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February 13, 2023

Via Federal eRulemaking Portal
Department of Defense
General Services Administration
National Aeronautics and Space Administration

Re: Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (Docket ID No. FAR-2021-0015)

Federal contracting is a big business with a far-reaching impact. In the proposed “Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk,” the agencies tout that “[t]he Federal Government is the world’s single largest purchaser of goods and services.”¹ Indeed, federal contractors employ over one-fifth of the labor force in the United States² and contribute billions of dollars to state economies.³

But purchasing power is not a substitute for statutory authority. And the federal procurement system is not a vehicle for the President to further his policy wishes. Courts have already struck down the Biden Administration’s attempt to improperly leverage the federal procurement system to impose a COVID vaccine mandate.⁴ Yet,

¹ *Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk*, 87 Fed. Reg. 218 at 68318 (proposed Nov. 14, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-11-14/pdf/2022-24569.pdf> [hereinafter “Proposed FAR Amendment”].

² Office of Federal Contract Compliance Programs, *History of Executive Order 11246*, U.S. DEP’T OF LAB., available at <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited Jan. 24, 2023).

³ See *Which States Capture the Largest Share of Federal Contracts*, FEDSCHED (Jun. 7, 2022), <https://gsa.federalschedules.com/resources/most-profitable-states-for-government-contractors/> [hereinafter “State Federal Contract Shares”] (noting that in FY 2021 total federal contract awards in Kentucky equaled \$11,804,469,676; total federal contract awards in West Virginia equaled \$1,483,802,761).

⁴ See e.g., *Commonwealth v. Biden*, 57 F.4th 545 (6th Cir. 2023); *Kentucky v. Biden*, 571 F. Supp. 3d 715 (E.D. Ky. 2021); *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022); *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022).

the Administration now seeks to use that same system to implement the President's climate-change policies. The executive branch has no authority to address climate change in this way. Therefore, the Attorneys General of Kentucky, West Virginia, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia, and Wyoming submit these comments in opposition to the proposed amendment to the Federal Acquisition Regulation (FAR).

I. The President cannot direct the Federal Acquisition Regulatory Council to regulate greenhouse gas emissions through the FAR.

On May 20, 2021, the President signed Executive Order 14030.⁵ It directed the Federal Acquisition Regulatory Council (FARC)⁶ to “consider” amending the FAR to require certain federal contractors to disclose their greenhouse gas (GHG) emissions and to set targets to reduce those emissions.⁷ FARC did as the President directed. Citing Executive Order 14030 and three other executive orders as its “authority,”⁸ FARC's proposed amendment requires certain contractors to disclose their GHG emissions, requires those contractors to set targets to reduce emissions, and requires that such targets be determined by what “the latest climate science deems necessary to meet the goals of the Paris Agreement.”⁹ A contractor will be treated as

⁵ *Climate-Related Financial Risk*, Exec. Order No. 14030 (May 20, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-05-25/pdf/2021-11168.pdf>.

⁶ FARC is comprised of the Administrator of the Office of Federal Procurement Policy, the Secretary of the Department of Defense, the Administrator of the General Services Administration, and the Administrator of the National Aeronautics and Space Administration. See 41 U.S.C. § 1302(b).

⁷ *Supra* note 5 at 27969.

⁸ Proposed FAR Amendment at 68328 (citing to Section 1 of Executive Order 13990, Section 206 of Executive Order 14008, Section 5(b)(i) of Executive Order 14030, and Section 302 of Executive Order 14057). Executive Order 13990 is a general order directing all executive departments and agencies “to immediately commence work to confront the climate crisis.” Executive Order 14008 directs the Chair of the Council on Environmental Quality to consider guidance to assist FARC in “developing regulatory amendments to promote increased contractor attention on reduced carbon emission and Federal sustainability.” Executive Order 14030 explicitly directs FARC to consider amending the FAR to “(i) require major Federal suppliers to publicly disclose [GHG] emissions and climate-related financial risk and to set science-based reduction targets; and (ii) ensure that major Federal agency procurements minimize the risk of climate change, including requiring the social cost of [GHG] emissions to be considered in procurement decisions . . . [.]” Finally, Executive Order 14057 mandates that the Administrator of the Government Services Administration track disclosures of GHG emissions, emissions targets, and climate risks based on data collected under Executive Order 14030.

⁹ Proposed FAR Amendment at 68313–14. Among other things, the proposal would require certain contractors to complete an annual GHG inventory of (1) emissions from sources the contractors owns or controls and (2) emissions associated with the electricity the contractor purchases. *Id.* at 68313, 68329. The proposal then directs the contractors to disclose those emissions in the Federal Government's System for Award Management (SAM) and seemingly on a separate, publicly accessible website. *Id.* at 68313–14, 68329.

“nonresponsible” if it does not meet the requirements.¹⁰ Contractors deemed “nonresponsible” are ineligible for federal contracts.¹¹

The FAR exists to promote efficiency in the federal procurement system, not to serve as a vehicle for climate-change policies.¹² In the Federal Property and Administrative Services Act (the Act), Congress delegated to the President the authority to “carry out” the Act.¹³ But that “authority is not absolute.”¹⁴ The President may not “exercise powers that reach beyond the Act’s *express* provisions.”¹⁵ Title 40 U.S.C. § 101 sets out a summary of those provisions:

The purpose of this subtitle is to provide the Federal Government with an economical and efficient system for the following activities:

- (1) Procuring and supplying property and nonpersonal services, and performing related functions including contracting, inspection, storage, issue, setting specifications, identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before federal and state regulatory bodies.
- (2) Using available property.
- (3) Disposing of surplus property.
- (4) Records management.¹⁶

¹⁰ *Id.* at 68313.

¹¹ FAR 9.103, *available at* https://www.acquisition.gov/far/part-9#FAR_9_000.

¹² *See* Kentucky v. Biden, 23 F.4th 585, 604–06 (6th Cir. 2022); *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, CONGRESSIONAL RESEARCH SERVICE (Dec. 18, 2015), <https://crsreports.congress.gov/product/pdf/R/R42826> (explaining that Congress created the FAR after a 1972 report found “a burdensome mass and maze” of federal procurement regulations and “no effective overall system for coordinating, controlling, and standardizing regulations”).

¹³ 40 U.S.C. § 121.

¹⁴ Kentucky v. Biden, 571 F. Supp. 3d at 725; *see also* Chamber of Commerce v. Reich, 74 F.3d 1322, 1330 (D.C. Cir. 1996) (cautioning that the President does not have a “blank check . . . to fill in at his will”).

¹⁵ Kentucky v. Biden, 571 F. Supp. 3d at 725 (citation omitted; emphasis added); *see also* 40 U.S.C. § 121(a) (“The President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle.”).

¹⁶ 40 U.S.C. § 101. This is the Act’s purpose statement. The President does not appear to cite the purpose statement as authority for the orders at issue here. Even if he did, the Act allows the President to “carry out this subtitle”—it does not permit him to use the purpose statement of the subtitle to expand his authority beyond the Act’s express provisions. *See* Commonwealth v. Biden, 57 F.4th at 552 (“[A] purpose statement may be a useful guide to construing statutory language. But what a purpose provision cannot do is ‘limit or expand the scope of the operative clause.’” (internal citations

Nowhere is climate change mentioned. And from this summary, as well as the Act's further language, it is clear that all of the Act's functions—including contracting—are to serve the purpose of providing an “economical and efficient system.”¹⁷ Put another way, the President may exercise his given authority only to “provide the Federal Government with an economical and efficient system for . . . contracting.”¹⁸ Directing FARC to use the federal acquisition system to address climate change goes way beyond that.

There must be at least a “close nexus” between an executive order and “the objectives of [the Act].”¹⁹ And recent decisions from multiple circuit courts have strongly suggested that more than a mere close nexus is required.²⁰ Here, the orders would fail even the close nexus test because they plainly seek to implement the President's preferred climate policies rather than streamline federal contracting. For instance, Section 1 of Executive Order 13990 seeks to “advance environmental justice” and directs “all executive departments and agencies . . . to immediately commence work to confront the climate crisis.”²¹ In Executive Order 14008, the President made it explicit that “[i]t is the policy of [his] Administration to lead the Nation's effort to combat the climate crisis by example—specifically, by aligning the management of Federal procurement . . . to support robust climate action.”²² Nothing in these orders demonstrates an attempt to implement a provision of the Act. Nor has the President attempted to explain how the orders implement such provisions. That is likely because, as noted above, the Act does not mention climate change, much less authorize the executive branch to combat it via executive order.

omitted)). Regardless, there is no safe harbor in the purpose statement because it mentions nothing about climate change.

¹⁷ *Kentucky v. Biden*, 23 F.4th at 604 (emphasis in original) (citing to 40 U.S.C. § 101); *see also* *Am. Fed'n of Labor and Congress of Indus. Orgs. v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979) (“[T]hat direct presidential authority should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency.”).

¹⁸ 40 U.S.C. § 101.

¹⁹ *Kentucky v. Biden*, 571 F. Supp. 3d at 725 (citation omitted).

²⁰ *Id.*; *see also* *Commonwealth v. Biden*, 57 F.4th at 553 and *Louisiana*, 55 F.4th at 1031 (suggesting that there must be more than a mere “close nexus” between an executive order and the Act).

²¹ *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, Exec. Order No. 13990 at 7037 (Jan. 20, 2021), *available at* <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01765.pdf>.

²² *Tackling the Climate Crisis at Home and Abroad*, Exec. Order No. 14008 at 7623 (Jan. 27, 2021), *available at* <https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-02177.pdf>.

The Sixth Circuit recently issued an opinion on the President’s use of the Act to pursue interests beyond the efficiency of the federal contracting system.²³ That opinion concerned the Biden Administration’s COVID vaccine mandate for federal contractors.²⁴ According to the Court, the President likely exceeded his authority under the Act because he relied on its declaration of purpose to expand the operative language in the Act.²⁵ But “a purpose statement cannot override a statute’s operative language,” and “[t]he operative language in § 121(a) empowers the President to issue directives necessary to effectuate the [Act’s] substantive provisions, not its statement of purpose.”²⁶ The Court further noted that those substantive provisions are “speaking to government efficiency, not contractor efficiency.”²⁷ Accordingly, the Sixth Circuit said the President likely exceeded his authority by attempting to make contractors more efficient through mandatory vaccination.²⁸

The Fifth Circuit similarly opined on the scope of the President’s authority under the Act. The Court rejected the assertion that the Act permitted the President to impose a vaccine mandate “encompass[ing] even employees whose sole connection to a federal contract is a cubicle in the same building as an employee working ‘in connection with’ a federal contract[.]”²⁹ According to the Fifth Circuit, “[t]he President’s use of procurement regulations . . . to force obligations on *individual employees* is truly unprecedented.”³⁰ “The vast scope” of the mandate belied the contention that the President had the authority to impose it.³¹ Therefore, like the Sixth Circuit, the Court found the President had exceeded his authority.³²

The reasoning of the Fifth and Sixth Circuits likely would bar the proposed amendment. According to the agencies, “this rule will lead to increased efficiency in the processes and industries by which major contractors disclose climate related financial risks.”³³ The agencies also assert that the public disclosure of GHG emissions and climate risks may “reveal opportunities [for the companies] to realize efficiencies and manage risks,” and “[a]ny efficiency improvements would, in turn,

²³ Commonwealth v. Biden, 57 F.4th 545. Additionally, the Eleventh Circuit recently determined that the President’s vaccine mandate for federal contractors goes beyond the authority of the Act. Georgia, 46 F.4th at 1297 (“Other statutes setting out procurement rules show that when Congress wants to further a particular economic or social policy among federal contractors through the procurement process—beyond full and open competition—it enacts explicit legislation.”).

²⁴ Commonwealth v. Biden, 57 F.4th at 547.

²⁵ See *id.* at 552.

²⁶ *Id.* (internal citations omitted).

²⁷ *Id.* at 553.

²⁸ *Id.* at 555.

²⁹ Louisiana v. Biden, 55 F.4th at 1032–33.

³⁰ *Id.* at 1033 (emphasis in original).

³¹ *Id.* at 1032.

³² See *id.* at 1033.

³³ Proposed FAR Amendment at 68320.

flow into the company's performance on Federal contracts."³⁴ As in the Sixth Circuit case, these arguments center on making *contractors* more efficient. And, as in the Fifth Circuit case, the amendment's attempt to address climate change is "unprecedented." But the Act's substantive provisions speak to *systematic* efficiency, not contractor efficiency, and they do not mention climate change at all. Thus, the Fifth and Sixth Circuits' reasoning likely would bar the proposed amendment.

Even if such regulation were permissible, the proposed amendment does not actually improve economy and efficiency. Rather than a "close" connection, the proposed amendment lists a series of speculative, attenuated steps: companies providing disclosures "may be prompted to thoroughly investigate their operations and supply chains, which may, in turn, reveal opportunities to realize efficiencies and manage risks. Any efficiency improvements would, in turn, flow into the company's performance on Federal contracts."³⁵ More important, the proposed amendment fails to demonstrate how compliance with the required climate disclosures would improve the likelihood that the contractor completes the contract or even makes the system of government contracting more economical and efficient.

II. Congress has not empowered FARC to implement climate-change policy through the FAR.

Just as the President lacks authority to direct FARC to implement climate-change policies, FARC itself has no authority to implement those policies. "Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line."³⁶ When an agency asserts it has a particular power, the review of the statute "must be 'shaped, at least in some measure, by . . . ' whether Congress in fact meant to confer the power the agency has asserted."³⁷ And when an agency asserts authority of "vast 'economic and political significance,'" it possesses that authority only when Congress "speak[s] clearly" about conferring it.³⁸

Whether and how to confront climate change is a decision of vast economic and political significance, which the FAR has never purported to address. "Climate change has staked a place at the very center of this Nation's public discourse."³⁹ It is

³⁴ *Id.* at 68319.

³⁵ *Id.* Any nexus is further attenuated because many of the companies impacted by the proposed amendment are "suppliers." See Exec. Order No. 14030, *supra* note 5 at 27969 (referencing "major Federal *suppliers*" (emphasis added)). Because suppliers merely provide commercially available goods, they are even further removed.

³⁶ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (cleaned up).

³⁷ *Id.* at 2607–08 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

³⁸ *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S. at 160).

³⁹ *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari).

a “controversial subject[],”⁴⁰ and no one has any clear answer as to how to address it. And this Administration has only moved the issue further to the heart of U.S. political discourse. Indeed, in 2019, as a presidential candidate, Biden promised to “end fossil fuel[s],”⁴¹ which account for about seventy-five percent of U.S. carbon emissions.⁴² Clearly, the ramifications of combatting climate change make this an issue of vast economic and political significance.⁴³

FARC proposes to amend the FAR for the purpose of “ensur[ing] major Federal suppliers . . . reduce their GHG emissions.”⁴⁴ Nothing in the enabling legislation indicates that Congress intended for FARC to wield such power. Under 41 U.S.C. § 1121, Congress directs the Administrator of the General Services Administration to “provide overall direction of procurement policy and leadership in the development of procurement systems of the executive . . . in a single Government-wide procurement regulation called the Federal Acquisition Regulation.”⁴⁵ The FAR shall be “jointly issue[d] and maintain[ed]” by the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration.⁴⁶ Title 41 U.S.C. § 1122 identifies the functions of the Administrator. Although the functions vary from collecting procurement data to promoting participation by small and minority-run businesses, none of the functions relate to climate change.

Even if the President had the authority to direct executive agencies to respond to the “climate crisis” (and that should be seriously doubted after *West Virginia v. EPA*⁴⁷), he certainly cannot direct FARC to do so.⁴⁸ FARC’s capabilities lie in federal government procurement. It has no expertise in climate science or in the vast policy judgments related to climate change. FARC acknowledges it lacks such expertise

⁴⁰ *Janus v. Am. Fed’n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018).

⁴¹ *See Biden: “I Guarantee You We’re Going To End Fossil Fuel,”* GOP WAR ROOM (Sep. 6, 2019), <https://www.youtube.com/watch?v=Slzva6kk90>.

⁴² Melissa Denchak, *Fossil Fuels: The Dirty Facts*, NRDC (Jun. 01, 2022), <https://www.nrdc.org/stories/fossil-fuels-dirty-facts#:~:text=Fossil%20fuels%20produce%20large%20quantities,quarters%20of%20our%20carbon%20emissions.>

⁴³ *West Virginia v. EPA*, 142 S. Ct. at 2608 (using the terms “sweeping” and “consequential” to refer to issues of vast economic and political significance and noting that Congress would not delegate the authority to address such issues in a “cryptic” fashion).

⁴⁴ Proposed FAR Amendment at 68312.

⁴⁵ 41 U.S.C. § 1121. To the extent the Administrator considers appropriate, she “may prescribe Government-wide procurement policies.”

⁴⁶ 41 U.S.C. § 1303(a)(1).

⁴⁷ 142 S. Ct. 2587 (2022).

⁴⁸ *See id.* at 2612–2613 (“When [an] agency has no comparative expertise’ in making certain policy judgments, we have said, ‘Congress presumably would not’ task it with doing so.” (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019))). As noted previously, any presidential direction to respond to the climate crisis would require clear authorization from Congress, which is not present here.

because it tasks an outside entity with determining the science-based criteria on which the emissions targets would be based.⁴⁹

FARC's power to make the procurement system efficient is not the power to confront major political and economic questions like climate change.⁵⁰ In fact, the Supreme Court recently made clear that even the EPA cannot use its existing authority to take unprecedented and unauthorized actions to address climate change.⁵¹ If Congress wants the Administrator or FARC to address climate change, it must say so clearly. Congress has not done so. Accordingly, FARC has no power to amend the FAR to advance the President's preferred climate policies.

III. The proposed amendment would violate the First Amendment.

The federal government typically cannot “tell people that there are things ‘they must say.’”⁵² Even “requiring content-neutral speech may violate the First Amendment, although it will be subject to a different level of scrutiny than content-based requirements.”⁵³ And applying compelled-speech requirements to for-profit businesses is not a constitutional shield, either.⁵⁴ The proposed amendment completely fails to address the significant First Amendment concerns.

FARC's proposed amendment requires certain contractors to disclose their GHG emissions, requires those contractors to set targets to reduce emissions, and requires that such targets be determined by what “the latest climate science deems necessary to meet the goals of the Paris Agreement.”⁵⁵ A contractor will be treated as

⁴⁹ See Proposed FAR Amendment at 68318 (explaining that the targets must be “in line with science-based criteria . . . which are available on the SBTi website”).

⁵⁰ See *Brown & Williamson*, 529 U.S. at 160 (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”); see also *Util. Air Regulatory Grp. v. EPA*, 573 U.S. at 324 (explaining that Congress has to “speak clearly” before an agency can exercise “an unheralded power to regulate a significant portion of the American economy” (internal citation omitted)).

⁵¹ See *West Virginia v. EPA*, 142 S. Ct. at 2612 (noting the EPA never had previously used the statutory provision it cited as authority in the manner it now wanted).

⁵² *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 170 (2d Cir. 2020) (quoting *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013)).

⁵³ *Miller v. Mitchell*, 598 F.3d 139, 151 n.14 (3d Cir. 2010).

⁵⁴ *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1177 (10th Cir. 2021) (“[A]s the Supreme Court has recognized, for-profit businesses may bring compelled speech claims.”), *cert. granted* 142 S. Ct. 1106 (2022); see also, e.g., *Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 9 (1986) (“For corporations as for individuals, the choice to speak includes within it the choice of what not to say. And we have held that speech does not lose its protection because of the corporate identity of the speaker.” (internal citations omitted)).

⁵⁵ Proposed FAR Amendment at 68313–14.

“nonresponsible” if it does not meet the requirements.⁵⁶ Contractors deemed “nonresponsible” are ineligible for federal contracts.⁵⁷

At a minimum, this proposal would need to satisfy intermediate scrutiny. That standard requires a substantial governmental interest that is not more extensive than necessary to further that interest.⁵⁸ A substantial governmental interest requires more than “simply posit[ing] the existence of the disease sought to be cured.”⁵⁹ Therefore, it is not enough for FARC to speculate about a climate crisis, it must provide evidence of the harm and show “that the regulation will in fact alleviate . . . [the] harm[] in a direct and material way.”⁶⁰

The D.C. Circuit observed the problems with such lack of evidence in a case involving SEC disclosures.⁶¹ In *National Association of Manufacturers v. SEC*, the SEC regulation compelling certain companies to declare their products not “DRC conflict free” (that is, not free of inputs from the war-torn Democratic Republic of Congo) did not satisfy intermediate scrutiny.⁶² Among other problems, the Commission “present[ed] no evidence that less restrictive means would fail.”⁶³ Though the rule’s defenders insisted that the disclosures aided the sale of securities, the court stressed that this justification gave insufficient respect to the First Amendment:

[That argument] would allow Congress to easily regulate otherwise protected speech using the guise of securities laws. Why, for example, could Congress not require issuers to disclose the labor conditions of their factories abroad or the political ideologies of their board members, as part of their annual reports? Those examples, *obviously repugnant*

⁵⁶ *Id.* at 68313.

⁵⁷ FAR 9.103, *available at* https://www.acquisition.gov/far/part-9#FAR_9_000.

⁵⁸ *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (finding “the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech” appropriate for the must-carry provisions imposed on cable operators).

⁵⁹ *Id.* at 664.

⁶⁰ *Id.*

⁶¹ In compelled speech cases, the D.C. Circuit is not alone in requiring evidence of the harm and that the regulation will alleviate that harm. *See, e.g., Safelite Group, Inc. v. Jepsen*, 764 F.3d 258, 264 (2d Cir. 2014) (holding the regulation failed to withstand intermediate scrutiny because it advanced the government’s stated interest “in an indiscernible or *de minimis* fashion”); *Nat’l Ass’n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1260 (E.D. Cal. 2020) (agreeing with NAM III, *infra* note 62, that “when the great weight of evidence” contradicts the need for certain language, then the government cannot force companies to use that language).

⁶² *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) [hereinafter NAM III].

⁶³ *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 372 (D.C. Cir. 2014) [hereinafter NAM II] (overruled by *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) only to the extent it limited “*Zauderer* to cases in which the government points to an interest in correcting deception”); *see also* NAM III, 800 F.3d at 526 (“Under the First Amendment, in commercial speech cases the government cannot rest on ‘speculation or conjecture.’” (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993))).

to the First Amendment, should not face relaxed review just because Congress used the “securities” label.⁶⁴

Moreover, FARC might have to justify its overreach under an even more demanding standard: strict scrutiny. The proposed amendment would stand no chance. “[R]egulation compelling speech is by its very nature content-based, because it requires the speaker to change the content of his speech or even to say something where he would otherwise be silent.”⁶⁵ And when a policy “imposes a content-based burden on speech,” it “is subject to strict-scrutiny review.”⁶⁶

Strict scrutiny is the “most demanding” test in constitutional law.⁶⁷ The standard “requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”⁶⁸ “If a less restrictive alternative would serve the Government’s purpose,” then Congress must use it.⁶⁹ And in all cases, “the government cannot be excused from the obligation to identify evidence that supports its restriction of a constitutional right.”⁷⁰ In other words, to survive strict scrutiny FARC will need to “specifically identify an actual [procurement] problem in need of solving, and the curtailment of the constitutional right must be actually necessary to the solution.”⁷¹

FARC has not identified—let alone proven—how the proposed amendment advances a compelling governmental interest, much less a substantial one that would effectively require government interference with free speech. And any interest is tenuous here, as FARC largely leans on speculative, multistep voluntary actions of the companies that will *somehow* lead to efficiencies. It defies logic to assume that until the proposed amendment, the contractors purposefully avoided these potential efficiencies that could have been realized. No matter which level of scrutiny a court might apply, the proposed amendment will fail. FARC should therefore decline to implement these unconstitutional requirements.

⁶⁴ NAM II, 748 F.3d at 372 (emphasis added).

⁶⁵ *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) (citing *Riley v. Nat’l Fed’n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988)).

⁶⁶ *McClendon v. Long*, 22 F.4th 1330, 1337–38 (11th Cir. 2022) (citing *Turner*, 512 U.S. at 641–42).

⁶⁷ *Reed v. Town of Gilbert*, 576 U.S. 155, 182 (2015) (Kagan, J., concurring in the judgment).

⁶⁸ *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (citation omitted).

⁶⁹ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

⁷⁰ *Cornelio v. Connecticut*, 32 F.4th 160, 177 (2d Cir. 2022).

⁷¹ *Mance v. Sessions*, 896 F.3d 699, 705 (5th Cir. 2018) (cleaned up); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 879 F.3d 101, 112 (4th Cir. 2018) (finding “a loose fit between the compelled disclosure at issue and the purported ills identified by the government” insufficient to satisfy strict scrutiny).

IV. The proposed amendment is bad public policy.

A. The proposed amendment imposes significant costs.

Analysts estimated in 2019 that it would cost \$50 trillion to “halt[] global warming and reduc[e] net carbon emissions to zero.”⁷² Likewise, FARC says that its specific initiative will impose around \$4 billion in costs over the next ten years.⁷³ Those costs will significantly impact the economies of States that rely on fossil fuels.

For example, low electricity prices—made possible because of coal and other fossil fuels—have attracted manufacturing to certain States.⁷⁴ This has led to jobs and revenue for those States. It also has led to energy-intensive economies⁷⁵ and, thereby, emissions-intensive economies.⁷⁶ As a result, the cost of cutting carbon emissions would be borne by Kentuckians and West Virginians at almost double the national average.⁷⁷

Furthermore, federal contractors employ approximately one-fifth of the U.S. labor force.⁷⁸ They account for billions of dollars to state economies and millions of dollars in state revenues.⁷⁹ The cost of complying with this proposed amendment would impact those numbers. FARC’s own analysis foresees that its action “may have a significant economic impact on a substantial number of small entities.”⁸⁰ Most contractors will expend at least \$30,000 in the first year and over \$18,000 each subsequent year to comply with the proposed amendment.⁸¹ Some entities with larger

⁷² Sergei Klebnikov, *Stopping Global Warming Will Cost \$50 Trillion: Morgan Stanley Report*, FORBES (Oct. 24, 2019), <https://www.forbes.com/sites/sergeiklebnikov/2019/10/24/stopping-global-warming-will-cost-50-trillion-morgan-stanley-report/?sh=52bacc6651e2>.

⁷³ Proposed FAR Amendment at 68324. The agencies also estimate that the amendment will cost the U.S. government ten million dollars over ten years. *See id.* at 68322 (estimating this to be the cost at a 3-percent discount rate).

⁷⁴ *Kentucky State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (Aug. 18, 2022), <https://www.eia.gov/state/analysis.php?sid=KY>.

⁷⁵ *Id.*

⁷⁶ Liam Denning, *Kentucky’s Anti-ESG Attack is Anti-Reality*, BLOOMBERG (Jan. 6, 2023), <https://www.bloomberg.com/opinion/articles/2023-01-06/this-gop-state-s-anti-esg-attack-ignores-its-own-energy-reality?leadSource=verify%20wall#footnote-4>.

⁷⁷ *See id.* (noting that the cost would be greatest to the disposable personal income of people living in Kentucky and West Virginia) (citing *Yes, An ‘Energy Election,’* CLEARVIEW ENERGY PARTNERS (Nov. 3, 2022)).

⁷⁸ *History of Executive Order 11246*, *supra* note 2.

⁷⁹ *See State Federal Contract Shares*, *supra* note 3; *see e.g.*, Joe Sonka, *Kentucky AG Daniel Cameron sues to block Biden vaccine mandate for federal contractors*, THE COURIER-JOURNAL (Nov. 4, 2021), <https://www.courier-journal.com/story/news/politics/2021/11/04/kentucky-sues-over-biden-vaccine-mandate-federal-contractors/6281646001/> (explaining that local jails in Kentucky have federal contracts to detain, house, and transport federal prisoners).

⁸⁰ Proposed FAR Amendment at 68324.

⁸¹ *Id.* at 68321–68322. Adding the estimated regulatory familiarization, annual representations, and GHG emissions inventory costs for non-small business significant contractors equals \$74,483 for the first year and \$58,598 for subsequent years while the estimated costs for small business significant

contracts should expect to spend over \$500,000 in the first year and over \$400,000 every year after that.⁸²

This is hardly the time to add such costs. Federal contractors, like the rest of America, recently endured shutdowns, labor shortages, and supply chain issues related to COVID. Now they are fighting high gas prices and record inflation, with small businesses particularly struggling.⁸³ Adding tens of thousands of dollars in additional costs will exacerbate small businesses' current struggles.

B. The proposed delegation of authority to SBTi raises several public policy concerns.

The proposed amendment requires major contractors to validate their GHG emission targets through an international entity known as the Science-Based Targets Initiative (SBTi).⁸⁴ The proposal mandates that contractors pay SBTi \$9,500 every five years for it to validate their emission targets.⁸⁵ SBTi is a partnership between CDP (formerly the Carbon Disclosure Project), the United Nations Global Compact, the World Resources Institute, and the World Wide Fund for Nature (also known as the World Wildlife Fund, or WWF)⁸⁶ to “set ambitious emissions reductions targets in line with the latest climate science.”⁸⁷ SBTi seeks to “accelerate companies across the world to support the global economy to halve emissions before 2030 and achieve net-zero before 2050.”⁸⁸

The delegation of authority to SBTi poses several public policy concerns. First, the proposed amendment provides no remedy for contractors whose emission targets SBTi refuses to validate. In fact, the proposed amendment does not detail the validation process at all; the proposal simply provides a link to SBTi's website.⁸⁹ Second, SBTi's role places American military projects, which are responsible for the

contractors equals \$30,947 for the first year and \$24,863 for subsequent years. The sum of added costs for small business major contractors is \$33,719 for the first year and \$27,635 for subsequent years.

⁸² *Id.* (based on the combined estimated costs of regulatory familiarization, annual representations, and climate disclosure and SBTi fees for major contractors—that is, those with contracts over \$50 million dollars—that do not already publicly disclose information about emissions or reduction goals).

⁸³ *See Video: Small Business Owners Explain Impacts of Record High Inflation*, NFIB (Aug. 18, 2022), <https://www.nfib.com/content/analysis/in-their-own-words/small-business-owners-explain-impacts-of-record-high-inflation/> (“As [small business] owners manage the highest inflation rate in decades, they are also managing an ongoing worker shortage and supply chain disruptions, which is hurting their businesses and consumers.”); *Inflation Concern Reaches New High for Small Business Owners*, U.S. CHAMBER OF COMMERCE (Sep. 21, 2022), <https://www.uschamber.com/small-business/inflation-concern-reaches-new-high-for-small-business-owners>.

⁸⁴ Proposed FAR Amendment at 68314.

⁸⁵ *Id.* at 68322.

⁸⁶ *Id.* at 68315.

⁸⁷ *Setting science-based emission reduction targets through the Science Based Targets initiative (SBTi)*, CDP, <https://www.cdp.net/en/campaigns/science-based-targets> (last visited Feb. 6, 2023).

⁸⁸ *Id.*

⁸⁹ Proposed FAR Amendment at 68331.

majority of federal contracting,⁹⁰ at the mercy of a foreign institution. This could threaten national security. Additionally, if more defense dollars go toward compliance, less will be available for producing the goods and services that our military needs.⁹¹ In short, FARC's amendment attempts to convert our defense industry from the military machine it should be to the climate-protecting apparatus some wish it to be. Third, the Executive Board of SBTi includes no one elected by the American people.⁹² Consequently, the proposed amendment puts the success of American businesses in the hands of individuals that neither these businesses nor the American public played a role in choosing. That is, at the very least, bad public policy.

V. Conclusion.

For the reasons set forth above, the undersigned Attorneys General respectfully request that the agencies withdraw the proposed FAR amendment. We look forward to your response.

Respectfully submitted,



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⁹⁰ *Federal Government Contracting for Fiscal Year 2018*, U.S. GOV'T ACCOUNTABILITY OFF. (May 28, 2019), <https://www.gao.gov/blog/2019/05/28/federal-government-contracting-for-fiscal-year-2018-infographic> (showing that in fiscal year 2018 over sixty percent of federal contracting dollars were spent by the Department of Defense).

⁹¹ The amendment will also produce non-quantifiable costs that arise from contractors spending time and manpower on compliance rather than on projects that keep the United States safe.

⁹² *Governance*, SCIENCE BASED TARGETS, <https://sciencebasedtargets.org/about-us/governance> (last visited Feb. 6, 2023).



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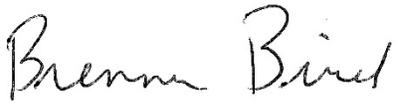
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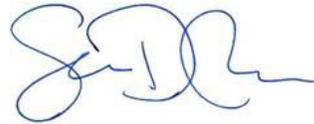
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