FAR Case 2021-015; Docket No. FAR-2021-0015

COMMENT

of

WASHINGTON LEGAL FOUNDATION

to the

DEPARTMENT OF DEFENSE, GENERAL SERVICES ADMINISTRATION, AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Concerning

FEDERAL ACQUISITION REGULATION: DISCLOSURE OF GREENHOUSE GAS EMISSIONS AND CLIMATE-RELATED FINANCIAL RISK

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED AT 87 FED. REG. 68,312 (Nov. 14, 2022)

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FAR Case 2021-015

Re: Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (FAR Case 2021-015)

Sir or Madam:

On behalf of Washington Legal Foundation, please consider this comment responding to the invitation for comments at 87 Fed. Reg. 68,312 (Nov. 14, 2022). WLF appreciates the opportunity to weigh in on whether the Federal Acquisition Regulation (FAR) should be amended to require federal contractors to disclose greenhouse-gas (GHG) emissions and climate-related financial risks and to set emissions-reduction targets. As explained below, because the Proposed Rule lacks any statutory basis in the law and violates the First Amendment, it should be withdrawn.

The Proposed Rule exceeds the President's authority under federal law. Nothing in the Federal Property and Administrative Services Act of 1949 (Procurement Act), Pub. L. 152, Ch. 288, 63 Stat 377 authorizes the President to impose intrusive and burdensome GHG mandates on federal contractors in the name of "economy and efficiency." As a "major question" impacting the nation's economy, climate policy is the exclusive prerogative of Congress, not the President. Because the Proposed Rule lacks any statutory basis, it is vulnerable to a facial challenge in federal court.

The Proposed Rule also violates the First Amendment by requiring government contractors to report their GHG emissions, climate risks, and emissions targets or else lose eligibility for government contracts. Government contractors enjoy the same First Amendment rights as everyone else. Yet because the Proposed Rule compels government contractors to speak when they would prefer not to, it unconstitutionally compels speech.

I. Interests of WLF

Founded in 1977, WLF is a nonprofit, public-interest law firm and policy center based in Washington, DC, with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often submits comments to federal agencies on proposed rulemakings. *See, e.g.*, WLF Comment, *In re Trade Regulation Rule on Commercial Surveillance and Data Security* (Oct. 14, 2022); WLF Comment, *In re Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors* (May 20, 2022); WLF Comment, *In re Proposed Amendments to Regulations on "Intended Uses"* (Oct. 23, 2020).

WLF's Legal Studies Division, its publishing arm, produces and distributes articles on a wide array of legal issues related to administrative rulemaking. *See, e.g.*, Jeremy J. Broggi, *Defense Department's Climate-Risk Disclosure Proposal Threatens Free Speech*, WLF Legal Opinion Letter (Jan. 20, 2023). WLF believes that federal procurement rules must comply with both federal law and the First Amendment.

II. The Proposed Rule Exceeds the Executive Branch's Statutory Authority.

The executive branch's power is not unlimited. As "creatures of statute," executive agencies "possess only the authority Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational & Safety Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam). Under current law, the DoD, GSA, and NASA lack any authority to impose mandatory climate-related disclosures on government contractors. This lack of legal authority dooms the Proposed Rule.

The Proposed Rule cites four 2021 executive orders as its sole authority for mandating climate disclosures from contractors. 87 Fed. Reg. at 68,328 ("Authorities."). But an executive order is lawful only to the extent it enforces otherwise applicable law. Congress passed the Procurement Act "to provide the Federal Government with an economical and efficient system for" procuring and supplying goods and services, 40 U.S.C. § 101. But the Procurement Act "does not authorize the President to issue directives that simply 'improve the efficiency of contractors and subcontractors." *Kentucky v. Biden*, 57 F.4th 545, 555 (6th Cir. 2023) (quoting 86 Fed. Reg. at 50,985). The executive action much be tied to a specific delegation.

Recently, three federal courts of appeals rejected a similar attempt at Executive Branch overreach under the Procurement Act. *See Kentucky*, 57 F.4th at 545; *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022); *Georgia v. President of the U.S.*, 46 F.4th 1283 (11th Cir. 2022). Just as the Procurement Act does not allow the Executive Branch to compel contractors to obtain COVID vaccines before doing business with the government, neither does it permit the President or his agencies to compel contractors to disclose GHG emissions and climate-related financial risks, much less to set emissions-reduction targets. In short, "the President's authority to issue [the executive orders at issue here], and executive agencies' authority to implement [them], depend on whether Congress delegated the power [to require GHG disclosures from contractors] through the Procurement Act." *Georgia*, 46 F.4th at 1301. Congress did no such thing.

In other words, the "[a]gencies' bare authority to set contract specifications and terms [under the Procurement Act] is not enough to show that when Congress passed the Procurement Act it contemplated" the power to compel GHG disclosures. *Id.* "Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Were it otherwise, the President's ability to compel involuntary speech from contractors would be nearly limitless.

Nothing in the Procurement Act remotely authorizes the Proposed Rule's sweeping climate-related disclosure provisions. DoD, GSA, and NASA are not legislative bodies; they must abide by the words of the statutes that Congress enacted. The Proposed Rule does violence to this basic constitutional principle.

III. Major policy questions belong to Congress, not the Executive Branch.

The major-questions doctrine "presume[s] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quoting U.*S. Telecom Ass'n v. FCC*, 855 F.3d 381, 422–23 (D.C. Cir. 2019) (Kavanaugh, J., dissenting from denial of rehearing en banc)). This is especially true when an agency claims regulatory authority "beyond what Congress could reasonably be understood to have granted." *Id.* at 2609. Such "grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or

'subtle device[s].'" *Id.* (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001)). The Procurement Act is no exception; it cannot bear the enormous weight the Proposed Rule seeks to heap on it. Simply put, federal courts no longer tolerate agency attempts to promulgate expansive rules that exceed their statutory reach. The unprecedented breadth and depth of the Proposed Rule's GHG mandates suggest that the major questions doctrine will likely pose a formidable obstacle to any final rule.

Agencies rarely have "the power to resolve a matter of great 'political significance' or end an 'earnest and profound debate across the country.'" *Id.* at 2621 (Gorsuch, J., concurring) (cleaned up). One can hardly imagine a more politically significant or hotly debated policy matter than how best to address climate change. In fiscal year 2020, the federal government spent more than $665 billion on contracts, an increase of over $70 billion from fiscal year 2019. *See* GAO, *A Snapshot of Government-Wide Contracting for FY 2020*, http://bit.ly/3DGCge8. Multiple Congresses have had the opportunity to impose GHG-reporting requirements on government contractors or to authorize agencies to do so, but that has never happened. "It seems that fact has frustrated the Executive Branch and led it to attempt its own regulatory solution." *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring).

"A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *Id.* at 2616. Without a clear congressional statement authorizing the Proposed Rule's compelled GHG disclosures, those provisions cannot stand.

IV. The Proposed Rule's Climate-Change Disclosure Raises Serious First Amendment Concerns.

The First Amendment's guarantee of "freedom of speech" encompasses "the decision of what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 797 (1988). By compelling companies "to speak a particular message" they would not otherwise recite, the Proposed Rule "alters the content of [their] speech." *Id.* at 795. Executive agencies have been down this road before and lost. *See Merck & Co. v. HHS*, 962 F.3d 531 (D.C. Cir. 2020) (holding that HHS's rule requiring prescription drug manufacturers to disclose their wholesale acquisition cost in television ads violated the First Amendment); *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Circ. 2015) (holding that SEC's conflict-mineral disclosure rule violated the First Amendment). There, as here, the agencies could not satisfy their

burden of showing that its mandated disclosures passed constitutional muster.

As the District of Columbia Circuit has explained, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), and *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), both apply the same intermediate scrutiny to commercial-speech regulations. *Zauderer* simply applies that scrutiny to one kind of regulation: government-mandated disclosures. *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 26-27 (D.C. Cir. 2014) (en banc). In such cases, "the means-end fit is self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose 'purely factual and uncontroversial information' about attributes of the product or service being offered." *Id.* at 26. *Zauderer* is thus best understood as "an *application* of *Central Hudson*, where several of *Central Hudson*'s elements have already been established." *Id.* at 27 (cleaned up).

But requiring companies to disclose their climate-related risks and GHG emissions is *not* uncontroversial. Given the large economic costs associated with it, climate-change regulation is one of the most highly charged policy issues in the United States. Over the course of decades, Congress has carefully struck a delicate balance between energy production, economic growth, and environmental stewardship. What's more, a disclosure is always controversial when it strays from the statutory text and purpose that the mandating agency relies on. *Nat'l Ass'n of Mfrs.*, 800 F.3d at 529–35. As shown above, the Proposed Rule's climate-change disclosures are ultra vires; they are the epitome of controversial.

Above all, a disclosure is controversial if it is "dispute[d]." *Id.* at 529. Yet establishing a causal link between contractor's actions at a particular time and in a particular place and global climate change is an exceedingly difficult task. It would be nearly impossible, in fact, to disaggregate a single contractor's actions from all other potential causes of climate change. So while the Proposed Rule raises costs and lacks statutory support, it will create no appreciable benefit. "Carbon accounting is plagued with well documented methodological flaws." Wayne Winegarden, Forbes, *Neither The Department Of Defense Nor NASA Should Be Setting U.S. Climate Policy* (Jan. 30, 2023), http://bit.ly/3laijG2. Inaccurate information furthers no valid governmental interest.

"If the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for [the] speech regulation is

defeated." *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas and Ginsburg, JJ., dissenting from denial of certiorari). Here, the value of the Proposed Rule's controversial compelled speech is zero. The Proposed Rule's compelled-speech mandate thus constitutes a significant constitutional and commercial harm.

Conclusion

Because it exceeds the scope of federal statutory authorization and violates the First Amendment's limits on compelled speech, the Proposed Rule should be withdrawn.

Respectfully submitted,

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