public health readiness. The USTR deployed Section 301 for an entirely different goal: to change IP and cyber theft practices in China. In policy terms, the Trump administration weighed the impact of retaliatory tariffs for imports by Americans with the goal of ending China's unfair treatment of American businesses. In this calculation, PPE imports are just one set of goods amongst thousands that became more expensive with additional tariffs, starting in 2018.<sup>208</sup> Section 301 is a part of a larger trade war with China, with executive tariffs also imposed on steel, solar panels, and washing machines. All of these trade measures are part of larger tensions with China. These tensions include public friction over 5G and Huawei, Hong Kong, journalists in the two countries, COVID responses, and multilateral tensions in the World Health Organization, South China Sea, and World Trade Organization.<sup>209</sup> In sum, executive choices to deploy retaliatory tariffs, whether in Sections 301, 201, or 232, happened while the administration pursued other foreign policy objectives.

The USTR in the investigation and retaliation stages of the China Case publicly and methodologically contemplated economic pressure on China. Section 301 cases cause harm to domestic American economic interests.<sup>210</sup> Tariff duties are actually paid domestically by Americans, and later these impacts, in the form of external economic pressure, may force changes in China's unfair commercial practices.<sup>211</sup> With Section 301, taxes are charged and paid in the United States whereas changes to Chinese policies are the eventual goal but are not certain. In the past, Section 301 cases succeeded when the United States had more leverage over the foreign country.<sup>212</sup> Past experiences with Section 301 cases suggest that without sufficient leverage the result can frustrate goals to open foreign markets, unpredictability hurting American consumers, and creating negative consequences to foreign policy, financial, and national security objectives.<sup>213</sup> China is the second largest economy in the world and by many measures a superpower, changing

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systemic study reports a large reduction in the risk of infection with the use of N95 and surgical masks, see Chu, Akl, Duda, Solo, Yaacoub & Schünemann, *supra* note 38. See also C. Raina MacIntyre, *A Rapid Review of the Efficacy of Face Masks and Respirators Against Coronaviruses and Other Respiratory Transmissible Viruses for the Community, Healthcare Workers and Sick Patients*, 108 INT'L J. NURSING STUDIES 103629 (2020) (suggesting mask use could be beneficial in healthcare and other settings); Timo Mitze, Reinhold Kosfeld, Johannes Rode & Klaus Wälde, *Face Masks Considerably Reduce COVID-19 Cases in Germany: A Synthetic Control Method Approach* (IZA Inst. Lab. Econ., Discussion Paper No. 13319, 2020), <http://ftp.iza.org/dp13319.pdf> (finding masks can reduce the daily growth rate of reported infections by around 40%).

<sup>208</sup> See Ana Swanson, *White House Unveils Tariffs on 1,300 Products*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/politics/white-house-chinese-imports-tariffs.html>.

<sup>209</sup> See Rick Gladstone, *How the Cold War Between China and U.S. Is Intensifying*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/world/asia/us-china-cold-war.html>.

<sup>210</sup> See Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 STAN. L. & POL'Y REV. 115 (2019).

<sup>211</sup> See Mary Amity, Stephen J. Redding & David E. Weinstein, *New China Tariffs Increase Costs to U.S. Households*, LIBERTY ST. ECON. (May 23, 2019), <https://libertystreeteconomics.newyorkfed.org/2019/05/new-china-tariffs-increase-costs-to-us-households.html>; Smialek & Swanson, *supra* note 11.

<sup>212</sup> See Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263 (1992).

<sup>213</sup> See Warren Maruyama, *Section 301 and the Appearance of Unilateralism*, 11 MICH. J. INT'L L. 401 (1990).

leverage calculations.<sup>214</sup> As such, the China Case appears to be more focused on rewriting legal rules on trade to compete with China versus protecting domestic industries or helping Americans who economically suffer from trade.<sup>215</sup>

In 2020 it became clear that the Trump administration did not take public health warnings as seriously as needed when it failed to assess the blowback effects of its tariffs on the global supply chain. Warnings specifically concerned PPE and medical supplies from China because China is the largest producer of PPE.<sup>216</sup> Supply chains provide these products worldwide as opposed to the goods manufactured domestically. Supply chains quickly and economically produce and transport PPE.<sup>217</sup> Overseas producers formulate their manufacturing procedures for international demand.<sup>218</sup> For American purchasers, this results in PPE of high medical quality, with the overseas production having the required American health regulation approvals.<sup>219</sup> However, the supply chain system is not flexible. It is not easy to source alternative suppliers for PPE. It takes years to find new producers or to develop production capacities elsewhere. This is particularly true given China's large share of global PPE production, low labor costs, and manufacturing capabilities approved by the FDA for the American market.<sup>220</sup>

With these commercial aspects, the USTR failed to recognize the foreseeable negative impacts if PPE demand surged. Industry representatives gave their warnings in 2018 and 2019 during the retaliation and exclusion stages of the China Case.<sup>221</sup> Looking back, Section 301 tariffs could have been imposed on thousands of imports with PPE not included. The public health and emergency significance of PPE, plus tariff charges of up to 25%, should have been weighed against the economic pressure directed at China. Pandemics are not a surprise. Recent presidencies have had to quickly address virus outbreaks, like MERs, H1N1, Ebola, and others.<sup>222</sup> Most likely, Trump administration officials prioritized putting economic pressure on China, or they did not recognize the impact that tariffs would have on American supplies.

Here, the executive branch did not use its discretionary powers to avoid additional tariffs on PPE. It has two ways to avoid these tariffs. The USTR did not eliminate PPE from Section 301 tariffs in 2018 or 2019, nor did the President invoke emergency powers to allow duty-free imports in 2020. As described, the USTR enjoys wide delegations of discretionary influence over the retaliation and exclusion stages.<sup>223</sup> As early as 2018, it

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<sup>214</sup> See Yen Nee Lee, *Here are 4 Charts that Show China's Rise as a Global Economic Power*, CNBC (Sept. 23, 2019), <https://www.cnbc.com/2019/09/24/how-much-chinas-economy-has-grown-over-the-last-70-years.html>.

<sup>215</sup> See Andrew Lang, *Protectionism's Many Faces*, 44 *Yale J. INT'L L. ONLINE* 54 (2018).

<sup>216</sup> See Keith Bradsher, *China Dominates Medical Supplies, in This Outbreak and the Next*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/business/china-medical-supplies.html>; Talha Burki, *Global shortage of personal protective equipment*, 20 *LANCET INFECTION DISEASE* 785-786 (2020).

<sup>217</sup> See SUTTER, SCHWARZENBERG & SUTHERLAND, *supra* note 41.

<sup>218</sup> See Kaplan, *supra* note 28; James Randall Patrinely Jr., Sean T. Berkowitz, Danny Zakria, Douglas J. Totten, Mumin Kurtulus & Brian C. Drolet, *supra* note 55.

<sup>219</sup> See Kaplan, *supra* note 28.

<sup>220</sup> See Keith Bradsher, *China Dominates Medical Supplies, in This Outbreak and the Next*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/business/china-medical-supplies.html>.

<sup>221</sup> See Rowan Testimony, *supra* note 106; Simmons Testimony, *supra* note 119; O'Neill Testimony, *supra* note 119.

<sup>222</sup> See HOMELAND SEC. COUNCIL, *supra* note 29.

<sup>223</sup> See 19 U.S.C. § 2411(b).

could have taken PPE off the tariff list for Section 301 retaliation. The USTR and President did not use their legal powers to offset the blowback from imposing executive tariffs on PPE.

Moreover, the administration did not use its emergency power to make imports duty-free. Section 318 of the Tariff Act of 1930 specifically allows the President to eliminate import tariffs for designated goods.<sup>224</sup> In April 2020, President Trump did invoke Section 318 to change custom charges for imports. But, this only allowed importers to postpone (not suspend) tariff payments, and it explicitly excluded Section 301 duties.<sup>225</sup>

The executive similarly did not take the public health impacts of PPE supplies as seriously as needed when it planned Section 301 retaliations and exclusions in 2018 and 2019. Multiple PPE and medical supply producers submitted comments and testified to the need for these goods in a public health emergency or epidemic.<sup>226</sup> Speaking directly to potential inclusion on the tariffs list and then for exclusion requests, they described the experience of PPE demand and price surges during recent H1N1 and Ebola epidemics.<sup>227</sup>

While the USTR is primarily focused on trade enforcement and economic consequences for Americans, the executive branch has multiple agencies and mandates to monitor and prepare for situations like COVID.<sup>228</sup> These agencies contribute to the Section 301 intra-agency consultations.<sup>229</sup> The Trump administration was not prepared for this kind of emergency. These complaints encompass far more than PPE.<sup>230</sup> These mishaps from the White House add to the mentioned delays in responding to COVID warnings from leading aides and cabinet members.<sup>231</sup>

### C. Section 301 Can Be Reformed.

PPE and medical supplies will remain of extreme significance, whether this pandemic persists, new ones arise, or trade tensions with China continue. Lawmakers can

<sup>224</sup> See 19 U.S.C. § 1318(a) (providing for the President to authorize the “importation free of duty” for “medical, surgical, and other supplies for use in emergency relief work”).

<sup>225</sup> See Temporary Postponement of the Time To Deposit, 85 Fed. Reg. 22,349 (Apr. 22, 2020).

<sup>226</sup> See *Rowan Testimony*, *supra* note 106; *Simmons Testimony*, *supra* note 119; *O’Neill Testimony*, *supra* note 119.

<sup>227</sup> See *Simmons Testimony*, *supra* note 119; *O’Neill Testimony*, *supra* note 119.

<sup>228</sup> For a listing of agencies responding to COVID, see *Federal Agencies Responding to Coronavirus (COVID-19)*, usa.gov (May 18, 2020), <https://www.usa.gov/government-coronavirus-response>.

<sup>229</sup> See 19 U.S.C. § 2155. This includes officials from HHS, Small Business Administration and Departments of State, Commerce, Labor, Homeland Security, Agriculture, and Treasury. See, e.g., *Section 301 Hearings*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/issue-areas/enforcement/section-301-investigations/record-section-301-investigation/section-301> (last visited July 31, 2020).

<sup>230</sup> The administration eliminated the National Security Council (NSC) Directorate on Global Health Security and Bio-Defense devised specifically to coordinate pandemic responses. See Deb Riechmann, *Trump Disbanded NSC Pandemic Unit That Experts Had Praised*, AP (Mar. 14, 2020), <https://apnews.com/ce014d94b64e98b7203b873e56f80e9a>. The administration did not follow the NSC’s Pandemic Playbook, provided in 2017. See Dan Diamond & Nahal Toosi, *Trump Team Failed to Follow NSC’s Pandemic Playbook*, POLITICO (Mar. 25, 2020, 8:00 PM), <https://www.politico.com/news/2020/03/25/trump-coronavirus-national-security-council-149285>. It also did not implement lessons from “Crimson Contagion,” an influenza pandemic simulation in 2019 with various agencies and conducted by the HHS. See David E. Sanger, Eric Lipton, Eileen Sullivan & Michael Crowley, *Before Virus Outbreak, a Cascade of Warnings Went Unheeded*, N.Y. TIMES (Mar. 22, 2020), <https://www.nytimes.com/2020/03/19/us/politics/trump-coronavirus-outbreak.html>.

<sup>231</sup> See Biesecker, *supra* note 79; Fernandez, *supra* note 79; Perano, *supra* note 29.

reform Section 301 to avoid crises similar to the PPE crisis experienced in early 2020.<sup>232</sup> The administration, Congress, and courts have the means to help ensure supply shortages are not exacerbated during trade enforcement measures.

The executive has two ways to offset the harms of additional tariffs deployed in a Section 301 case: emergency powers under Section 318 and exclusions from these tariffs.

One way the executive can combat the economic harms is to implement Section 318 emergency powers eliminating the additional tariffs enacted pursuant to Section 301. The President can pursue Section 301 cases and then in conjunction with this it can invoke emergency Section 318 powers when needed. Emergency scenarios can be identified before imports are taxed. Already, the USTR complies with various Notice-and-Comment requirements while preparing the tariff list and during the exclusion process.<sup>233</sup> At these stages, the USTR could identify the emergency significance of any goods. Section 318 allows for importing goods duty-free after declaring an emergency. It specifically lists “food, clothing, and medical, surgical, and other supplies.”<sup>234</sup> When an emergency like COVID develops, or a natural disaster or war, the President can invoke these Section 318 powers to eliminate tariffs on PPE. These measures are distinct from requests to have particular items not included in list for additional tariffs.

Another way is for the USTR to use its discretion to suspend a good from being included on the tariff list.<sup>235</sup> Part II of this Article described these exclusions in the China Case generally and for PPE more specifically. These two options, Section 318 and exclusions, permit the executive branch to retain control of a Section 301 case while offsetting the harms of goods being imported with added taxes.

However, these executive options pose two complications. First, for the USTR to invoke emergency powers or modify the tariff list at its own discretion, it would require an administration politically invested in the trade enforcement action to, on its own accord, decide to pullback or to limit retaliatory tariffs. These levies are part of a larger Section 301 case. It is unlikely the Trump administration would have done this given the importance it placed on the trade war. Second, any of these reliefs, with Section 318 or with exclusion from the Section 301 tariff list, would not help supply shortages until after goods are imported. As such, relief comes later, perhaps too late for emergency help. PPE imports from China, weeks if not months away, exemplify these problems with government action having a delayed impact.

Aside from these examples of executive action, Congress and the courts can help avoid these delays and shortages in the future. Congress can reform parts of Section 301. Since the China Case, members of Congress proposed bills to have the USTR provide more disclosures to Congress about Section 301 actions.<sup>236</sup> With new legislation, Congress can

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<sup>232</sup> This essay suggests a specific reform that helps identify the economic burden of tariffs. This is only suggested as a measure specific for PPE and other crucial products. Surely, more checks on the executive branch would result in more transparency and input whenever Section 301 and other executive tariffs are implemented. For discussion on these larger reforms, see Claussen, *supra* note 163, Meyer & Sitaraman, *supra* note 163.

<sup>233</sup> See *supra* notes 141-143 and accompanying text.

<sup>234</sup> See 19 U.S.C. § 1318(a).

<sup>235</sup> See 19 U.S.C. § 2411(b).

<sup>236</sup> See American Business Tariff Relief Act of 2019, S. 2362, 116th Cong. (2019); the Import Tax Relief Act of 2019, S. 577, 116th Cong. (2019); H.R. 1452, 116th Cong. (2019); SCHWARZENBERG, CONG. RES. SERV., IF11582, *supra* note 118, at 2.

require the USTR to provide more information on the tariff list and the exclusion process. The China Case has illuminated the lack of clarity involving the procedures for determining what products will be subject to additional tariffs, what will be the tariff rate applied to these products, and when these levies are applied. Similarly, the China Case has shown a lack of clarity in the exclusions process, regarding how the USTR receives these requests and reviews them.<sup>237</sup>

Another legislative option is for Congress to limit certain economic sectors from retaliation measures in Section 301 cases. National security tariffs, also implemented by the USTR, have such a provision limiting retaliation for petroleum in Section 232(f).<sup>238</sup> A similar provision could permit the USTR to make its substantive Section 301 determinations in stage one, as it does now, but in stage two or three any inclusion of medical supplies or PPE would require Congressional approval. The President and the USTR would be free to conduct the investigation, but tariff powers delegated by Congress would be reserved for sensitive economic sectors.

Alternatively, Congress could designate another agency such as the USITC, which is more independent than the USTR,<sup>239</sup> to approve the tariff retaliation list generally or to approve the USTR's inclusion of products with emergency significance. While these reforms to Section 301 would not secure PPE or medical equipment supplies, much less limit health inequities, they would allow Congress members the opportunity to ask about the economic burden of tariffs. If appropriately legislated, Congress could stop or delay additional tariffs for certain goods.

Courts could step in once Section 301 cases are filed to enforce procedural limits on USTR actions. The Court of International Trade's recent rulings on Section 232 and 201 tariffs point to these potential procedural limitations. Section 232 and 201 have similar delegations, structured as executive tariff actions after an agency conducts an investigation and makes its determination. So far, recent rulings on these statutes found that the USTR is an agency for APA jurisdictional purposes, the USTR and the President must comply with procedures and timeline requirements, and Notice-and-Comment procedures limit how the USTR makes its exclusion determinations.<sup>240</sup> While these are not specific to Section 301, they do provide insight into how courts may review the economic harms felt domestically from executive tariffs. They also suggest how courts can begin to look at how the USTR prioritizes its determination in the retaliation and exclusion stages of Section 301.

In sum, Section 301 tariffs are one of many statutory trade enforcement measures delegated to the executive branch. With discretion to implement, administer, and decide when to end these tariffs, Section 301 insulates presidents from significant checks from Congress and the courts. This level of discretion protects executive choices intended to end unfair trade practices hurting American commerce overseas. It similarly allows the executive branch to designate how domestic businesses and consumers feel the burden of additional tariffs. The PPE crisis, experienced in 2020, is one economic example of such a burden. As described below, this has racial consequences by limiting PPE needed for

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<sup>237</sup> See SCHWARZENBERG, CONG. RES. SERV., IF11582, *supra* note 118, at 2.

<sup>238</sup> See 19 U.S.C. § 1862.

<sup>239</sup> See Claussen, *supra* note 163, at 1128.

<sup>240</sup> See *supra* notes 141-143 and accompanying text.

communities who are disproportionately exposed to, infected by, and dying because of the coronavirus.

#### IV. PPE SCARCITY ADDS TO COVID'S RACIAL DISPARITIES.

PPE scarcity exemplifies how trade policies can have negative socioeconomic effects. PPE supply chains function as intended, relying on Chinese production, when goods are imported without added duties. This changed significantly with Section 301 retaliation, the consequential rise in PPE prices, and demand spikes because of COVID. Because of this, a PPE buyer, whether a hospital system or an essential worker, faced uncertainty in finding crucial items. In commercial terms, this decreased the supply of goods needed in a public health emergency. Limited access to PPE prevented important protections that would help stop virus spread, enabling individuals to work and support themselves and their families.

PPE scarcity and its detrimental consequences disproportionately impact minority communities. Public health and worker advocates explain that PPE is essential for minority populations to fight COVID.<sup>241</sup> This Part describes the impact that disruptions in PPE supplies had on minority communities, provides definitions and a framework, describes data regarding populations of color and the pandemic, and suggests how PPE scarcity adds to COVID's racial disparity. This Part also tries to motivate further inquiry. It prompts questions as to the relationship between PPE costs and availability, and the resulting socioeconomic consequences. The most important consequence of a disruption in PPE supplies is a limited capacity to avoid virus contraction.

The pandemic shines light on "health disparities," differences closely associated with social, economic, and environmental disadvantages, or some combination of all three.<sup>242</sup> These inequalities impact groups with characteristics linked to discrimination such as race, gender, socioeconomic status, and immigration. This Article uses the terms "racial disparity" or "racial consequences" to show how COVID disproportionately impacts minority populations. Racial disparities and racial consequences are examples of health disparities or health inequities.<sup>243</sup> Racism and discrimination are structural and institutional, with organizations or systems continuing race-based exclusions, without needing any individual actor to discriminate.<sup>244</sup> Specific intent to discriminate is not needed, either when administering health services or when the USTR imposes executive tariffs on PPE. From a similar perspective, Philip Blumenshine provides a framework to

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<sup>241</sup> See *COVID-19: protecting health-care workers*, *supra* note 21; *The plight of essential workers during the COVID-19 pandemic*, *supra* note 21; Lauren Dunn & Sarah Fitzpatrick, *Few N95 Masks, Reused Gowns: Dire PPE Shortages Reveal COVID-19's Racial Divide*, NBC NEWS (June 12, 2020, 2:00 AM), <https://www.nbcnews.com/health/health-care/few-n95-masks-reused-gowns-dire-ppe-shortages-reveal-covid-n1229546>; Claudia Wallis, *Why Racism, Not Race, Is a Risk Factor for Dying of COVID-19*, SCI. AM. (June 12, 2020), <https://www.scientificamerican.com/article/why-racism-not-race-is-a-risk-factor-for-dying-of-covid-19/>; FRYE, *supra* note 20.

<sup>242</sup> See Obasogie, Headen & Mujahid, *supra* note 35, at 316.

<sup>243</sup> For descriptions of these terms, see *id.*; see also Bleich, Jarlenski, Bell & LaVeist, *supra* note 37.

<sup>244</sup> For examples of structural racism and discrimination in health care, see Obasogie, Headen & Mujahid, *supra* note 35, at 316. For the role of structural racism and discrimination in the medical study of diseases, see Jones, *supra* note 35.

examine how pandemics impact these communities. The framework identifies three fronts: virus exposure, susceptibility to the virus, and treatment for the virus.<sup>245</sup>

COVID's racial disparities stand out clearly in the quantitative data on virus deaths and contractions amongst African American, Latino, and other groups.<sup>246</sup> These figures are continually collected and examined as the pandemic develops with new surges since June 2020.<sup>247</sup> The *New York Times* reports African American and Latino persons are three times more likely to be infected and are nearly twice as likely to die compared to white populations.<sup>248</sup> These conclusions are based on nationwide CDC records from January until the end of May of 2020.<sup>249</sup> This time period corresponds to the focus of this Article's analysis of Section 301 tariffs and PPE shortages.

Multiple sources offer similar assessments, looking at different records and more demographic groups. The COVID Racial Data Tracker explains that the virus "aff[ects] Blacks, Indigenous, Latinx, and other people of color the most," and offers figures updated regularly and organized by deaths or positive cases, demographic group, and state or territory.<sup>250</sup> The APM Research Lab reports that compared to whites, the age-adjusted mortality rate for African Americans is 3.8 times as high, followed by 3.2 times as high for Indigenous persons, 2.6 for Pacific Islanders, 2.5 for Latinos, and 1.5 for Asians.<sup>251</sup> Academic research examining COVID medical treatments in the early months of 2020 reaches conclusions consistent with these figures.<sup>252</sup>

These various sources, medical and quantitative, show that populations of color disproportionately experience the contraction of COVID, as well as the illnesses, hospitalizations, and deaths associated with it.<sup>253</sup> Simultaneous to a PPE crisis, this begins to illustrate the significance of protective equipment. In socioeconomic terms, these studies indicate when PPE was most needed and when market disruptions had their most

<sup>245</sup> Philip Blumenshine, Arthur Reingold, Susan Egerter, Robin Mockenhaupt, Paula Braveman & James Marks, *Pandemic Influenza Planning in the United States from a Health Disparities Perspective*, 14 EMERGING INFECTIOUS DISEASES 709 (2008).

<sup>246</sup> See Oppel, Gebeloff, Lai, Wright & Smith, *supra* note 15; *The COVID Racial Data Tracker*, ATLANTIC: COVID TRACKING PROJECT, <https://covidtracking.com/race> (last visited July 31, 2020); *The Color of Coronavirus: COVID-19 Deaths By Race and Ethnicity in the U.S.*, APM RSCH. LAB, <https://www.apmresearchlab.org/covid/deaths-by-race> (last updated July 22, 2020).

<sup>247</sup> *The COVID Racial Data Tracker*, *supra* note 246; *The Color of Coronavirus*, *supra* note 246.

<sup>248</sup> See Oppel, Gebeloff, Lai, Wright & Smith, *supra* note 15.

<sup>249</sup> See *id.*

<sup>250</sup> See *The COVID Racial Data Tracker*, *supra* note 246.

<sup>251</sup> See *The Color of Coronavirus*, *supra* note 246.

<sup>252</sup> See, e.g., Gregorio A. Millett, Austin T Jones, David Benkeser, Stefan Baral, Laina Mercer, Chris Beyrer, Brian Honermann, Elise Lankiewicz, Leandro Mena, Jeffrey S. Crowley, Jennifer Sherwood & Patrick S. Sullivan, *Assessing Differential Impacts of COVID-19 on Black Communities*, 47 ANNALS EPIDEMIOLOGY 37 (2020) (using county-level demographic data and COVID predictors to find disproportionate levels of diagnoses and death for African American communities); Eboni G. Price-Haywood, Jeffrey Burton, Daniel Fort & Leonardo Seoane, *Hospitalization and Mortality Among Black Patients and White Patients with COVID-19*, 382 NEW ENG. J. MED. 2534 (2020) (describing disproportionate levels of hospitalization and death for African American patients in a Louisiana hospital); Cary P. Gross, Utibe R. Essien, Saamir Pasha, Jacob R Gross, Shi-yi Wang & Marcella Nunez-Smith, *Racial and Ethnic Disparities in Population Level Covid-19 Mortality* (May 11, 2020) (unpublished manuscript), <https://www.medrxiv.org/content/10.1101/2020.05.07.20094250v1> (comparing CDC data with U.S. Census demographic data).

<sup>253</sup> See Oppel, Gebeloff, Lai, Wright & Smith, *supra* note 15; *The COVID Racial Data Tracker*, *supra* note 246; *The Color of Coronavirus*, *supra* note 246.

significant negative impact. The likely public health consequences were that a disproportionate amount of minority groups had less protections from the virus. In sum, these studies show COVID's *ultimate* disparity and suggest *when* PPE was most needed.<sup>254</sup>

A picture can be drawn of *how* COVID affects populations of color and *when* PPE could help. Pandemics impact these communities on three fronts: exposure to the virus, susceptibility to the virus, and in treating virus-related illness.<sup>255</sup> Ruqaiyah Yearby and Seema Mohapatra apply this framework to COVID.<sup>256</sup> Specifically, for coronavirus, exposure relates to employment and housing, susceptibility involves pre-existing health conditions, and treatment refers to limited access to medical care.<sup>257</sup> Guided by these findings, Yearby and Mohapatra identify COVID's racial disparities in the CARES Act and employment, housing, and health care laws.<sup>258</sup> This Article similarly looks at these fronts to identify how PPE shortages arguably add to COVID's disproportionate impacts.

Minority groups make up a disproportionate number of essential workers.<sup>259</sup> Populations of color need PPE to avoid virus exposure while working in essential and frontline jobs.<sup>260</sup> With this equipment, workers can prevent virus contraction and further infection of others. The Center for Economic and Policy Research (CEPR) found that over four-in-ten frontline workers are African American, Hispanic, Asian-American/Pacific Islander or non-white.<sup>261</sup> CEPR describes a series of demographic findings for workers in frontline industries nationwide.<sup>262</sup> These industries are grocery, convenience, and drug stores; public transit; trucking, warehouse, and postal service; building cleaning services; health care; and childcare and social services.<sup>263</sup> Hispanics are especially overrepresented in building cleaning, and African Americans are most overrepresented in childcare and social services.<sup>264</sup> Workers of color are particularly overrepresented in specific occupations in transit, cleaning, health care, childcare, and social services industries.<sup>265</sup> Immigrants are overrepresented in cleaning services and various frontline industries.<sup>266</sup> The Economic

<sup>254</sup> See Oppel, Gebeloff, Lai, Wright & Smith, *supra* note 15; *The COVID Racial Data Tracker*, *supra* note 246; *The Color of Coronavirus*, *supra* note 246.

<sup>255</sup> See Blumenshine, Reingold, Egerter, Mockenhaupt, Braveman & Marks, *supra* note 245.

<sup>256</sup> See Yearby & Mohapatra, *supra* note 36.

<sup>257</sup> *See id.*

<sup>258</sup> *See id.*

<sup>259</sup> RHO, BROWN & FREMSTAD, CTR. ECON. & POL'Y RSCH., *supra* note 18.

<sup>260</sup> There is a lack of legal clarity on definitions of frontline workers and essential industries. The Brookings Institute provides good working definitions and reports demographic data for the defined industries. It defines "essential industries" as "businesses, organizations, and government agencies whose functions are critical to public health, safety, and economic and national security" and "frontline workers" as "*employees within essential industries who must physically show up to their jobs.*" See Adie Tomer & Joseph W. Kane, *To Protect Frontline Workers During and After COVID-19 We Must Define Who They Are*, BROOKINGS: METRO'S COVID-19 ANALYSIS (June 10, 2020), <https://www.brookings.edu/research/to-protect-frontline-workers-during-and-after-covid-19-we-must-define-who-they-are/>.

<sup>261</sup> See RHO, BROWN & FREMSTAD, *supra* note 18, at 3.

<sup>262</sup> This definition of frontline industries refers to groupings provided by the New York City Comptroller. *See id.* at 5.

<sup>263</sup> *See id.* at 5-6.

<sup>264</sup> *See id.* at 3-4.

<sup>265</sup> *See id.* at 4.

<sup>266</sup> *See id.*

Policy Institute finds similar overrepresentations for people of color in food and agriculture industries and in industrial, commercial, and residential facilities and services.<sup>267</sup>

Specifically, non-white women are overrepresented in frontline industries. The Center for American Progress explains that many of the jobs where women of color most commonly work are in essential industries. For example, women of color often work as nursing assistants, home health aides, and childcare workers.<sup>268</sup> They also make up major parts of specific occupations such as cashiers, registered nurses, personal care aides, maids, and housekeeping cleaners.<sup>269</sup> Another study finds that women make up the majority of frontline workers, such as 76.8% of health care workers, 85.2% childcare and social services workers, and the majority in 24 other frontline occupations.<sup>270</sup>

These studies begin to suggest how men and women may contract COVID while working in these jobs where PPE is most needed. The UC Berkeley Labor Center found that in California over 20,000 worker infections could have been avoided with proper PPE.<sup>271</sup> Recently, medical researchers found that frontline health care workers had at least a threefold increased risk of COVID infection.<sup>272</sup> This study added that “Black, Asian, and minority ethnic” workers are at “especially high risk” of infection with “at least a fivefold increased risk.”<sup>273</sup> Specific to equipment shortages, it concluded that both the availability of and the quality of PPE reduce the risk of COVID, and reusing PPE or inadequate PPE might confer “comparably increased risk.”<sup>274</sup>

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<sup>267</sup> See Celine McNicholas & Margaret Poydock, *Who Are Essential Workers?*, ECON. POL’Y INST.: WORKING ECONS. BLOG (May 19, 2020, 11:25 AM), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/>.

<sup>268</sup> See RHO, BROWN & FREMSTAD, CTR. ECON. & POL’Y RSCH., *supra* note 18, at 3-4, 10 (reporting on occupations organized by African American, Hispanic, Asian American and Pacific Islander, American Indian, and similar categories).

<sup>269</sup> *See id.* at 3-4.

<sup>270</sup> *See id.* at 3. Women make up three quarters of essential workers in health care and almost the same amount of government and community-based services. *See* McNicholas & Poydock, *supra* note 267.

<sup>271</sup> William Dow & Kevin Lee, *Economic and Health Benefits of a PPE Stockpile*, LAUREL (Aug. 12, 2020), <https://laborcenter.berkeley.edu/economic-and-health-benefits-of-a-ppe-stockpile/>.

<sup>272</sup> See Long H. Nguyen, David A. Drew, Mark S. Graham, Amit D. Joshi, Chuan-Guo Guo, Wenjie Ma, Raaj S. Mehta, Erica T. Warner, Daniel R. Sikavi, Chun-Han Lo, Sohee Kwon, Mingyang Song, Lorelei A. Mucci, Meir J. Stampfer, Walter C. Willett, A. Heather Eliassen, Jaime E. Hart, Jorge E. Chavarro, Janet W. Rich-Edwards, Richard Davies, Joan Capdevila, Karla A. Lee, Mary Ni Lochlainn, Thomas Varsavsky, Carole H. Sudre, Jorge Cardoso, Jonathan Wolf, Tim D. Spector, Sebastien Ourselin, Claire J. Steves & Andrew T. Chan, *Risk of COVID-19 among frontline healthcare workers and the general community: a prospective cohort study*, LANCET PUB. HEALTH ONLINE (July 31, 2020), [https://doi.org/10.1016/S2468-2667\(20\)30164-X](https://doi.org/10.1016/S2468-2667(20)30164-X), at 6-7.

<sup>273</sup> *See id.* at 7.

<sup>274</sup> *Id.*

News stories describe workers in grocery stores,<sup>275</sup> meat processing plants,<sup>276</sup> health care,<sup>277</sup> and agriculture<sup>278</sup> catching the virus and dying. Labor and occupational analysis shows that health care workers have the greatest risk of virus exposure, while personal care and home health aides are quite vulnerable since they work with people most susceptible to the coronavirus.<sup>279</sup> State-level analysis of confirmed COVID cases reports this risk for health care and social assistance workers.<sup>280</sup> In some occupations, a large majority of health care workers are exposed to disease or infection at least once per week.<sup>281</sup> For these workers, over 90% are exposed at least once per month.<sup>282</sup> Over half of childcare workers, nannies, and personal care aides are similarly exposed.<sup>283</sup> Labor studies show African American workers are “more likely to be essential and more likely to die.”<sup>284</sup> Given these working conditions, it is no surprise that healthcare, food, nursing home, and sanitation workers have gone on strike or threatened to do so, calling for more PPE.<sup>285</sup>

Moreover, populations of color are disproportionately susceptible to the virus due to pre-existing medical conditions and comorbidities. Health studies of African American COVID patients report higher diagnoses of diabetes, hypertension, obesity, chronic kidney

<sup>275</sup> See Abha Bhattarai, ‘It Feels Like a War Zone’: As More of Them Die, Grocery Workers Increasingly Fear Showing up at Work, WASH. POST (Apr. 12, 2020), <https://www.washingtonpost.com/business/2020/04/12/grocery-worker-fear-death-coronavirus/>.

<sup>276</sup> See Eric Schlosser, *America’s Slaughterhouses Aren’t Just Killing Animals*, ATLANTIC (May 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpacking-coronavirus/611437/>.

<sup>277</sup> See The Staffs of KHN & The Guardian, *Lost on the Frontline*, KAISER HEALTH NEWS (July 29, 2020), <https://khn.org/news/lost-on-the-frontline-health-care-worker-death-toll-covid19-coronavirus/>.

<sup>278</sup> See Liz Crampton, *In Absence of Federal Action, Farm Workers’ Coronavirus Cases Spike*, POLITICO (June 10, 2020), <https://www.politico.com/news/2020/06/09/farm-workers-coronavirus-309897>.

<sup>279</sup> See Lazaro Gamio, *The Workers Who Face the Greatest Coronavirus Risk*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/interactive/2020/03/15/business/economy/coronavirus-worker-risk.html>; Marcus Lu, *These Are the Occupations with the Highest COVID-19 Risk*, WORLD ECON. F. (Apr. 20, 2020), <https://www.weforum.org/agenda/2020/04/occupations-highest-covid19-risk>.

<sup>280</sup> See *Department of Health Releases New COVID-19 Data Tied to Occupation, Industry*, WASH. DEP’T HEALTH (June 19, 2020), <https://www.doh.wa.gov/Newsroom/Articles/ID/1255/Department-of-Health-releases-new-COVID-19-data-tied-to-occupation-industry>.

<sup>281</sup> See Marissa G. Baker, Trevor K. Peckham & Noah S. Seixas, *Estimating the Burden of United States Workers Exposed to Infection or Disease: A Key Factor Containing Risk of COVID-19 Infection*, 15 PLOS ONE 1 (Apr. 28, 2020), <https://doi.org/10.1371/journal.pone.0232452>.

<sup>282</sup> See *id.*

<sup>283</sup> See *id.*

<sup>284</sup> See Molly Kinder & Tiffany Ford, *Black Essential Workers’ Lives Matter. They Deserve Real Change, Not Just Lip Service*, BROOKINGS: METRO’S COVID-19 ANALYSIS (June 24, 2020), <https://www.brookings.edu/research/black-essential-workers-lives-matter-they-deserve-real-change-not-just-lip-service/>.

<sup>285</sup> Michael Sainato, *US nurses at for-profit hospital chain to strike over cuts and PPE shortages*, GUARDIAN (June 23, 2020), <https://www.theguardian.com/us-news/2020/jun/23/us-nurses-strike-over-cuts-ppe-shortages-pandemic>; Scott Neuman, *Essential Workers Plan May Day Strikes; Others Demand End To COVID-19 Lockdowns*, NPR (May 1, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/01/848931228/essential-workers-plan-may-day-strikes-others-demand-end-to-covid-19-lockdowns>; Jaya Saxena, *Food Workers Across the Country Join the Strike for Black Lives*, EATER (July 20, 2020), <https://www.eater.com/2020/7/20/21331616/food-workers-strike-for-black-lives>; Avi Wolfman-Arent, Ximena Conde & Zachariah Hughes, *Philly sanitation workers demand PPE and hazard pay; vigil for justice held in Trevoise*, WHYY (June 9, 2020), <https://whyy.org/articles/city-sanitation-workers-protest-their-treatment-demand-ppe-hazard-pay/>; Bryce Covert, *Hit Hard by Covid, Nursing Home Workers Threatened to Strike—and Won*, NATION (May 8, 2020), <https://www.thenation.com/article/society/nursing-homes-covid/>.

disease, heart disease and cerebrovascular disease.<sup>286</sup> These underlying conditions contribute to minority groups' higher susceptibility to the virus and higher rates of mortality.<sup>287</sup> Public concern about the virus reflects these consequences. The Pew Research Center reports that one in four African American adults said that they personally know someone who has been hospitalized or died from COVID, roughly double the share reported by Hispanic or white adults.<sup>288</sup> Hispanic adults express greater concern about contracting the virus, as well as about unknowingly spreading it.<sup>289</sup>

Disparity in virus treatment occurs with less access to medical resources needed to prevent, detect, and treat COVID cases. Shortages in PPE needed to stop infections is one of many structural factors making these communities more vulnerable. Put simply, fewer hospitals, limited insurance, and reduced number of health services are all examples of how limited medical resources characterize health inequity.<sup>290</sup> These are products of systemic racism.<sup>291</sup> They suggest why colorblind responses to COVID will not work.<sup>292</sup> These contexts cannot be easily changed or avoided now that a pandemic exists. For example, many people of color could not work from home in March when a national health emergency was declared.<sup>293</sup>

There are many examples of how the health care system provides limited medical attention to these communities. The most direct way this happens is when health care workers ignore or dismiss patients, either because they are from minority groups or because of their social class.<sup>294</sup> Likewise, economic and structural forces exert their influence when hospitals are closed in minority communities.<sup>295</sup> This presents a compound set of problems, with the elimination of care and then overburdening of any remaining medical care.<sup>296</sup> These health disparities reflect long-term discrimination that existed before and will likely

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<sup>286</sup> See Millett, Jones, Benkeser, Baral, Mercer, Beyrer, Honermann, Lankiewicz, Mena, Crowley, Sherwood & Sullivan, *supra* note 252; Price-Haywood, Burton, Fort & Seoane, *supra* note 252.

<sup>287</sup> See Maria Godoy & Daniel Wood, *What Do Coronavirus Racial Disparities Look Like State by State?*, NPR: SHOTS (May 30, 2020, 6:00 AM), <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state>; Carpenter, *supra* note 16.

<sup>288</sup> See Mark Hugo Lopez, Lee Rainie & Abby Budiman, *Financial and Health Impacts of COVID-19 Vary Widely by Race and Ethnicity*, PEW RSCH. CTR.: FACT TANK (May 5, 2020), <https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/>.

<sup>289</sup> See *id.*

<sup>290</sup> See Ruqaiyah Yearby, *Breaking the Cycle of "Unequal Treatment" with Health Care Reform: Acknowledging and Addressing the Continuation of Racial Bias*, 44 CONN. L. REV. 1281 (2012).

<sup>291</sup> See David R. Williams, Jourdyn A. Lawrence & Briggette A. Davis, *Racism and Health: Evidence and Needed Research*, 40 ANN. REV. PUB. HEALTH 105 (2019); Clarence C. Gravlee, *How Race Becomes Biology: Embodiment of Social Inequality*, 139 AM. J. PHYSICAL ANTHRO. 47 (2009).

<sup>292</sup> See Emily Cleveland Manchanda, Cheri Couillard & Karthik Sivashanker, *Inequity in Crisis Standards of Care*, 383 NEW ENG. J. MED. e16 (2020).

<sup>293</sup> See Leana S. Wen & Nakisa B. Sadeghi, *Addressing Racial Health Disparities In The COVID-19 Pandemic: Immediate and Long-Term Policy Solutions*, HEALTH AFFS. (July 20, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200716.620294/full/>.

<sup>294</sup> See FRYE, *supra* note 20, at 14.

<sup>295</sup> See Michelle Ko, Jack Needleman, Kathryn Pitkin Derose, Miriam J. Laugesen & Ninez A. Ponce, *Residential Segregation and the Survival of U.S. Urban Public Hospitals*, 71 MED. CARE RES. & REV. 243, 244 (2014).

<sup>296</sup> See Brietta R. Clark, *Hospital Flight from Minority Communities: How Our Existing Civil Rights Framework Fosters Racial Inequality in Healthcare*, 9 DEPAUL J. HEALTH CARE L. 1023, 1033-35 (2005).

persist after the current pandemic.<sup>297</sup> Gregorio Millett describes COVID's racial disparities as reflecting similar patterns with HIV, air pollution, cancer, and low birthrates.<sup>298</sup>

In sum, empirical studies illustrate how COVID disproportionately impacts Black, Indigenous, and People of Color populations. Quantitative data analysis shows that these communities have higher rates of virus contractions and COVID deaths.<sup>299</sup> Medical research confirms these higher rates by examining diagnoses, hospitalization, and mortality trends among people of color.<sup>300</sup> Demographic and labor analysis illustrate that minority groups, immigrants, and non-white women are overrepresented in essential and frontline jobs.<sup>301</sup> This research into the healthcare system helps identify racial disparities in the pandemic.

All of this data suggests that these communities need PPE to avoid COVID and to continue working. It is logical to see PPE shortages or price rises as disproportionately impacting populations of color in terms of virus exposure, disease susceptibility, and COVID treatment. At this time, data needs to be gathered regarding the effect of PPE prices and supplies on equipment used by those with COVID and by essential and frontline workers. However, even without such data, Doctor Camara Phyllis Jones suggests how to examine race and health: investigate the basis of race-associated differences in health outcomes; acknowledge the relationship between race and social class, perpetuated by racism; and identify the present-day impacts of racism.<sup>302</sup> Following this lead, the empirical studies mentioned along with the PPE crisis indicate that PPE shortages exemplify the socioeconomic effects of trade policies and add to racial disparities in public health.

## V. CONCLUSION

As the pandemic hit the United States early in 2020, the need for PPE heightened, just as inventories of face masks, gloves, and other items were increasingly scarce. An existing trade war with China, a major supplier of these goods, aggravated this PPE crisis. Since 2018, Section 301 tariffs have taxed PPE imports with additional duties of 7.5% to 25%.<sup>303</sup> These added costs are paid by domestic importers and passed on to American consumers.<sup>304</sup> By 2020, tariffs resulted in increased prices and decreased imports for PPE and medical supplies.<sup>305</sup> The increase in PPE prices, for consumers and health professionals, exemplifies the socioeconomic impacts of trade policies. It also disproportionately impacts populations of color because they make up the majority of essential workers and COVID cases and deaths.

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<sup>297</sup> See, e.g., Bleich, Jarlenski, Bell & LaVeist, *supra* note 37.

<sup>298</sup> See Millett, Jones, Benkeser, Baral, Mercer, Beyrer, Honermann, Lankiewicz, Mena, Crowley, Sherwood & Sullivan, *supra* note 252.

<sup>299</sup> See Oppel, Gebeloff, Lai, Wright & Smith, *supra* note 15; *The COVID Racial Data Tracker*, *supra* note 246; *The Color of Coronavirus*, *supra* note 246.

<sup>300</sup> Millett, Jones, Benkeser, Baral, Mercer, Beyrer, Honermann, Lankiewicz, Mena, Crowley, Sherwood & Sullivan, *supra* note 252; Price-Haywood, Burton, Fort & Seoane, *supra* note 252; Gross, Essien, Pasha, Gross, Wang & Nunez-Smith, *supra* note 252.

<sup>301</sup> See Baker, Peckham & Seixas, *supra* note 281.

<sup>302</sup> See Jones, *supra* note 35.

<sup>303</sup> See Bown, *supra* note 10; U.S. INT'L TRADE COMM'N, *supra* note 61-62.

<sup>304</sup> See Amiti, Redding & Weinstein, *supra* note 211; Smialek & Swanson, *supra* note 11.

<sup>305</sup> See Bown, *supra* note 10.

This Article analyzes America's response to COVID-19 and the resulting PPE crisis from legal, policy, and race-and-health perspectives. First, trade statutes provide the executive branch expansive authority to increase tariffs. From this authority, the USTR can impose Section 301 tariffs without significant checks from Congress or the courts.<sup>306</sup> In the China Case, tariffs were meant to compel changes in China's IP and cyber theft practices. American PPE inventories during COVID-19 were just one casualty of this trade war. Second, with Section 301 the Trump administration prioritized tariffs over public health readiness. For instance, the USTR did not remove PPE and medical equipment from Section 301 tariff lists in 2018, did not approve various exclusions in 2019, and told Congress that it prefers tariffs for PPE in 2020.<sup>307</sup> In this context, tariffs impacted how Americans lived through and worked during a pandemic.

Third, the trade war disproportionately impacts African Americans, Latinos, women, and other groups. Limited PPE fuels virus exposure, with populations of color and non-white women overrepresented in essential and frontline jobs.<sup>308</sup> Similar disparities exist with susceptibility to the virus and limited health care resources in these communities. These racial consequences are evidenced by quantitative studies and medical research on COVID infections, hospitalizations and deaths;<sup>309</sup> demographic and occupational analysis of essential workers;<sup>310</sup> and critical health scholarship.<sup>311</sup> Taken together, they paint a picture of how racial disparity afflicts the American COVID response. PPE scarcity or spikes in PPE prices logically add to these inequities.

This Article argues for reforms to Section 301 and proposals in Congress to increase PPE inventories and address COVID's racial disparities.<sup>312</sup> Similarly, the administration could permit future PPE and medical imports to enter tariff-free, using its powers in Section 318.<sup>313</sup> If implemented, all of these suggestions would help, but not quickly enough if there is a pressing need for PPE. This is worrisome on trade and public health fronts. The trade war with China shows no sign of abating. This keeps tariffs as the administration's default option. With COVID surges continuing, Americans will need PPE and medical supplies from China. Tariffs will fuel a second PPE crisis. Already, PPE shortages look likely well into 2021.<sup>314</sup> Since August 2020, the FDA and General Accounting Office have issued reports on PPE shortages.<sup>315</sup> With the latest virus surges in the fall of 2020 and winter of

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<sup>306</sup> See *supra* notes 164-180 and accompanying text.

<sup>307</sup> See *supra* notes 31, 106, 119-126, 130-134 and accompanying text.

<sup>308</sup> See *supra* notes 259-270 and accompanying text.

<sup>309</sup> See *supra* note 252-253 and accompanying text.

<sup>310</sup> See *supra* notes 271-274 and accompanying text.

<sup>311</sup> See Yearby & Mohapatra, *supra* note 36; Blumenshine, Reingold, Egerter, Mockenhaupt, Braveman & Marks, *supra* note 245.

<sup>312</sup> See *supra* notes 87, 238-239 and accompanying text.

<sup>313</sup> See 19 U.S.C. § 1318(a); *supra* notes 224, 233-234 and accompanying text.

<sup>314</sup> See Sandhya Raman, *FEMA chief: Meeting domestic PPE demand 'months away'*, ROLLCALL (July 22, 2020), <https://www.rollcall.com/2020/07/22/fema-chief-meeting-domestic-ppe-demand-months-away/>; Jessica GlENZA, *PPE Shortage Could Last Years Without Strategic Plan, Experts Warn*, KAISER HEALTH NEWS (Aug. 17, 2020), <https://khn.org/news/ppe-shortage-could-last-years-without-strategic-plan-experts-warn/>; Bob Herman, *supra* note 43; Shawn Radcliffe, *supra* note 43.

<sup>315</sup> See U.S. Food and Drug Administration, *Medical Device Shortages During the COVID-19 Public Health Emergency* (Aug. 18, 2020), <https://www.fda.gov/medical-devices/coronavirus-covid-19-and-medical-devices/medical-device-shortages-during-covid-19-public-health-emergency> (identifying shortages for 9 PPE items) (current as of Sept. 24, 2020); U.S. Government Accountability Office, *COVID-19:*

2020-2021, new headlines tell the story of continued PPE scarcity.<sup>316</sup> For the Biden administration, the immediate lessons are: take prior PPE supply warnings seriously in order to limit virus spread and COVID deaths; and certain trade policies, like the China Case, can result in economic burdens for American consumers and fuel racial inequities in health care.

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*Federal Efforts Could be Strengthened by Timely and Concerted Actions, Report to Congressional Committees*, GAO-20-701, (Sept. 21, 2020), <https://www.gao.gov/reports/GAO-20-701/>.

<sup>316</sup> See Andrew Jacobs, *Health Care Workers Still Face Daunting Shortage of Masks and Other P.P.E.*, N.Y. TIMES (Dec. 20, 2020), <https://www.nytimes.com/2020/12/20/health/covid-ppe-shortages.html?referrer=masthead>; Doyle McManus, *Why the U.S. still hasn't solved its mask and glove shortages*, L.A. TIMES (Dec. 16, 2020), <https://www.latimes.com/politics/story/2020-12-16/column-why-the-u-s-still-hasnt-solved-its-mask-and-glove-shortages>.